



## BRIEFING PAPER

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# Brexit: Parliament's role in approving and implementing agreements with the European Union

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## Summary

### **The UK Parliament's role in approving the agreements negotiated under Article 50**

There is no domestic legal or constitutional requirement for a vote to be held in Parliament to *approve* the Withdrawal Agreement before it is concluded by the UK and the EU under Article 50 of the Treaty on the European Union (TEU). The Government can negotiate and sign an international treaty using its prerogative powers and without any formal parliamentary involvement.<sup>1</sup> Article 50 TEU requires the consent of the European Parliament for the Withdrawal Agreement to be approved.

On 17 January 2017, the Prime Minister announced in [her Lancaster House speech](#) that the Government would put “the final deal that is agreed between the UK and the EU to a vote in both Houses of Parliament, before it comes into force”.<sup>2</sup> The Government also confirmed that the votes in Parliament would be held before the European Parliament votes on the Withdrawal Agreement under the terms required by Article 50 TEU.

On 13 December 2017, the Government announced that the proposed votes on the agreements, expected in Autumn 2018, would have the following features:

- The votes would be held on the same motion in both Houses of Parliament;
- The motion would ask each House to approve both the Withdrawal Agreement on the terms of exit from the European Union (a legally binding treaty) and the Political Declaration on the Framework of the Future Relationship (a political declaration attached to the Withdrawal Agreement);
- The Government would only introduce the *Withdrawal and Implementation Bill* (the WAI Bill) after the motion was passed in both Houses;
- The votes would be held “as soon as possible” after the negotiations are concluded.

The Government has also said that if the Commons fails to approve the agreements, the UK will leave the EU on 29 March 2019 without a deal.

The proposed votes in Parliament will have no direct legal effect on the status of the Withdrawal Agreement, nor any domestic legal effect.

### **The UK Parliament's role in implementing the agreements – the Withdrawal Agreement and Implementation Bill**

On 13 November 2017, the Government [announced](#) that the Withdrawal Agreement, if approved, would be implemented in domestic legislation through the WAI Bill.

The UK is a dualist legal system, which means that international treaties to which it is a party must be implemented through domestic legislation to have domestic legal effect. If the WAI Bill could not be enacted, the UK would not be able to meet the legal obligations set out in the Withdrawal Agreement. As such, the votes on the WAI Bill will provide a

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<sup>1</sup> In *Miller* [2017] UKSC 5 the Supreme Court concluded that the European Communities Act 1972 meant that triggering Art 50 did require statutory authority: “we consider that, in light of the terms and effect of the 1972 Act, and subject to considering the effect of subsequent legislation and events, the prerogative could not be invoked by ministers to justify giving Notice: ministers require the authority of primary legislation before they can take that course” para 101

<sup>2</sup> In February 2017, the Government announced that it would “put the final deal that is agreed between the UK and the EU to a vote in both Houses of Parliament”, [The United Kingdom's exit from and new partnership with the European Union](#), Cm 9417 p.11

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further opportunity, albeit at a later stage in the process, for the Commons and the Lords to give their views on the Withdrawal Agreement.

The Government has since confirmed that the WAI Bill would need to be enacted before exit day, which is expected to be 29 March 2019. The Institute for Government has described the Government's proposed timetable as "ambitious", explaining that there "will be enough time, providing that nothing goes wrong".<sup>3</sup>

### **The European Union (Withdrawal) Bill**

Clause 9 of the *European Union (Withdrawal) Bill 2017-19* (EUW Bill) as introduced (now clause 11 of the Bill as amended on report in the Lords) contained a power to implement the Withdrawal Agreement through secondary legislation. It was amended in the Commons so that the power could only be used after a Bill to implement the Withdrawal Agreement (likely to be the WAI Bill) has been enacted by Parliament.

It is not clear how many of the provisions of the EUW Bill, particularly those that create "retained EU law", will be used in the process of implementing the Withdrawal Agreement. For example, the WAI Bill could amend the EUW Bill in order to provide transitional arrangements.

During the report stage in the House of Lords, a new clause tabled by Viscount Hailsham was added to the EUW Bill which seeks to provide a legal framework for the parliamentary process of approving the Withdrawal Agreement through a motion in both Houses. The new clause would also grant Parliament a power to issue a legally binding direction to Government on the negotiations if either the Withdrawal Agreement is rejected or if no agreement was presented for approval to Parliament before exit day.

### **The Constitutional Reform and Governance Act 2010**

Under the *Constitutional Reform and Governance Act 2010* (CRAGA), the House of Commons has the power to delay ratification of the Withdrawal Agreement repeatedly. The 2010 Act does not create a positive duty for a vote to be held in Parliament before a treaty is ratified. Further, for the House of Commons to resolve to delay ratification for 21 days, the Government or the Opposition would need to find the time for the debate and vote.

### **The political declaration on the framework for the future relationship**

The Government has said that the vote on the agreements secured through the Article 50 process will include "the terms for our future relationship".<sup>4</sup> The Council of the European Union has said that as part of the Article 50 negotiations the EU and the UK will negotiate a "political declaration" on the framework for the future relationship, which will "accompany" the Withdrawal Agreement.<sup>5</sup> The political declaration is not a legally binding treaty; it will likely set out negotiating objectives that will need to be turned into a treaty, which can then be approved and implemented once the UK has left the EU.

The substance of the political declaration on the future relationship will not have any domestic legal effect in the UK until a binding agreement(s) is negotiated with the EU and then approved, which can only occur once the UK has left. Once such an agreement is approved, parts of it will then need to be implemented in the UK through domestic legislation, presumably before the end of the implementation period.

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<sup>3</sup> Raphael Hogarth and Hannah White, [Voting on Brexit](#) (Institute for Government) (2018) p3

<sup>4</sup> David Davis, [Written Statement Procedures for the Approval and Implementation of EU Exit Agreements](#), HCWS342 13 December 2017

<sup>5</sup> Council of European Union, [Draft Guidelines on the framework for the future relationship](#), 7 March 2018

The European Parliament will consider the political declaration while it is examining the Withdrawal Agreement, but it will do so in the knowledge that an Association Agreement or any other type of 'deep and comprehensive' free trade agreement [under Article 218\(6\) of the TFEU](#) will require its consent.

The UK Government has not said whether the UK Parliament would be granted a vote to approve the Treaty on the Future Relationship before the European Parliament is asked for its consent.

# 1. Parliament's role in approving the agreements secured under Article 50

## Summary

The UK's constitution has no formal requirements for the UK Parliament to formally approve an agreement before it is agreed or ratified by the UK Government. Article 50 does not require the national legislature of the withdrawing state to play a role in approving the Withdrawal Agreement.

In February 2017 the UK Government stated that Parliament will have the opportunity to approve the Withdrawal Agreement through a motion before the European Parliament has voted on whether to grant consent.

On 13 December 2017 David Davis MP, the Secretary of State for Exiting the European Union, gave details of [the procedures for both the approval and implementation of EU Exit Agreements](#). The precise procedure adopted for the approval process, including the time between the final texts being published and the vote being held, will have implications for how Parliament scrutinises the agreements.

If Parliament approves the agreements, Parliament will then be asked to approve a Bill to implement the Withdrawal Agreement - the WAI Bill - which will need to be enacted before exit day. The Commons has a statutory power, under section 20 of the *Constitutional Reform and Governance Act 2010*, to delay ratification of the Withdrawal Agreement and if it does so repeatedly it could even prevent it from being ratified. The Commons has never used its powers to delay ratification of a treaty.

Parliament's role in the process of accession to what was then the European Communities in 1971 and 1972 offers a useful point of comparison for how and when it may approve any agreements reached with the EU in 2018.

## 1.1 The UK Government's position on Parliament's role in approving the agreements negotiated under Article 50

The UK Government triggered Article 50 on 29 March 2017, beginning the formal process of negotiating the UK's withdrawal from the European Union (EU). The role of the UK Parliament in the Article 50 TEU process is not clear. The provision itself only makes reference to the UK's "own constitutional requirements". However, under the terms of Article 50 TEU, the European Parliament's consent must be secured before the Withdrawal Agreement is approved (discussed in detail in Section 5).

On 17 January 2017, the Prime Minister announced in [her Lancaster House speech](#) that the Government would put "the final deal that is agreed between the UK and the EU to a vote in both Houses of Parliament, before it comes into force".

A number of parliamentarians questioned whether the proposed vote would be on the same terms as the one guaranteed for the European Parliament. For example, on 31 January 2017, Margaret Beckett MP (Labour) said, during the second reading debate on the *European Union (Notification of Withdrawal) Bill 2016-2017*:

When this process is concluded, the European Parliament will have the right to vote on the outcome. If taking back control means anything, it must mean that this House enjoys the same right.<sup>6</sup>

During the Commons committee stage debate on the Bill on 7 February 2017, the then Minister of State in the Department for Exiting the European Union, David Jones, said:

What I am committing to from the Dispatch Box, is that before the final agreement is concluded—the final draft agreement, if you like—it will be put to a vote of this House and a vote of the other place. That, we intend, will be before it is put to the European Parliament.<sup>7</sup>

### **The vote to approve and *the European Union (Withdrawal) Bill***

On 13 July 2017, the Government introduced the *European Union (Withdrawal) Bill 2017-19* to the House of Commons. As introduced, the Bill contained a power to make secondary legislation to implement the Withdrawal Agreement. During the second reading debate, David Davis justified the power in the following terms:

Given the timetable set by Article 50, it is prudent to take this power now so that we are ready, if necessary, to move quickly to implement aspects of an agreement in domestic law. That will be particularly important if the negotiations conclude late in the two-year period.<sup>8</sup>

Hilary Benn, chair of the Commons Exiting the European Union Committee, questioned whether this power would be used before the House has had the chance to approve the Withdrawal Agreement.<sup>9</sup> David Davis could not commit either way during the debate and promised to get back to Hilary Benn after the debate.

### **The Government's written statement: Procedures for the Approval and Implementation of EU Exit Agreements**

On 13 December 2017, David Davis published a written statement which set out some of the details relating to the proposed votes on the Article 50 agreements.<sup>10</sup>

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<sup>6</sup> HC Debate 31 January 2017 c849

<sup>7</sup> HC Deb 7 February 2017 c295

<sup>8</sup> HC Deb 7 September 2017 c352

<sup>9</sup> HC Deb 7 September 2017 c353

<sup>10</sup> David Davis, [Written Statement Procedures for the Approval and Implementation of EU Exit Agreements](#), HCWS342 13 December 2017

## Two agreements

Davis explained that the vote to approve would take the form of a resolution in both Houses of Parliament covering “both the Withdrawal Agreement and the terms for our future relationship”.<sup>11</sup>

The statement by David Davis indicated that the resolution would cover at least two agreements. The Government expects that there will be more than one agreement secured through the [Article 50](#) process: the withdrawal agreement itself (which will contain detailed provisions on citizens’ rights, transition, the exit bill and Ireland) and a political declaration on the framework for the future relationship. Davis’ written statement indicates that the motion on the resolution will ask each House to approve both agreements together through a single decision. Each agreement will have a distinct legal status. When Parliament is asked to approve both agreements, the legal text of the Withdrawal Agreement will have been finalised; however, the Political Declaration on the Future Relationship will not yet have been converted into a legal text.

## Timing

David Davis said the resolution would be put to the House “as soon as possible” after the agreements are concluded.<sup>12</sup> The Government has also said the vote will occur before the European Parliament holds its vote on whether to give its consent to the Withdrawal Agreement.<sup>13</sup> The amount of time between the publication of the two agreements and the decision on the resolution will have implications for how the agreements are scrutinised.<sup>14</sup>

A recent Institute for Government report has argued that the Government should treat the debate on the principle of acceding to the European Communities in 1971 as the appropriate benchmark for the length of the debate:

In October 1971, the House of Commons was given five days of debate on a government motion approving the then Government’s decision to join the European Communities. Today’s Government should see this as a starting point. In January 1972, there was a further one day of debate on an opposition motion to stop the then Government from signing the accession treaty before it had been published to Parliament, but the Government successfully amended it to say the reverse.<sup>15</sup>

On 25 April 2018, in evidence to the Commons Exiting the European Union Committee, David Davis was asked about the length of time between the publication of the final agreements and the vote in Parliament, and he confirmed that the UK Parliament’s vote would take

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<sup>11</sup> David Davis, [Written Statement Procedures for the Approval and Implementation of EU Exit Agreements](#), HCWS342 13 December 2017

<sup>12</sup> Ibid

<sup>13</sup> David Jones MP HC Deb 7 February 2017 c295

<sup>14</sup> For more information on the time spent analysing Bill relating to changes to the EU Treaties see Commons Library Briefing [EU Treaty change: the parliamentary process of bills](#) (June 2015)

<sup>15</sup> Raphael Hogarth and Hannah White, [Voting for Brexit](#) (Institute for Government 2018) p11

place before the European Parliament's vote. He added the following on timing:

Unlike most votes in the House, in the previous several months you will have seen unveiled or put in front of the public and in front of Parliament all the elements of the negotiation. We already know large parts of what is going to be put in front of the House. We will know all of it, to the very last bits of the negotiation, way before we are in a position to put it to the House. You will then have a statement, and I imagine not too long after that, you will have the vote. That will be a matter for the usual channels at that stage.<sup>16</sup>

On 28 February 2018, the European Commission published a draft of the Withdrawal Agreement text. The EU published an [amended draft text](#) on 15 March and another [draft](#) on 19 March which contained areas of agreement between the EU and the UK. Negotiations will continue in the coming months, with a view to agreeing a final draft in October 2018. The final text of the Withdrawal Agreement is not expected to be published until the negotiations are formally concluded.

The second text that will be considered by Parliament under the proposed motion, the Political Declaration on the Framework for the Future Relationship, has not yet been published in any form. It is not yet clear whether it will be published in draft before the negotiations conclude. The Political Declaration is not a treaty and so is not expected to contain draft clauses equivalent to those in the draft legal text of the Withdrawal Agreement published on 19 March 2018.

## 1.2 The UK's constitutional requirements for approving a treaty

There is no statutory or procedural requirement for a treaty to be formally approved by Parliament before it can be agreed and signed by the UK Government. Such agreements are normally concluded by the Government, acting through prerogative powers. In 1972 Sir Geoffrey Howe, then Solicitor General, explained the constitutional position during a Commons debate on the UK Treaty of Accession:

It is by virtue of the Royal Prerogative in the conduct of foreign affairs that the Government initiate, sign and ratify international agreements. As a matter of constitutional law, no parliamentary authority is necessary before the Crown may exercise those powers.<sup>17</sup>

The Box below outlines the treaty making process in the UK.

### Box 1: Outline of treaty-making in the UK

- The Government **negotiates** a treaty, which for multilateral treaties is often a lengthy process involving a series of inter-governmental meetings.

<sup>16</sup> Exiting the European Union Committee Oral evidence: The progress of the UK's negotiations on EU withdrawal, HC 372 Wednesday 25 April 2018

<sup>17</sup> HC Deb 20 January 1972 col 793

- The Government **signs** the finalised treaty. Signing usually shows only that the State agrees with the text and puts it under an obligation to refrain from acts that would defeat the object and purpose of the treaty. The UK does not usually sign a treaty unless it has a reasonably firm intention of ratifying it. Sometimes, however, a treaty itself provides that it enters into force on signature alone.
- Parliament makes any necessary **domestic legislative changes**.
- The Government **lays the signed treaty before Parliament**, along with an Explanatory Memorandum. It may not ratify the treaty during the following 21 sitting days (this requirement is set out in section 20 of the *Constitutional Reform and Governance Act 2010*).
- Parliament does not have to do anything, but if either House **resolves against ratification** during that period, the Government must explain why it wants to ratify anyway. The House of Commons can effectively block ratification by passing repeated resolutions (this requirement is set out in section 20 of the *Constitutional Reform and Governance Act 2010*).
- If there are no outstanding resolutions, the Government can **ratify** the treaty. Ratifying is when a State confirms that it is bound by a treaty that it had already signed.
- The treaty **enters into force** for the UK according to the provisions in the treaty – for example six months after ratification, or once the treaty has been ratified by 20 States.

In relation to the Article 50 process, the legal requirement for the European Parliament's consent before the text of the agreement can be approved has led to calls, particularly from the Labour Party, that the UK Parliament be granted an equivalent role. The Government announced early in 2017 that they would grant Parliament an equivalent role. However, the Government's proposed vote on a motion in both Houses would have no legal effect, whereas the European Parliament's vote is legally binding.

### Box 2: The European Parliament and Article 50

Article 50 TEU requires the consent of the European Parliament (EP) and a qualified majority vote of the Council (20 of the 27 other Member States) before the Withdrawal Agreement can be concluded by the European Union. The "consent" procedure gives the EP an effective veto over the Withdrawal Agreement before the negotiations can be concluded.

Article 50 does not grant the EP a right to amend the Withdrawal Agreement; nor does it seek to regulate the role of the EP should it refuse to grant consent to the Withdrawal Agreement. The Article 50 procedure provides an incentive for the European Commission to take into account the relevant positions of the EP while the negotiations are ongoing and the text of agreement has not yet been agreed.

The lack of legal effect of that vote, however, does not mean that the UK Parliament cannot have a legal effect on the process of leaving the EU. For the Withdrawal Agreement to take effect in domestic law, the consent of the Commons and the Lords will be required to enact the WAI Bill. Further, under the power in the *Constitutional Reform and Governance Act 2010*, the Commons has the power to delay ratification of a treaty.<sup>18</sup>

The Commons' vote at second reading on the WAI Bill could be seen as providing another opportunity for the House to approve the agreement.

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<sup>18</sup> Section 20 of the Constitutional Reform and Governance Act 2010 enables the Commons to repeatedly resolve to block the ratification. The 2010 Act does not grant the Lords the same power.

### **Implementing an agreement in domestic law: a form of parliamentary approval?**

The United Kingdom is a dualist legal system, which means that for any international agreement to grant legally enforceable rights in domestic law, domestic legislation must be enacted to give legal effect to the agreement in question. The process of enacting a Bill that implements an agreement can also provide an opportunity for Parliament to approve the relevant treaty or treaties.

For the UK to join the European Community, the Government introduced *the European Communities Bill 1971-72* to the House of Commons on 25 January 1972.

The Government of the day had argued that the Bill would serve as a means for the Treaty of Accession and the other European Treaties to be debated and scrutinised in Parliament. The Treaties themselves required that domestic implementing legislation be in place before they could be ratified.

Sir Geoffrey Howe, defended the then Government's position that they would not hold a debate on the text of the Accession Treaty before it was signed. He argued that the proper time for scrutiny was when the implementing legislation was presented to the Commons:

The treaties in isolation are not as suitable for scrutiny by the House as the treaties in conjunction with the legislation; they are to be taken and studied alongside each other.<sup>19</sup>

The constitutional requirement for implementing domestic legislation provides Parliament with a right to refuse implementation, which in some cases would prevent ratification of the agreement in question. In relation to both accession and withdrawal from the European Union, Parliament could effectively veto the agreements if the implementing legislation could not complete its parliamentary stages.

David Davis made this point in evidence to Exiting the EU Committee - that the second reading vote in the Commons on the WAI Bill is effectively a second chance to reject the agreement:

In other words, if the House rejects the proposed negotiation then that negotiation will fall. There are two chances of that, because of course you will then have the second reading of the Withdrawal Agreement and Implementation Bill, which will incorporate all of that, which will also be another test. In that case, of course the Government have absolutely no choice constitutionally.<sup>20</sup>

Parliamentary consideration of implementing legislation can be distinguished from an approval process in two principal ways. First, an approval procedure can occur before the treaty has been formally concluded by the Government and other relevant parties. Second, debate on implementing legislation is not on the text of the treaty itself, but rather on the legislative provisions which would implement the

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<sup>19</sup> HC Deb 20 January 1972 col 793

<sup>20</sup> Exiting the European Union Committee Oral evidence: The progress of the UK's negotiations on EU withdrawal, HC 372 Wednesday 25 April 2018

agreement. In 1972 Sir Robert Grant-Ferris, the Chairman of the Way and Means, made a ruling on the first day of the *European Communities Bill's* committee stage in the Commons stating that a number of amendments which purported to change the text of the treaties themselves were out of order:

Since this is not a Bill to approve the basic treaties, Amendments designed to vary the terms of those treaties are not in order, and I have no option to rule otherwise.<sup>21</sup>

Grant-Ferris pointed out that the Bill provided a legal mechanism to enable the UK to comply with the obligations of membership and to exercise the rights of membership.<sup>22</sup>

Even if a bill is designed to enable a specific treaty to be approved and implemented, in strict legal terms, Parliament's consideration of a bill does not have a direct legal effect on the status or content of the agreement in question.

It is also worth noting that the Commons will only vote on the WAI Bill if the House has already voted to approve the principle of approving the agreements through the proposed vote on the motion.

The role of the Commons in the accession process to the European Communities in 1971 and 1972 provides a useful comparison (see Box 3).

### **Box 3: The role of Parliament in the process of acceding to the European Communities in 1971-72**

#### **The Commons' vote on a motion to approve the principle of accession (approval)**

On 21 October 1971 the House of Commons began a six-day debate on the following Government motion:

That this House approves Her Majesty's Government's decision of principle to join the European Communities on the basis of the arrangements which have been negotiated.

The motion was passed by 365 to 244 on 28 October 1971. The vote was held before the Treaty of Accession was published.<sup>23</sup> In this sense, the vote was on the principle on joining, rather than on the specific question of whether to approve particular agreements.

It is not yet known whether the current Government will ask both Houses to approve specific agreements or whether the accession example will be followed and the House to will be asked whether it approves to leave the EU on "the basis of the arrangements which have been negotiated".

#### **The Commons' second reading vote on the European Communities Bill (implementation)**

After the House of Commons had approved in October 1971, through a vote on a motion, the principle of joining the European Communities, the Government introduced in the Commons, on 25 January 1972, the *European Communities Bill*.

<sup>21</sup> HC Deb 29 February 1972 col 269

<sup>22</sup> Ibid

<sup>23</sup> Danny Nicol, *EC Membership and the Judicialization of British Politics* (OUP 2001) p80; Nicol reports that this led to a second motion, tabled by the Opposition, to force the Government to publish the text of the Treaty, and to enable Parliament to debate it, before it was signed by the Prime Minister. The motion was amended successfully amended by the Government, to state that the text would only be published after it was signed. See also: CBP Number 7823, 19 January 2017, Treaty negotiations: when has the Government published its position?

The three-day second reading debate in the Commons concluded on 17 February 1972. Ahead of the vote, the Prime Minister, Edward Heath, told the Commons:

I must tell the House that my colleagues and I are of one mind that the Government cannot abdicate their responsibilities in this matter. Therefore, if this House will not agree to the Second Reading of the Bill tonight and so refuses to give legislative effect to its own decision of principle, taken by a vast majority less than four months ago, my colleagues and I are unanimous that in these circumstances this Parliament cannot sensibly continue. I urge hon. Members to implement the clear decision of principle taken on 28th October last and to cast their votes for the Second Reading of this Bill.<sup>24</sup>

The vote was won by only 8 votes, 309 voting for and 301 against. While only 254 MPs voted against the principle of joining the European Communities, 301 MPs voted not to give the Bill to implement that decision a second reading.

The European Communities Bill condensed the constitutional effect of the Bill into three clauses, and these clauses were enacted in the form in which they were introduced to the Commons.

## ***The Constitutional Reform and Governance Act 2010***

The Government has said that the Withdrawal Agreement will be subject to the procedures in Part 2 of CRAGA.

Under CRAGA, the Government has a general statutory requirement to lay before Parliament any treaty that is subject to ratification or its equivalent. The Government must also include an Explanatory Memorandum (EM) on the treaty.<sup>25</sup>

The 2010 Act gives the Commons the power to block ratification indefinitely by repeatedly passing motions that a treaty should not be ratified. Even if the proposed vote on a motion in the Commons to approve the Withdrawal Agreement has no legal effect, the Commons' statutory power to block ratification provides a legal underpinning to the vote.

CRAGA provides that the Minister can extend the 21 sitting day period by up to 21 further sitting days by laying a statement about the extension before Parliament during the original 21 sitting day period. If the Minister does so, a resolution against ratification will have legal effect in this extended period.<sup>26</sup>

Neither House has yet resolved against ratification under these provisions.

In order for the Commons to resolve that a treaty should not be ratified, a motion would need to be agreed on the floor of the House. The Labour Government in 2008 said that this would be left to the 'usual channels' (in other words the party whips) and for 'people to make a

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<sup>24</sup> HC Deb 17 February 1972 c753

<sup>25</sup> CRAGA s24: 'In laying a treaty before Parliament under this Part, a Minister shall accompany the treaty with an explanatory memorandum explaining the provisions of the treaty, the reasons for Her Majesty's Government seeking ratification of the treaty, and such other matters as the Minister considers appropriate.'

<sup>26</sup> CRAGA s21

noise'.<sup>27</sup> (For more details see Commons Library Briefing [Parliament's role in ratifying treaties CBP 5855](#).)

### 1.3 Outcome of the vote

During the debate on the European Union (Notification of Withdrawal) Bill on 7 February 2017, the then Minister of State in the Department for Exiting the European Union, David Jones, made the following statement on the political effect of the proposed vote:

The vote will be either to accept the deal that the Government will have achieved—I repeat that the process of negotiation will not be without frequent reports to the House—or for there to be no deal. Frankly, that is the choice that the House will have to make.<sup>28</sup>

On 13 November 2017, David Davis said: “If the original motion is put but not passed, the deal falls—full stop; in toto.”<sup>29</sup> A meaningful vote, he said, “is one that allows people to say whether they want or do not want the deal”.<sup>30</sup>

On 25 April 2018, in evidence to the Commons Exiting the EU Committee, Mr Davis reconfirmed the Government's position on the effect of the vote: “if the House rejects the proposed negotiation then that negotiation will fall”.<sup>31</sup> Davis also confirmed that the motion will be subject to amendment.<sup>32</sup>

The Government has not said how the motion will be worded, and what would happen if the motion was passed in an amended form (for example consenting to one agreement but not the other).

In an Institute for Government report, Raphael Hogarth and Hannah White have argued that the Government's portrayal of the vote as a binary choice is wrong:

Parliament won't be able to amend the content of the withdrawal agreement or future framework. But if MPs and peers are unhappy with what the Government has negotiated, they will almost certainly be able to amend the motion so as to put conditions on approval. Even if Parliament voted the Government's deal down without amendment, this could lead to a renegotiation if the Government faced insurmountable political pressure to heed Parliament's concerns, and the 27 member states of the EU (EU27) were willing to discuss the issues raised by parliamentarians.<sup>33</sup>

Amendments to the motion, Hogarth and White point out, could either aim at substantive changes to either the Withdrawal Agreement or the Political Declaration, or could seek to add procedural hurdles in the

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<sup>27</sup> Jack Straw, Evidence to the Joint Committee on the Draft Constitutional Renewal Bill, 1 July 2008 (Q750)

<sup>28</sup> David Jones MP HC Deb 7 February 2017 c295

<sup>29</sup> HC Deb 13 November 2017 col 41

<sup>30</sup> HC Deb 13 November 2017 col 41

<sup>31</sup> Exiting the European Union Committee Oral evidence: The progress of the UK's negotiations on EU withdrawal, HC 372 Wednesday 25 April 2018

<sup>32</sup> Exiting the European Union Committee Oral evidence: The progress of the UK's negotiations on EU withdrawal, HC 372 Wednesday 25 April 2018

<sup>33</sup> Raphael Hogarth and Hannah White, [Voting for Brexit](#) (Institute for Government 2018) p3

Brexit process. In relation to any substantive changes, however, Parliament cannot itself change the content of either agreement – it can at most instruct the Government to seek a different outcome with the EU. In this context the status of the Political Declaration could be significant as it is only expected to be converted into a legally binding treaty once the UK has left the EU.

#### **Box 4: What if the European Parliament votes against the Withdrawal Agreement?**

Article 50 TEU does not set out what would happen to the negotiations if the EP votes against the Withdrawal Agreement. A consent or ratification procedure, for example that under the Article 218 TFEU or under the *Constitutional Reform and Governance Act 2010*, is not designed to enable the legislature to make changes to an international legal text once it has been negotiated. However, unlike the CRAGA procedure, Article 50 TEU and Article 218 TFEU require the EP's consent before the agreement is formally approved and finalised ('concluded'). This means that in the event of a refusal to consent to the Withdrawal Agreement under Article 50, it is at least theoretically and legally possible for a re-negotiation to occur and for another attempt to be made to get the EP's consent. The principal difficulty with this possibility is that Article 50 imposes a two-year time limit on the negotiations, and as exit day is due on 29 March 2019, there is limited scope for this to occur.

It is also important to stress that the EP has been closely involved in the negotiations. The EP has passed a number of resolutions [in light of the negotiating directives](#) produced by the Council. It has also [responded to the Joint Report on Phase 1](#) agreed in December 2017, focusing particularly on the 'citizens rights' dimensions of Brexit.

## **1.4 The European Union (Withdrawal) Bill**

As introduced to the Commons the *European Union (Withdrawal) Bill 2017-19* contained a power (then clause 9), to enable Ministers to implement the Withdrawal Agreement through secondary legislation before exit day.

When the EUW Bill was introduced to the Commons, the Government had not yet announced its intention to introduce a separate Bill to implement the Withdrawal Agreement.

This would have enabled the Government to begin implementing the Agreement once the EUW Bill had received Royal Assent and the content of the Agreement had been finalised. Yvette Cooper MP raised this point during the Committee stage debate:

Clause 9 is where those two anxieties come crashing together, because it allows a huge concentration of power in the hands of the Executive, and it does so over the final withdrawal agreement on the outcome of Brexit. Notwithstanding the commitments that the Prime Minister has made today and the written statement that we have seen, the reality is that clause 9 would allow Ministers to start to implement a withdrawal agreement entirely through secondary legislation and to do so even before Parliament has endorsed the withdrawal agreement.<sup>34</sup>

<sup>34</sup> [HC Deb 13 December 2017, c 417](#)

The substance of a number of important elements of the draft Withdrawal Agreement, for example provisions on Citizens' Rights, would need to be implemented by primary, rather than secondary, legislation in order to guarantee their effectiveness.

This point was raised by Lord Hope of Craighead, a former Justice of the Supreme Court, in February 2017 during the Lords' consideration of the *European Union (Notification of Withdrawal) Bill 2016-17*. Lord Hope said that the Government "cannot escape from the effect of the Miller decision when we reach the end of the negotiation".<sup>35</sup> He pointed out that primary legislation would be required once the Agreement was finalised. The Government announced on 13 November 2017 that a dedicated Bill, the WAI Bill, would be brought forward "to enshrine the Withdrawal Agreement between the UK and the EU in domestic law".<sup>36</sup>

The EUW Bill provides a framework for the UK's relationship with EU law that does not and could not, due to when it was drafted, reflect the content of the Withdrawal Agreement. So long as the Withdrawal Agreement is approved, it is the WAI Bill, rather than the EUW, which will legislate on the nature of the UK constitution's new relationship with the EU that will begin when the UK leaves the EU on 29 March 2019.

### **The Grieve Amendment**

On 13 December 2017, the Commons voted to amend what was then clause 9 of the EUW Bill so that the power could only be used after Parliament had enacted a statute "approving the final terms of withdrawal of the United Kingdom from the European Union". In practical terms, the effect of Dominic Grieve's amendment would have meant that the WAI Bill (or a Bill to implement the Withdrawal Agreement) and therefore the resolution to approve the agreement that will precede it, would have to be enacted before clause 9 of the EUW Bill could be used to implement the withdrawal agreement.

The Government had already committed, on the day of the vote, only to use the power after Parliament had approved the Withdrawal Agreement.

The amendment goes further and would prevent the Government using secondary legislation to implement the agreement in the period *after* the resolution to approve the agreement has been passed in both Houses but before the WAI Bill has received Royal Assent. In this sense Grieve's amendment is principally concerned with how and when the Agreement is implemented rather than how it is approved.

### **Clause 10 of the European Union (Withdrawal) Bill (as amended by the Lords)**

On 2 May 2018, the House of Lords voted to amend the EUW Bill to insert a new clause which would regulate Parliament's role in approving the Withdrawal Agreement. The amendment was tabled by Viscount Hailsham (Conservative), Lord Hannay of Chiswick (Crossbench),

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<sup>35</sup> HL Deb 20 February 2017, c 23

<sup>36</sup> Ibid

Baroness Hayter of Kentish Town (Labour) and Lord Wallace of Saltaire (Liberal Democrat).

The constitutional effect of clause 10 can be divided into two parts. Subclauses 1-3 codify Government commitments on arrangements for parliamentary approval of the Withdrawal Agreement and seek to expand the restriction on how the Agreement is implemented made by Dominic Grieve's amendment to clause 9.

Subclauses 4-8 would go beyond existing political commitments made by the Government and seek to regulate Parliament's role in three scenarios: a) if Parliament rejects the Withdrawal Agreement, or b) if no agreement is presented to Parliament for approval before 30 November 2018, or c) if Parliament refuses to pass the Bill needed to implement the Withdrawal Agreement.

At present there are no statutory provisions that regulate the Government's power to conduct treaty negotiations. If the motion the Government plans to propose to approve the Agreement is amended so as to contain a direction relating to the negotiations, the Government would not be under a legal obligation to follow this direction.

Subclause 9 confirms that this clause would only apply to the Withdrawal Agreement and not to any future agreements secured between the UK and the EU.

### **Subclauses 1-3**

Subclauses 1-2 would place the Government's position on the planned vote to approve the Withdrawal Agreement on a statutory footing. Subclause 1 reflects the Government's commitment, as set out in David Davis' Written Statement on 13 December 2017, to hold a vote on a motion in both House of Parliament to approve the Withdrawal Agreement. Subclause 2 places an obligation on the Government to hold the vote on the Withdrawal Agreement before the European Parliament hold its own vote. This also reflects the Government's stated position. Subclauses 1-2 convert the Government's stated position into a legally binding statutory obligation.

Subclause 3 replicates and expands the legal effect of Dominic Grieve's amendment to clause 9. Subclause 3 seeks to prevent the Government using any delegated powers to implement the Withdrawal Agreement until a Bill has been enacted to give effect to the Withdrawal Agreement.

### **Subclauses 4-8**

Subclauses 4-8 must be read together. Subclause 5 would grant Parliament a power to issue a legally binding direction "in relation to the negotiations" under Article 50, if such a direction is approved by a "resolution of the House of Commons" and "subject to a consideration of a motion in the House of Lords". This provision, if enacted, would mean that the Government could be placed under a legally binding obligation to observe the substance of any resolution relating to the negotiations passed by the Commons and considered by the Lords. This is a power to issue a legally binding negotiating direction upon the

Government. Such a direction would not have any legal effect upon the EU's negotiation position.<sup>37</sup>

Subclause 4 would provide that the power in subclause 5 is only activated if any of three conditions are met. The first, in subclause 6, is that a motion to approve the agreement, as required by subclause 1, has not been passed by 30 November 2018. This covers two scenarios: if the motion has been put forward and rejected, or if the Government has failed to secure an agreement and no motion is tabled and voted upon by 30 November 2018.

Subclause 7 activates the subclause 5 power if the Bill that would implement the Withdrawal Agreement, presumably the WAI Bill, has not received Royal Assent by 31 January 2019.

Subclause 8 activates subclause 5 if the UK and the EU have failed to agree a Withdrawal Agreement before 28 February 2019.

This amendment, and in particular the statutory power to issue a direction, would enable Parliament to make clear that it wishes to steer the directions of these negotiations, not unlike how the European Parliament carries out its information and veto functions vis-à-vis the Council and the Commission in EU international relations. This would set a precedent significantly expanding [the role Parliament currently has in relation to treaties](#).<sup>38</sup>

### **The Government's response**

Speaking for the Government, Lord Callanan stated that the amendment contained "a number of constitutional, practical, legal and political difficulties". He said:

It is a well-established feature of our constitution that the Executive represent the country in international diplomacy, and this constitutional arrangement exists for very good practical reasons. ... It would be impossible for negotiators to demonstrate the flexibility necessary for an effective negotiation if they are stripped of their authority to make decisions. That will do nothing but guarantee a bad deal for the UK, which is something I hope we all wish to avoid. If the UK is to be a trusted and effective negotiator, with the EU or anybody else, the Executive branch must be competent to negotiate, just as they are competent to act on their own judgment in other areas of international relations. I speak in strong terms, because I want to demonstrate the seriousness with which the Government take this amendment, its implications and the precedent it will set.

The drafting of the amendment itself is of further concern. It states that a draft of the withdrawal agreement must be approved by the Commons before it can be concluded, but it is not clear what "conclude" means in this context. This may seem a lesser point but noble Lords will understand that we need legal certainty to ensure that the vote occurs at the right time in relation to the process of withdrawing from the EU. We would not want to end

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<sup>37</sup> See Sylvia de Mars, [Brexit: can Parliament control the outcome of the negotiations? Second Reading Blog](#) (1 May 2018)

<sup>38</sup> Sylvia de Mars, [Brexit: can Parliament control the outcome of the negotiations? Second Reading Blog](#) (1 May 2018)

up in a perverse situation in which a vote must be offered while negotiations are ongoing, for instance. The vote must happen once the final text has been agreed. Until that point, there would be nothing for Parliament to vote upon, given that ultimately, of course, nothing is agreed until everything is agreed.<sup>39</sup>

He further noted that he considered the amendment unnecessary because under the Grieve amendment, “there is no mechanism by which the Government can give the full final withdrawal agreement domestic legal effect without introducing primary legislation”.

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<sup>39</sup> HL Deb 30 April 2018 c1867

## 2. The Withdrawal Agreement and Implementation Bill

### Summary

International treaties to which the UK is party must be implemented through domestic legislation to give them binding legal effect. The Government has committed to implementing the Withdrawal Agreement through the Withdrawal Agreement and Implementation Bill (the WAI Bill).

The WAI Bill is likely to contain provisions of major constitutional significance. The draft Withdrawal Agreement published in March 2018 contains a number of Articles that set out rights and obligations, upon which the UK and the EU are agreed, which will require domestic legislative provisions to ensure that they are effective in the UK.

The WAI Bill will need to be enacted before the UK leaves the EU on 29 March 2019. The WAI Bill is required to be on the statute book by then so that it can come into force immediately after exit day, and so that it can, among other things, provide the legislative basis for the proposed transition period which is due to last until December 2020.

### 2.1 The purpose of the WAI Bill

For the Withdrawal Agreement to come into effect when the UK leaves the EU, expected to be on 29 March 2019, the UK Parliament will have to enact primary legislation which implements the Withdrawal Agreement. The Government has said that if the motion on the agreement is passed, the Government will bring forward a Withdrawal Agreement and Implementation Bill (the WAI Bill) for that purpose. The WAI Bill is expected to provide the legislative basis for the transition period, citizens' rights and the other contents of the Withdrawal Agreement.

The *European Union (Withdrawal) Bill* provides a framework for the UK's relationship with EU law that does not reflect the content of the proposed withdrawal agreement. The Government has said, in response to the Constitution Committee's report on the EUW Bill, that the WAI Bill "will give effect to the agreement reached with the EU, which will include making any changes to existing legislation if necessary".<sup>40</sup>

This statement highlights that the WAI Bill will, so long as the Withdrawal Agreement is approved, provide the final word on the UK constitution's relationship with the EU which will begin when the UK leaves the EU on 29 March 2019. It is not yet clear how the WAI Bill will interact with the EUW Bill. For example, it is not known whether the legislative architecture of the EUW Bill will provide the foundations for transition, or whether it will be the WAI Bill alone, or a combination of the two. The role of the Court of Justice of the European Union (CJEU) after exit and the devolution settlement are both addressed by the EUW

<sup>40</sup> Lord Callanan, [Government Response to the Lords Constitution Committee Report on the European Union \(Withdrawal\) Bill](#), 11 April 2018 p10

Bill, but both might need to be changed as a result of the Withdrawal Agreement, in which case it would seem logical that the provisions in the EUW Bill will either have to be amended or not brought into force.

In terms of the legislative approach taken in the WAI Bill, there are a number of different legislative precedents that might offer some indication of the options open to the Government. Two of the most prominent are the *European Communities Act 1972* and the *Human Rights Act 1998*. Both provide a domestic legislative link to an international treaty, and both contain legislative instructions to the courts as to the constitutional status of the rights in question.

The draft Withdrawal Agreement indicates that the WAI Bill will need to provide an analogous instruction to the courts. It should also be stressed that incorporating the Withdrawal Agreement into the UK's constitutional framework is a fundamentally different exercise from the examples cited above. One question is: to what extent will the content of the Withdrawal Agreement be directly reflected in the clauses of the WAI Bill? The *European Communities Act 1972* connects the entire body of EU law to domestic law in a handful of provisions, whereas the *Human Rights Act 1998* is a more detailed legislative scheme. The complexity and length of the Bill could make a difference to how the Bill is scrutinised and debated when it is introduced to Parliament. It is not yet known whether the Bill will contain a delegated power, such as that included in the EUW Bill, to enable Ministers to make changes through secondary legislation in order to implement the Withdrawal Agreement.

## 2.2 The Draft Withdrawal Agreement

It is possible to predict some of the legal effect of the WAI Bill. On 19 March 2019 a [draft](#) Withdrawal Agreement was published, which highlighted the areas of agreement between the EU and the UK. The Commons Library Briefing on [the draft withdrawal agreement](#) provides detailed commentary of the text. This section highlights Article 4 of the draft Withdrawal Agreement, which offers some indication of the potential constitutional effect of the WAI Bill.

### Article 4

Article 4 of the draft Withdrawal Agreement makes reference to the domestic primary legislation needed to ensure that any provisions of domestic legislation inconsistent with Part 2 of the Withdrawal Agreement on citizens' rights can be "disapplied" (paragraphs 1 and 2).

The WAI Bill is likely therefore to have to provide the domestic courts with a power to scrutinise the compatibility of primary legislation for the purpose of enforcing the relevant rights. It is likely that any such provisions will have implications for the operation of the legislative framework in the EUW Bill. Mark Elliott, Professor of Public Law at the University of Cambridge, has pointed out that "EU citizens' directly effective rights under the Withdrawal Agreement are intended to have a

legal status in the UK that is at least the equal of the status presently enjoyed by directly effective EU law".<sup>41</sup>

Article 4(4) confirms that references to EU law in the agreement must be interpreted in line with the judgments of the CJEU given before the end of transition.<sup>42</sup> Article 4(5) requires that judgments of the CJEU handed down after the end of transition should be given "due regard" by domestic courts. These provisions, particularly 4(4), do not appear to be compatible with clause 6 of the EUW Bill, which states (in clause 6(1)(a)) that domestic courts are not bound by Court of Justice judgments handed down after exit day. If Article 4(4) is given domestic legal effect, domestic courts will be bound to interpret provisions of the Withdrawal Agreement, referring to EU law in line with CJEU judgments given after exit day but before the end of the transition/implementation period.

## Transition

When the Government announced that the WAI Bill would be introduced after the Withdrawal Agreement is finalised, the Government explained that the WAI Bill would provide the "details of an implementation period".<sup>43</sup> The "transition" or "implementation" period is intended to see the "existing structure of EU rules and regulations" continue for a time-limited period after the UK is no longer a Member of the EU. As the UK will no longer be a Member State, the UK will no longer participate in the EU institutions. However, in domestic terms, the aim of the "transition period" is to ensure that EU law continues to operate as if the UK were a Member State.

The role of EU law in the UK is currently underpinned by the European Communities Act 1972. This statute is due to be repealed on exit day by clause 1 of the EUW Bill. The Government has said that the EUW Bill is not designed to provide for transitional arrangements.<sup>44</sup> As such it is expected that the WAI Bill will provide for a legislative mechanism which will enable EU law to continue to operate as it does currently from exit day until the end of the transition period, which is not expected to last beyond 31 December 2020.

A Hansard Society Briefing Paper written by Swee Leng Harris has argued that the WAI Bill will include provisions that mirror section 2 of the ECA 1972, albeit for a time-limited period.<sup>45</sup> Such a provision is likely to enable EU law which comes into force after exit day to take effect in UK law, and to enable Ministers to make secondary legislation

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<sup>41</sup> Mark Elliott, [The Brexit agreement and citizens' rights: Can Parliament deliver what the Government has promised?](#), Public Law for Everyone, 11 December 2017

<sup>42</sup> Steve Peers, [Dispute settlement and the ECJ in the draft withdrawal agreement](#), 9 March 2018

<sup>43</sup> Department for Exiting the EU, [New Bill to implement Withdrawal Agreement](#) (13 November 2017)

<sup>44</sup> House of Commons Exiting the EU Committee, [Oral evidence: The European Union \(Withdrawal\) Bill, HC 373, Thursday 26 October 2017](#), qq184 and 187 (Steve Baker MP Parliamentary Under Secretary of State, Department for Exiting the European Union)

<sup>45</sup> Swee Leng Harris, [Legislating for transition / implementation: implications for the EU \(Withdrawal\) Bill](#) (Hansard Society 2018) p5

to implement EU law. Harris has also pointed out the planned transition period might require changes to the EUW Bill after it has received Royal Assent.<sup>46</sup> However, as the Government has indicated that the EUW Bill is not intended to provide for transition, it is possible that certain provisions of that Bill might not be brought into force during the transition period.

### **The draft Withdrawal Agreement**

Part 4 the draft Withdrawal Agreement sets out the agreement between the parties on transition matters. A number of the Articles in the draft will need to be addressed by the WAI Bill, including the following:

- **Duration of 'transition':** Article 121 confirms that the "transition or implementation period" will not last beyond 31 December 2020.
- **Applicability of General EU Law:** the entire EU *acquis* will be applicable to the UK, with the exception of areas of enhanced cooperation; this is set out in Article 122. In terms of opt-ins on Justice and Home Affairs matters, Article 122(5) states that the UK may be invited to cooperate with new Justice and Home Affairs laws as a 'non-EU country'.
- **Applicability of Free Movement of Persons Law:** during the transition, there are no exceptions to EU free movement of persons law applying to the UK.
- **CJEU enforcement during transition:** the parties have agreed to CJEU jurisdiction on all matters during the transition period in Article 122(3); all provisions on alternative enforcement mechanisms (see Section 6.1 above) are to commence only following the transition period.

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<sup>46</sup> Swee Leng Harris, [Legislating for transition / implementation: implications for the EU \(Withdrawal\) Bill](#) (Hansard Society 2018)

### 3. The Political Declaration on the framework for the future relationship

#### Summary

The Council of the European Union has said that, as part of the Article 50 negotiations, the EU and the UK will negotiate a “political declaration” on the framework for the future relationship, which will “accompany” the Withdrawal Agreement.

The European Parliament will also consider the political declaration on the framework for the future relationship when it decides whether to give consent to the Withdrawal Agreement.

The Government has said that the planned vote in Parliament to approve the agreements secured through the Article 50 process will include “the terms for our future relationship”.<sup>47</sup> This is a reference to the fact that the proposed vote on the motion to approve the Withdrawal Agreement, an international treaty, will also cover (and thus enable Parliament to approve or reject), the political declaration on the framework for the future relationship.

The political declaration is not a treaty. It is instead a document which sets out a political agreement that will form the basis of negotiations towards a Treaty, or treaties, on the future relationship between the EU and the UK.

Even though the political declaration is not a treaty, David Davis said in evidence to the Exiting the EU Committee that the political declaration would contain “quite a lot of detail” on the future relationship.<sup>48</sup> Davis suggested that the Political Declaration would in effect be a “statement by the Council on a whole series of decisions as to what the future economic partnership will look like”.<sup>49</sup>

The status of the political declaration, and the precise implications of parliamentary approval, are likely to feature in debate. It is not yet clear how Parliament will be involved in the process of approving and implementing the terms of the Future Relationship. Parliament’s involvement will be influenced by the precise format of the Treaty on the Future Relationship, in particular whether the Future Relationship is set out in a single or in multiple agreements. The political declaration could provide some detail on how the legal basis of the Future Relationship will be negotiated, approved and implemented once the UK has left the EU.

#### 3.1 What is a political declaration?

The declaration on the future relationship will not be the first ‘Political Declaration’ produced by the EU. Examples of previous political declarations can be found in a wide variety of policy fields. Recent

<sup>47</sup> David Davis, [Written Statement Procedures for the Approval and Implementation of EU Exit Agreements](#), HCWS342 13 December 2017. For information on the new guidelines, see Commons Briefing Paper 8289, [Brexit: new guidelines on the framework for future EU-UK relations](#), 19 April 2018.

<sup>48</sup> David Davis, Oral Evidence to Exiting the European Union Committee: The progress of the UK's negotiations on EU withdrawal, HC 372 Wednesday 25 April 2018

<sup>49</sup> Ibid

'political declarations' have covered subject areas such as the EU's migration policy<sup>50</sup> and environmental policy<sup>51</sup>.

'Declarations' published by the Council also follow a similar format to those declared 'political declarations'. Among these are statements made by the EU Council about the direction of travel of the EU<sup>52</sup> and various statements by the High Representative on developments in foreign affairs.<sup>53</sup>

A declaration is not a formal EU law instrument under the EU Treaties. Article 288 TFEU provides a non-exhaustive list of EU law instruments. Declarations are understood to be not legally binding, but they do have political weight. Recent political declarations in the field of energy cooperation are illustrative in this regard, as they end with a disclaimer:

This document records a political intent alone. It is not intended to establish any new legal commitments or to replace or modify any existing legal obligations, nor is it meant to prejudge in any way an outcome of discussions on the governance system for the Energy Union.<sup>54</sup>

A further example of statements of a political nature made in advance of trade negotiations might be the EU-New Zealand 'scoping exercise' concluded in 2017. The New Zealand Ministry of Foreign Affairs and Trade (MFAT) has [published](#) a summary of the outcome of that 'scoping exercise', which again results in no binding commitments made by either party, but suggests a direction of travel for the actual trade negotiations. In the words of the MFAT:

The scoping discussions covered, at a high level, the shared ambition for some key issues often addressed in trade negotiations. These issues will be discussed in specific detail in formal negotiations.

The summary document the MFAT produced is a total of 14 pages, which suggests it does remain very general; however, it is the product of a 'scoping exercise' that commenced at the start of 2016 and concluded in March 2017. While not a directly relevant comparison to EU-UK negotiations, largely because the EU and New Zealand did not find themselves in the identical starting position that the EU and the UK do, it does suggest that even arriving at agreed 'ambitions' in the context of a comprehensive free trade agreement is likely to be a time-consuming process.

Assuming that the Article 50 political declaration follows the examples of other types of (political) declaration or scoping ambitions issued by

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<sup>50</sup> See, for example, Valletta Summit, 11-12 November 2015, [Political Declaration](#)

<sup>51</sup> See, for example, Valletta 18 May 2017, [Political Declaration on Clean Energy for the EU Islands](#)

<sup>52</sup> See, for example, [The Rome Declaration](#): Declaration of the leaders of 27 member states and of the European Council, the European Parliament and the European Commission, 25 March 2017

<sup>53</sup> See, for example, [Declaration](#) by the High Representative on behalf of the EU concerning the political situation in the Republic of the Congo following the presidential election, 7 April 2016

<sup>54</sup> The [Political Declaration on energy cooperation between the North Seas Countries](#) contains a similar but less detailed disclaimer.

the EU, it is likely that the political declaration will be primarily limited to common objectives.

The Institute for Government [notes](#) that Article 50 restrictions aside, there is no obvious 'safe' level of depth of content in a political declaration that two parliaments will have a vote on.

### Article 50 and the political declaration

In a report for the Scottish Parliament, Dr Tobias Lock, from the University of Edinburgh, points out that the terms of Article 50 provide "both an objective for the withdrawal agreement as well as a limit to what it can achieve".<sup>55</sup> Article 50's requirement that the withdrawal agreement should take "account of the framework for [the UK's] future relationship with the Union" means that, as Lock outlines, the Withdrawal Agreement should not "stand in the way of the relationship", and should ideally "pave the way towards achieving it".<sup>56</sup>

Article 50 does not expressly limit the extent to which it could be used as the basis for the future relationship. However, Lock suggests that "it is difficult to conceive of it being used as the basis for a future relationship treaty" as this would enable the more detailed and specific provisions on the procedures for negotiating agreements with third country to be "circumvented".<sup>57</sup>

Lock suggests that the political declaration on the future framework is "likely to broadly outline the areas of future cooperation and in particular the type of trading relationship envisaged, i.e. which 'model' should broadly speaking be followed".<sup>58</sup>

Until the political declaration is turned into a legally binding international agreement the substance of the UK's Future Relationship will remain, at least in legal terms, subject to negotiation.

## 3.2 The negotiations on the political declaration

On 23 March 2018 the European Council published new [guidelines](#) for the negotiations on the political declaration "with a view to the opening of negotiations on the overall understanding of the framework for the future relationship, that will be elaborated in a political declaration accompanying and referred to in the Withdrawal Agreement".<sup>59</sup> In the Guidelines the European Council reiterated "its readiness to initiate work towards a free trade agreement (FTA), to be finalised and concluded once the UK is no longer a Member State".<sup>60</sup>

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<sup>55</sup> Dr Tobias Lock, [The legal and political process for agreeing the future relationship between the EU and the UK and any transitional agreement](#), Scottish Parliament (December 2017) p16

<sup>56</sup> Lock, *Ibid*

<sup>57</sup> *Ibid*

<sup>58</sup> *Ibid*, p17

<sup>59</sup> European Council (Art.50) (23 March 2018), guidelines para 5

<sup>60</sup> *Ibid*, para 7

### Topics for discussion

On 4 May the Council Article 50 Working Party was presented with [topics](#) for forthcoming discussions on the future framework. Topics were presented under four main headings: basis for co-operation, economic partnership, security partnership and cross-cutting cooperation and standalone issues. The topics paper notes that discussions on the topics are “without prejudice to discussions on the framework of the future Relationship” – the topics paper will not result in formal texts but will develop and inform the negotiations and the political debate.

### “Lack of significant progress”

On the EU side there has been a sense of frustration at what they perceive as the slow pace of progress in solving the outstanding Brexit issues – primarily those surrounding the Ireland/Northern Ireland border. Ekaterina Zaharieva, deputy prime minister of Bulgaria, which holds the EU Presidency until 30 June 2018, has [emphasised](#) the need for reassurance “on both sides of the Channel [...] that there will be an orderly Brexit”.

On 14 May 2018 Michel Barnier updated the Council (EU27) on the Brexit negotiations. Ministers discussed the state of play in the talks in relation to the completion of work on withdrawal issues and to the discussions on the framework for future EU-UK relations, which will be reflected in the political declaration attached to the WA. The provisional [outcome document](#) notes “the lack of significant progress in the latest rounds of talks” and “recalled the need to intensify the work on preparedness, so that the EU is ready for any possible scenario”. The EU EU27 Ministers “expressed their support to the negotiator as well as their solidarity with Ireland [...] Ministers also recalled the importance of maintaining a constructive approach and the unity of the EU27 throughout the negotiations”.

Two things are significant here: one is that the EU is preparing to deal with different outcome scenarios, and the other is that there is no sign of any fraying at the edges of EU solidarity on Brexit. Michel Barnier continues to allude to the possibility of a no-deal outcome, telling Eurofi delegates at a high level seminar on 26 April 2018 that “market participants and public authorities must continue to prepare for all scenarios. No one should underestimate the risk of disagreement”.<sup>61</sup>

The EU aims to make progress by the June European Council (Article 50) on 28/29 June on the basis of the commitments the UK made in paragraph 49 of the [Joint Report](#) in December 2017 and the draft Protocol on Ireland/Northern Ireland on an operational legal text for the ‘backstop option’ in the [Withdrawal Agreement](#). Other issues include overall governance and dispute settlement of the WA and issues concerning intellectual property, data and information and Euratom. The European Council will review the state of the negotiations.

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<sup>61</sup> [Speech](#) by Michel Barnier at the Eurofi High Level Seminar 2018, Sofia, 26 April 2018

Both sides aim to have a final text by October 2018 to submit to the EP for consent.

### UK papers on future relations

David Davis announced on 15 May that the Government intends to publish a White Paper outlining its positions for the future UK-EU relationship ahead of the June European Council summit. Mr Davis said the document would “include detailed, ambitious and precise explanations of our positions” and that it would “communicate our ambition for the UK’s future relationship with the EU, in the context of our vision for the UK’s future role in the world”.<sup>62</sup> Reports suggest it will include Government plans for a post-Brexit customs arrangement with the EU.

## 3.3 The UK Parliament and the future relationship agreement

The UK Government has yet to set out how Parliament will be involved in the process of negotiating, approving and implementing the Treaty or Treaties on the Future Relationship. Parliament’s role will depend on the process agreed between the UK and the EU for converting the political declaration into a legally enforceable Treaty or Treaties. The number and form of the agreements will affect how Parliament engages with the negotiations with the EU after exit day.

The Government’s statement on Parliament’s role in EU Exit Agreement on 13 December 2017 said the following on Parliament’s role in relation to the future relationship:

In the UK, the Government will introduce further legislation where it is needed to implement the terms of the future relationship into UK law, providing yet another opportunity for proper parliamentary scrutiny.

The CRAG process is also likely to apply to agreements on our future relationship, depending on the final form they take.<sup>63</sup>

The UK Government has not said whether the UK Parliament would be granted a vote to approve such an agreement (or agreements) before they are concluded and approved by the European Parliament.

### Box 5: The European Parliament and the future relationship agreement

In March 2018 the European Parliament passed a [resolution](#) on its preferred framework for a future relationship. The resolution set out that the EP considered that an EU-UK association agreement would be the “appropriate framework” for future EU – UK relations. Such an association agreement would require the consent of the European Parliament under Article 218(6) of the Treaty on the Functioning of the European Union. This is in anticipation of a key role for the European Parliament in the actual conclusion of the future relationship agreement;<sup>64</sup> Article 218(6) TFEU, read in combination with Article

<sup>62</sup> BBC News, [Brexit: UK promises 'significant' White Paper](#), 16 May 2018

<sup>63</sup> David Davis, [Written Statement Procedures for the Approval and Implementation of EU Exit Agreements](#), HCWS342 13 December 2017

<sup>64</sup> For detailed information on EU (and UK) procedures for negotiating and ratifying external agreements, see Commons Briefing Paper 7192, [EU external agreements: EU and UK procedures](#), 29 March 2016.

207 TFEU on the Common Commercial Policy, sets out clearly that all trade agreements require the consent of the European Parliament.

### **The future relationship agreement and the role of Member States'**

It is also worth noting that if the scope of the future partnership agreement moves beyond the exclusive competences of the EU, all the other 27 Member States will also need to ratify the agreement before it can come into force. A 'deep and comprehensive' agreement is likely to touch upon competences shared with the Member States, turning the whole agreement into a so-called 'mixed agreement', requiring national as well as EU ratification.<sup>65</sup> The Member State ratification process is determined by domestic law, but in most Member States it involves parliamentary approval of the relevant agreement. The approval of the 27 Member States and at least 28 bespoke 'parliaments'<sup>66</sup> may be needed before the EU can formally conclude the text of the future partnership agreement.

In a [speech](#) on 1 March 2018, Michel Barnier confirmed the future relations agreement would be 'mixed' and would "require not only the ratification of the Council and the Parliament, but each of the 27 national parliaments by unanimity".

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<sup>65</sup> For more information on 'mixed agreements', see Commons Briefing Paper, [EU external agreements: EU and UK procedures](#), 29 March 2016.

<sup>66</sup> In federal Member States, state-level parliaments may also have a vote on mixed agreements; the illustrative example here is the initial [Wallonia 'no' vote on CETA](#).

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