

Annex – proposed text of withdrawal agreement, Part Six, annotated. My comments in *italics*; proposed amendments in *italics and underline*.

## PART SIX

### INSTITUTIONAL AND FINAL PROVISIONS

#### TITLE I

#### CONSISTENT INTERPRETATION AND APPLICATION

##### Article 151

##### References to the Court of Justice of the European Union concerning Part Two

Where, in a case which has commenced at first instance within eight years from the end of the transition period before a court or tribunal in the United Kingdom, a question is raised concerning the interpretation of Part Two of this Agreement, and where a court or tribunal in the United Kingdom seized with that case considers that a decision on that question is necessary to enable it to give judgment in that case, it may request the Court of Justice of the European Union to give a preliminary ruling on that question. The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings on such requests. The legal effects in the United Kingdom of such preliminary rulings shall be the same as the legal effects of preliminary rulings given pursuant to Article 267 TFEU in the Union and its Member States.

*Background: This reflects part of para 38 of the joint report. It sets the eight-year time limit starting from the end of the transition/implementation period, whereas that starting point was not definitively decided in the joint report, as it noted that discussions on the transition had yet to take place. It specifies that the CJEU's powers concern the whole of Part Two, not just the vaguer "interpretation of those rights" in the joint report. As agreed, this differs from Article 267 TFEU in that final courts in the UK are not obliged as a rule to refer cases. However, the legal effects of such rulings are the same as under Article 267. That issue was not mentioned in the joint report, but the CJEU has ruled that its judgments (where its jurisdiction exists) must always be binding, even as regards non-EU states (see [Opinion 1/91](#), para 38). It is implicit that the Court's other jurisdiction (notably on infringement proceedings) will not apply.*

*According to Article 168, this provision – and the whole of Title I of Part Six (Articles 151 to 156) will only apply from the end of the transition/implementation period. That temporal limitation appears in the text of Article 151, but not Articles 152 to 156.*

*Comments: It is not clear what will happen to cases pending at the end of this eight-year period. To address such issues, I have a suggested amendment, to add this sentence: After the end of this eight-year period, Articles 82(2) and (3), 83(2) and 85(1) and (2) shall apply mutatis mutandis. This would mean that the CJEU still has jurisdiction for cases pending before it and courts in the UK at the end of that date, and confirm that its judgments after that date will remain binding on the UK. This is perhaps evident anyway from the final sentence and the words “commenced at first instance within eight years” (and from “litigation brought within 8 years” in the joint report), but it is better to confirm it explicitly.*

*If the transition period were extended, that would in principle have knock-on effects on this Article. It should be noted that there is no time limit on the CJEU’s jurisdiction to rule on the application of this agreement as regards UK citizens in the EU27. Nor is there any other limit on its jurisdiction relating to them (ie final courts will in principle have to send cases concerning them to the CJEU; infringement proceedings can apply).*

## Article 152

### Monitoring of the implementation and application of Part Two

The United Kingdom shall set up an independent Authority to monitor the implementation and application of Part Two. That Authority shall have the power to receive and investigate complaints from Union citizens and their family members, and to conduct inquiries on its own initiative, concerning alleged breaches by administrative authorities of the United Kingdom of their obligations under Part Two. The Authority may make its findings public. Where it considers that the administrative authority concerned has not acted appropriately on its findings, and without prejudice to any remedies available to the Union citizens or family members concerned, the Authority shall have the right to bring a legal action before a competent court or tribunal in the United Kingdom in an appropriate judicial procedure with a view to seeking adequate redress. The Authority shall inform the European Commission of any such legal actions brought before courts or tribunals in the United Kingdom. It may also consult the European Commission before bringing such legal actions and the European Commission may suggest to the Authority to bring such legal actions.

*Background: This is based on part of para 40 of the joint report, which provides as follows:*

*The implementation and application of the citizens' rights Part will be monitored in the Union by the Commission acting in conformity with the Union Treaties. In the UK, this role will be fulfilled by an independent national authority; its scope and functions, including its role in acting on citizens' complaints, will be discussed between the parties in the next phase of the negotiations and reflected in the Withdrawal Agreement. There should be regular exchange of information between the UK Government and the Commission.*

*Comments: The “scope and functions” of this body, in the proposal, would be: a) “to receive and investigate complaints from Union citizens and their family members”; b) “to conduct inquiries on its own initiative, concerning alleged breaches” of the rules by UK “administrative authorities”; and c) to “bring a legal action before a competent court or tribunal in the United Kingdom in an appropriate judicial procedure with a view to seeking adequate redress”, if it believes that the administration does not react appropriately, “without prejudice to” remedies the EU citizens and their family members*

have. Implicitly it will not be able to make its own binding decisions on complaints brought to it. As for procedural rules: the authority “may make its findings public”; it “shall inform” the Commission on legal actions and “may consult” it beforehand; the Commission may also suggest that the authority brings such actions.

This clause raises certain questions. In light of the recent botched attempt to appoint Toby Young to a university regulator, without following a proper process, there might be some doubts about the integrity of the appointment process. The authority might lack sufficient staff and funding. At the very least, the UK should make a declaration attached to the agreement, specifying more detail on these points. Although the power for the authority to make its own decisions (which the government would have to challenge) would be useful, the proposed powers (broadly comparable to the Commission’s, although there are no details of the process as compared to Article 258-260 TFEU on infringement proceedings) are an essential minimum, and hopefully the UK government will not seek to weaken them.

The question arises what happens if the authority gives a disappointing reply to a complaint, or fails to reply within a reasonable time. Is there a remedy against the authority in that case? Must its decisions be reasoned? The Commission may be reluctant to push this issue because there are no effective remedies against its infringement decisions following individual complaints – and it likes it that way. There are also questions of whether there will be time limits upon bringing complaints, or upon the authority bringing legal proceedings. The authority does not appear to have the power to bring proceedings as regards general changes to the law, or to comment on them. It seems to have the discretion whether to make its proceedings public. It is not clear that the authority’s power to bring proceedings can lead to a remedy for the complainant; and it would be useful if the authority could submit observations in cases which it didn’t bring itself, in accordance with Articles 154 and 155.

Substantively, the definition of “family members” logically entails an implied cross-reference to the definition in Article 8, in light of the reference to Part Two. “Union citizens” are defined in Article 2, which applies to the entire agreement.

Note that according to Article 168, this provision will only apply from the end of the transition/implementation period. This seems highly objectionable, since the UK will be rolling out a “settled status” scheme well before that time, and EU27 nationals may need the assistance this body will offer as soon as possible after Brexit day. I have therefore suggested an amendment to Article 168. In comparison, the Commission’s powers to apply its infringement proceedings powers are unlimited in time.

To ensure that the powers of this authority are effective, I suggest an amendment based on the powers of data protection authorities. It would apply equally to the Commission, although it might be questioned whether such extra powers alter the “essential elements” of its powers pursuant to ECJ case law. I would argue not, since the Commission’s independence from Member States remains intact.

Suggested amendment: The United Kingdom shall set up an Authority to monitor the implementation and application of Part Two. That Authority shall act with complete independence in performing its tasks and exercising its powers in accordance with this agreement. The United Kingdom shall ensure that the Authority has the human, technical and financial resources, premises and infrastructure necessary for the effective performance of its tasks and exercise of its powers.

*The Authority shall have the power to receive and investigate complaints from Union citizens and their family members, and to conduct inquiries on its own initiative, concerning alleged breaches by administrative authorities of the United Kingdom of their obligations under Part Two. It shall inform the complainant of the progress and the outcome of the investigation within a reasonable period. [It shall have the power to order the administrative authorities to ensure compliance with this Agreement.] It shall give reasons for its decisions, which shall be subject to effective judicial review.*

*The Authority shall make its findings public, with the consent of the complainant. Where it considers that the administrative authority concerned has not acted appropriately on its findings, and without prejudice to any remedies available to the Union citizens or family members concerned, the Authority shall have the right to bring a legal action before a competent court or tribunal in the United Kingdom in an appropriate judicial procedure with a view to seeking adequate redress for the benefit of the individual(s) concerned. In other pending cases, the Authority may submit written observations to the courts or the tribunals in the United Kingdom. With the permission of the court or tribunal in question, it may also make oral observations.*

*The Authority shall inform the European Commission of any such legal actions brought before courts or tribunals in the United Kingdom. It may also consult the European Commission before bringing such legal actions and the European Commission may suggest to the Authority to bring such legal actions. The authority may also suggest to the Commission to commence an infringement procedure in accordance with the Treaties, and may submit observations in accordance with Article 154.*

*This Article shall apply mutatis mutandis to the Commission.*

## Article 153

### Jurisdiction of the Court of Justice of the European Union concerning Parts Three and Five

Without prejudice to Article 83 of this Agreement, Articles 258, 260, and 267 TFEU shall apply in respect of the interpretation and application of Part Three of this Agreement and of applicable Union law referred to in Article 129 and Article 131(1) or (2) of this Agreement. To this effect, any reference made in Articles 258, 260, and 267 TFEU to a Member State shall be read as including the United Kingdom.

*Comment: This gives the CJEU its jurisdiction as regards infringement actions and preliminary rulings over cases concerning the separation provisions (Part Three) and the references to EU financial law in Part Five (financial settlement), which will still apply after the end of the transition/implementation period to the extent that payments are made after that date.*

*According to Article 168, this provision will only apply from the end of the transition/implementation period. The Court's ordinary jurisdiction will apply up until to the end of that period.*

*The cross-reference to Article 83 covers cases brought before the end of the transitional/implementation period, which the CJEU will still have jurisdiction to decide afterwards.*

## Article 154

### Submission of statements of case or written observations

Where a court or tribunal of a Member State refers a question concerning the interpretation of this Agreement to the Court of Justice of the European Union for a preliminary ruling, the decision of the national court or tribunal containing that question shall be notified to the United Kingdom. The United Kingdom shall be entitled to submit statements of case or written observations to the Court of Justice of the European Union within two months of such notification.

*Background: This Article partly reflects the second sentence of para 39 of the joint report: "In the same vein, it is envisaged to give the UK Government and the European Commission the right to intervene in relevant cases before the CJEU and before UK courts and tribunals respectively." The text of this Article defines what "relevant cases" are. Note that the Article applies to the entire withdrawal agreement, not just the citizens' rights provisions. According to Article 168, this provision will only apply from the end of the transition/implementation period, although unlike Article 151 there is no final date when it expires.*

*Comment: A right of intervention like this is not unusual. For instance EFTA EEA states can (and sometimes do) state their view in CJEU cases which are relevant to the EEA treaty. However, it is a very narrow interpretation of the concept of "relevant cases". Surely a case is relevant not only where it concerns the withdrawal agreement as such, but where it concerns an EU law issue which could impact the UK in accordance with Article 4(5), which requires the UK's administrative and judicial authorities to have due regard to relevant CJEU case law decided after the end of the transition/implementation period. Also it seems appropriate to allow the Authority set up by Article 152 to intervene where there are issues relevant to EU27 or UK citizens, since the UK government may be reluctant to defend their rights.*

*I therefore suggest two amendments. The first sentence should read: "Where a court or tribunal of a Member State refers a question concerning the interpretation of this Agreement, or a provision of Union law within the scope of Article 4(5) of this Agreement..." A new sentence at the end should read: "Where the case concerns Part Two of this Agreement, this Article shall also apply mutatis mutandis to the Authority referred to in Article 152."*

## Article 155

### Participation of the European Commission in cases pending in the United Kingdom

Where the consistent interpretation and application of Part Two of this Agreement so requires, the European Commission may submit written observations to the courts or the tribunals in the United Kingdom in pending cases where the interpretation of the Agreement is concerned. The European Commission may, with the permission of the court or tribunal in question, also make oral observations. The European Commission shall inform the United Kingdom of its intention to submit observations before formally doing so.

*Background: This Article partly reflects the second sentence of para 39 of the joint report: “In the same vein, it is envisaged to give the UK Government and the European Commission the right to intervene in relevant cases before the CJEU and before UK courts and tribunals respectively.” The text of this Article defines what “relevant cases” are. Unlike Article 154, this Article does not apply to the entire withdrawal agreement, but only to the citizens’ rights provisions. According to Article 168, this provision will only apply from the end of the transition/implementation period. However, unlike Article 151, it will not expire after eight years.*

*Comment: As far as I know this explicit power to intervene in a national court proceeding is novel, although it could be compared to the Commission’s power to make observations in EFTA Court proceedings. It overlaps with the Authority’s power to bring cases, and (for a number of years) with the UK courts’ ability to ask the CJEU questions about the citizens’ rights in Part Two.*

## Article 156

### Regular dialogue and exchange of information

In order to facilitate the consistent interpretation of this Agreement and in full deference to the independence of courts, the Court of Justice of the European Union and the United Kingdom's highest courts shall engage in a regular dialogue, analogous to the one which the Court of Justice of the European Union pursues with the highest courts of the Member States.

*Background: This Article partly reflects para 39 of the Joint Report, which states: “Consistent interpretation of the citizens' rights Part should further be supported and facilitated by an exchange of case law between the courts and regular judicial dialogue.” However, Article 156 is not limited in scope to citizens’ rights, and makes no express reference to exchange of case law (or any other “information” referred to in the title of the Article). According to Article 168, this provision will only apply from the end of the transition/implementation period.*

*Comments: It seems odd that there is no exchange of information or case law provided for, especially as the EU has other treaties with non-EU states which provide for such exchanges. I suggest an amendment, to add a new sentence at the end of this Article: The Joint Committee shall establish a mechanism to ensure regular mutual transmission of case law and other information relevant to this Agreement.*

## TITLE II

### INSTITUTIONAL PROVISIONS

## Article 157

### Joint Committee

1. A Joint Committee is hereby established, comprising representatives of the Union and of the United Kingdom. The Joint Committee shall be co-chaired by the Union and the United Kingdom.

2. The Joint Committee shall meet at least once a year or at the request of the Union or the United Kingdom. The Joint Committee shall set its meeting schedule and its agenda by mutual consent.

3. The Joint Committee shall be responsible for the implementation and application of this Agreement. The Union or the United Kingdom may refer to the Joint Committee any issue relating to the implementation, application and interpretation of this Agreement.

4. The Joint Committee shall:

(a) supervise and facilitate the implementation and application of this Agreement;

(b) decide on the tasks of the specialised committees and supervise their work;

(c) seek appropriate ways and methods of preventing problems that might arise in areas covered by this Agreement or of resolving disputes that may arise regarding the interpretation and application of this Agreement;

(d) adopt its own rules of procedure, as well as rules of procedure of the specialised committees;

(e) consider any matter of interest relating to an area covered by this Agreement;

(f) adopt decisions and make recommendations as set out in Article 159;

(g) adopt amendments to this Agreement in the cases provided for in this Agreement.

5. The Joint Committee may:

(a) delegate responsibilities to the specialised committees, except those referred to in points (b), (d), (f) and (g) of paragraph 4;

(b) establish other specialised committees than those established by Article 158 in order to assist it in the performance of its tasks;

(c) change the tasks assigned to the specialised committees or dissolve any of those committees; and

(d) take such other action in the exercise of its functions as decided by the Union and the United Kingdom.

6. The Joint Committee shall issue an annual report on the functioning of this Agreement.



*Comment: The Joint Committee has a number of functions under the Agreement, not just in relation to citizens' rights. Its main explicit role in that area will be updating the social security annex and (potentially) being a forum for dispute settlement – see Articles 162 to 165 below.*

## Article 158

### Specialised committees

1. The following specialised committees are hereby established:

- (a) the Committee on citizens' rights;
- (b) the Committee on the other separation provisions;
- (c) the Committee on issues related to the island of Ireland;
- (d) the Committee on Sovereign Base Areas related issues;
- (e) the Committee on the financial provisions.

2. Unless otherwise provided in this Agreement, or unless the co-chairs decide otherwise, the specialised committees shall meet at least once a year. Additional meetings may be held at the request of the Union, the United Kingdom, or of the Joint Committee. They shall be co-chaired by representatives of the Union and of the United Kingdom. The specialised committees shall set their meeting schedule and agenda by mutual consent. The specialised committees may draw up draft decisions and recommendations and refer them for adoption by the Joint Committee.

3. The Union and the United Kingdom shall ensure that their respective representatives on the specialised committees have the appropriate expertise with respect to the issues under discussion.

4. The specialised committees shall inform the Joint Committee of their meeting schedules and agenda sufficiently in advance of their meetings and shall report to the Joint Committee on results and conclusions from each of their meetings. The creation or existence of a specialised committee shall not prevent the Union or the United Kingdom from bringing any matter directly to the Joint Committee.

*Comment: Note that one of the specialised committees concerns citizens' rights. It is likely to meet for some time into the future, given the long time frame of the application of Part Two of the Agreement.*

## Article 159

### Decisions and recommendations



1. The Joint Committee shall, for the purposes of this Agreement, have the power to adopt decisions in respect of all matters for which this Agreement so provides and make appropriate recommendations to the Union and the United Kingdom.

2. The decisions adopted by the Joint Committee shall be binding on the Union and the United Kingdom, and the Union and the United Kingdom shall implement them. They shall have the same legal effect as this Agreement.

3. The Joint Committee shall adopt its decisions and make its recommendations by mutual consent.

*Comment: the only power to adopt decisions which the Joint Committee has in the area of citizens' rights is to adopt new social security rules pursuant to Article 31, although its dispute settlement powers (discussed below) might be relevant. So might its recommendations, although there is no explicit reference to them in the citizens' rights part.*

### TITLE III

#### DISPUTE SETTLEMENT

##### Article 160

##### Cooperation

The Union and the United Kingdom shall, at all times, endeavor to agree on the interpretation and application of this Agreement, and shall make every attempt through cooperation and consultations to arrive at a mutually satisfactory resolution of any matter that might affect its operation.

*Comment: This is a "best endeavours" Article that points toward trying to find political solutions to disputes. It does not include any specific legal obligations but could nevertheless be relevant in practice, given that disputes under the EU's free trade agreements are usually settled diplomatically.*

##### Article 161

##### Exclusivity

For any dispute between the Union and the United Kingdom arising under this Agreement, the Union and the United Kingdom shall only have recourse to the procedures provided for in this Agreement.

*Comment: This Article prevents using other means besides those in the Agreement to settle disputes, unless the Agreement itself is amended.*

## Article 162

### Settlement of disputes

1. Without prejudice to Article 153, the Union or the United Kingdom may bring any dispute which concerns the interpretation or application of this Agreement before the Joint Committee.
2. The Joint Committee may settle the dispute through a recommendation. It shall be provided with all information which might be of use in making possible an in-depth examination of the situation, with a view to finding an acceptable solution. To this end, the Joint Committee shall examine all possibilities to maintain the good functioning of the Agreement.
3. The Joint Committee may, at any point, decide to submit the dispute brought before it to the Court of Justice of the European Union for a ruling. The Court of Justice of the European Union shall have jurisdiction over such cases and its rulings shall be binding on the Union and the United Kingdom.
4. If the dispute has not been settled within three months after it was brought before the Joint Committee and has not been submitted to the Court of Justice of the European Union by the Joint Committee pursuant to paragraph 3, the dispute may be submitted to the Court of Justice of the European Union for a ruling at the request of either the Union or the United Kingdom. The Court of Justice of the European Union shall have jurisdiction over such cases and its rulings shall be binding on the Union and the United Kingdom.

*Comments: According to Article 168, this provision will only apply from the end of the transition/implementation period. The dispute settlement clause applies to the entire Agreement, not only the citizens' rights rules. This text has clearly been adapted from Article 111 of the [EEA treaty](#). Para 1 is identical (except for the names of the parties, obviously). Para 2 is identical except for the addition of the words "through a recommendation". Paras 3 and 4 differ, however: under the EEA Treaty, the EEA Joint Committee can agree to ask the CJEU about a treaty rule which is identical to EU law after three months' discussion (not at any time); and if the dispute is not resolved or sent to the CJEU after six months' discussion, then one party can take a form of safeguard measure or disapply a part of the EEA rules due to divergence with the other party. It's also specified that the CJEU rules are binding, although that simply restates the ruling of the CJEU in Opinion 1/91 that its rulings must always be binding. It will be necessary to decide which EU institution decides to bring proceedings on behalf of the EU.*

*In comparison then, the version of the Withdrawal Agreement places far more reliance on the CJEU: allowing earlier recourse if both sides agree; unilateral recourse after three months; jurisdiction over all the agreement, not just the EU law aspects (although admittedly much of the agreement refers to EU law); and eliminating the possibility of settling a dispute by means of a safeguard or divergence decision instead – although Article 165 provides for a sanction by the EU side only during the transition/implementation period, and there is an odd disconnected sanctions clause in Article 163(3). This provision overlaps with the jurisdiction of the Court over citizens' rights that will apply for eight years after the end of the transition/implementation period. The CJEU jurisdiction in this Article would be subject to the rules of procedure to be set out in an Annex (see Article 164).*

*This proposal is problematic because it is one-sided, diverging from the solution in the EEA which the EU found legally and politically acceptable. (Suggesting a rather different approach to a similar issue could reasonably be seen as a form of “cherry-picking”). While it would be a breach of EU law to set up a system which lets arbitrators et al make the final decision on interpretation of EU law for the EU (see [Opinion 1/92](#)), the EEA system was found compatible with EU law in that judgment and the obvious question is why not follow that route here – which would mean a form of sanction by either side instead of recourse to the ECJ? Also, why give the ECJ jurisdiction to rule on issues in the withdrawal agreement which are not EU law issues – given that there is no EU law requirement to give it such jurisdiction even where the EU would be bound by an interpretation of such rules?*

*I suggest the following amendments, which would bring the text in line with the EEA model and be consistent with the limits set out by the ECJ in Opinion 1/92.*

*2. The Joint Committee may settle the dispute through a recommendation, which shall not affect the case law of the Court of Justice of the European Union....*

*3. If the dispute concerns the interpretation of Union law, the Joint Committee may, at any point....*

*4. If the dispute has not been settled within three months after it was brought before the Joint Committee and has not been submitted to the Court of Justice of the European Union by the Joint Committee pursuant to paragraph 3, either party may take a safeguard measure. Such safeguard measures shall be restricted with regard to their scope and duration to what is strictly necessary in order to remedy the situation. Priority shall be given to such measures as will least disturb the functioning of this Agreement.*

*If there is a dispute concerning the scope or duration of safeguard measures, either party may refer the dispute to arbitration under the procedures laid down in Protocol [xx]. No question of interpretation of the provisions of this Agreement concerning Union law may be dealt with in such procedures. The arbitration award shall be binding on the parties to the dispute.*

## Article 163

### Non-compliance

1. Where the Union or the United Kingdom consider that the other has not taken the necessary measures to comply with the judgment of the Court of Justice of the European Union resulting from proceedings referred to in Article 162, either the Union or the United Kingdom may bring the case before the Court of Justice of the European Union. The Court of Justice of the European Union shall have jurisdiction over such cases and its rulings shall be binding on the Union and the United Kingdom.

2. If the Court of Justice of the European Union finds, in proceedings brought before it pursuant to paragraph 1, that the Union or the United Kingdom, as the case may be, has not complied with its judgement, it may impose a lump sum or penalty payment on it.

3. The Union or the United Kingdom may decide to suspend:

(a) parts of this Agreement other than Part Two; or

(b) parts of any other agreement between the Union and the United Kingdom, under the conditions set out in such agreement.

Any suspension under this paragraph shall be proportionate to the breach of obligation concerned, taking into account the gravity of the breach and the rights in question. It shall be subject to judicial review by the Court of Justice of the European Union.

*Comments: According to Article 168, this provision will only apply from the end of the transition/implementation period. The CJEU jurisdiction in this Article would be subject to the rules of procedure to be set out in an Annex (see Article 164).*

*Paragraphs 1 and 2 are similar to Article 260(2) TFEU, which provide for the Commission to sue a Member State if it has allegedly not implemented a prior ruling in an infringement case. The text here differs in that: the prior judgment would not be an infringement case, but a dispute settlement ruling pursuant to Article 162 of the Agreement; the EU as such or the UK would bring the case, rather than the Commission; there is no reference to the obligation in Article 260 TFEU to giving the defending party “the opportunity to submit its observations” before the case is brought; and the plaintiff does not have to specify the lump sum or penalty which it wants the Court to impose.*

*For eight years, this provision would overlap with the Court’s special jurisdiction over citizens’ rights in Article 151 of this Agreement.*

*Paragraph 3 is quite different from Article 260 TFEU, and the legal drafting here is....unimpressive. Is this an alternative remedy instead of applying for a lump sum or penalty payment? Or an additional one after, before or alongside a court challenge? Implicitly (but not very clearly) the grounds for applying this rule would be a “breach of obligation” – what obligation though? There is no explicit reference to paragraphs 1 or 2.*

*In the absence of a cross-reference to Article 162, there’s no explicit obligation to consult and try to reach a solution before enforcing this penalty. It would overlap with Article 151 (citizens’ rights) and Articles 162 and 163(1) and (2). The one clear point is that it can’t be used to suspend the citizens’ rights provisions; although presumably a breach of those provisions could be used to trigger it. Remarkably, it could be used to suspend “any other agreement between” the EU and the UK, although this overreach is immediately rendered pointless by the proviso that this only applies “under the conditions set out in such agreement”.*

*Needless to say, I propose an amendment to delete this diabolical paragraph. In fact, my proposed amendment to Article 162 would mean that the rest of the Article would be superfluous too.*

## Procedural rules and powers

Proceedings brought to the Court of Justice of the European Union pursuant to Article 162 or 163 shall be governed by the Rules of Procedure set out in [Annex y+3] to this Agreement.

*Comment: This annex has not yet been filled in. According to Article 168, this provision will only apply from the end of the transition/implementation period.*

## Article 165

### Suspension of benefits during the transition period

1. Notwithstanding Article 126 of this Agreement, if during the transition period the Union considers that the United Kingdom has not fulfilled, during the transition period, an obligation under Union law as found in a judgment rendered pursuant to Article 126 of this Agreement in accordance with Article 258 TFEU, or that the United Kingdom does not respect an order rendered pursuant to Article 126 of this Agreement in accordance with Article 279 TFEU, and where the functioning of the internal market, of the customs union, or the financial stability of the Union or its Member States would be jeopardised as a result, the Union may suspend certain benefits deriving for the United Kingdom from participation in the internal market.

2. When applying paragraph 1, the Union shall take into account the possible consequences of such a suspension on the rights and obligations of natural and legal persons. Any suspension under paragraph 1 shall be proportionate to the breach of obligation concerned, taking into account the gravity of the breach and the rights in question, and shall not exceed three months. It may, however, be renewed.

3. The Union shall inform the United Kingdom of its intention to apply paragraph 1 and allow the United Kingdom, within 20 days, to remedy the situation. Any suspension shall take effect no earlier than 20 days after its notification to the United Kingdom.

*Background: The possibility of this clause was mooted when the Commission proposed Articles on the transition/implementation period. It is now limited to cases where the ECJ has already ruled in an infringement proceeding.*

*Comments: For the reasons set out in the main comments in this blog post, I suggest the simple amendment of deleting this Article. For convenience, in summary those arguments are: a) it's unnecessary because the usual jurisdiction of the ECJ will apply, including the remedy of the ECJ imposing fines for lack of compliance with its prior rulings; b) there's no time limit problem here, since cases against the UK pending at the end of the transition/implementation period will be decided afterward; c) the proposal assumes that only the UK could breach EU law, not the EU27; d) it would treat the UK as both a Member State and a non-Member State at the same time; e) there is no proviso for attempting to resolve the dispute politically; f) it circumvents the usual requirement for the party alleging the breach to discharge the burden of proof of proving its claim in the ECJ; and g) there's no provision for judicial review or arbitration concerning the decision.*

## TITLE IV

### FINAL PROVISIONS

#### Article 166

##### Annexes

Protocols [1 to N] and Annexes [y to y+x] shall form an integral part of this Agreement.

*Comment: Only the Protocol on Ireland and a few Annexes have been filled in.*

#### Article 167

##### Authentic texts

This Agreement, drawn up in a single original in the Bulgarian, Croatian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Irish, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovenian, Spanish and Swedish languages, the texts in each of these languages being equally authentic, shall be deposited in the archives of the Council, which shall transmit a certified copy to the United Kingdom.

*Comment: Provisions on authentic language versions are standard clause in treaties. Bilateral treaties between the EU and non-EU countries are always valid in the languages of all Member States and the non-Member State too. In case of conflict between language versions, the ECJ looks at a number of them to determine the overall intention of the drafters, including (where relevant) the non-EU language version.*

#### Article 168

##### Entry into force and application

This Agreement shall enter into force on 30 March 2019.

Parts Two and Three, with the exception of Articles 30(1) and 40, as well as Title I of Part Six and Articles 162, 163 and 164, shall apply as from the end of the transition period.

The Protocol on Ireland/Northern Ireland, with the exception of Article 10 thereof, shall apply as from the end of the transition period.

The Protocol relating to the Sovereign Base Areas in Cyprus shall apply as from the end of the transition period.

*Comment: Although the Agreement will enter into force on Brexit day, many parts of it would only apply from the end of the transition/implementation period: Part Two on citizens' rights (except a provision on participation in social security discussions), Part Three on separation provisions (except a provision on transferring files to authorise pharmaceuticals etc), the Protocols on Ireland and Cyprus bases (except the specialised committee on Ireland would be set up from Brexit day); the Part Six provisions on the ECJ and most dispute settlement clauses.*

*As noted above, it is objectionable that Article 152 (which sets up the Authority designed to help with applying EU27 citizens' rights in the UK) will only apply from the end of the transition/implementation period, because EU27 citizens may need its assistance before then. I therefore propose an amendment, so that the second paragraph reads "...as well as Title I of Part Six (with the exception of Article 152) and..."*

*Conversely, although not mentioned here, some parts of the agreement will expire at the end of the transition/implementation period: for instance, Part Four (which concerns that period), and Article 165 (sanctions during the transitional period).*

Done on [dd/mm/yyyy].