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**COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN COUNCIL  
(ARTICLE 50)**

**on the state of progress of the negotiations with the United Kingdom under Article 50 of  
the Treaty on European Union**

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#### **1. Introduction**

The purpose of the present Communication is to provide the European Council (Article 50) with the European Commission's assessment of the state of progress of the negotiations with the United Kingdom under Article 50 of the Treaty on European Union, in view of its meeting on 15 December 2017.

The negotiations have been conducted between the Commission, nominated by the Council as the Union negotiator, and the United Kingdom. The Heads of State or Government invited the Council to nominate the Commission as Union negotiator in their Statement of 15 December 2016.<sup>1</sup> The Commission's nomination of Michel Barnier as Chief Negotiator was welcomed by Heads of State or Government. On 29 April 2017, the European Council (Article 50) adopted Guidelines following the United Kingdom's notification under Article 50 TEU (the Guidelines) which confirmed the role of the Commission as the Union negotiator.<sup>2</sup>

The European Council (Article 50) on 15 December 2017 is scheduled to discuss and determine whether sufficient progress has been made in the first phase of the negotiations on the orderly withdrawal of the United Kingdom from the European Union, allowing the negotiations to proceed to their second phase.

The Commission's assessment, as set out below, is based on the Joint Report agreed by the negotiators of the Commission and of the United Kingdom Government. The Joint Report was published on 8 December 2017: [https://ec.europa.eu/commission/files/joint-report-negotiators-european-union-and-united-kingdom-government-progress-during-phase-1-negotiations-under-article-50-teu-united-kingdoms-orderly-withdrawal-european-union\\_en](https://ec.europa.eu/commission/files/joint-report-negotiators-european-union-and-united-kingdom-government-progress-during-phase-1-negotiations-under-article-50-teu-united-kingdoms-orderly-withdrawal-european-union_en)

Throughout the negotiations, the Commission has ensured an inclusive process with close contacts and regular meetings with the EU27. The Commission has also been in close and regular contact with the European Parliament to ensure that its views and positions are duly taken into account. On 4 December 2017, President Juncker met with the European Parliament's Brexit Steering Group to take stock of progress on three withdrawal issues, including with regard to the important issue of citizens' rights.

The negotiations have been carried out with unprecedented transparency. Each of the essential principles papers defining the Commission's negotiating position, the agenda of every negotiating round, as well as the Commission's recommendation to open negotiations have been published.<sup>3</sup>

The Joint Report is not the Withdrawal Agreement. Should the European Council consider that sufficient progress has been made in the negotiations, the Withdrawal Agreement based on Article 50 of the Treaty on European Union will need to be drafted on the basis of the Joint Report and the outcome of the negotiations on other withdrawal issues. The Withdrawal

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<sup>1</sup> <http://www.consilium.europa.eu/media/24173/15-euco-statement.pdf>

<sup>2</sup> The role of the Commission was confirmed by Council Decision of 22 May 2017 nominating the Commission as the Union negotiator, see <http://data.consilium.europa.eu/doc/document/XT-21016-2017-INIT/en/pdf>.

<sup>3</sup> [https://ec.europa.eu/commission/brexit-negotiations/negotiating-documents-article-50-negotiations-united-kingdom\\_en?field\\_core\\_tags\\_tid\\_i18n=351](https://ec.europa.eu/commission/brexit-negotiations/negotiating-documents-article-50-negotiations-united-kingdom_en?field_core_tags_tid_i18n=351)

Agreement will be concluded by the Council upon a proposal from the Commission, and after obtaining consent of the European Parliament, and is subject to approval by the United Kingdom in accordance with its own procedures.

## 2. Background

On 29 March 2017, the United Kingdom notified the European Council of its intention to withdraw from the European Union in accordance with Article 50 TEU. On 29 April 2017, the European Council (Article 50) adopted its Guidelines (hereafter the ‘Guidelines’)<sup>4</sup>, and on 22 May 2017, the General Affairs Council (Article 50) authorised the Commission to open negotiations with the United Kingdom and adopted directives for the negotiation (hereafter the ‘negotiating directives’)<sup>5</sup>.

According to point 4 of the Guidelines, *‘the first phase of the negotiations will aim to:*

- *provide as much clarity and legal certainty as possible to citizens, businesses, stakeholders and international partners on the immediate effects of the United Kingdom’s withdrawal from the Union;*
- *settle the disentanglement of the United Kingdom from the Union and from all the rights and obligations the United Kingdom derives from commitments undertaken as Member State.*

*The European Council will monitor progress closely and **determine when sufficient progress has been achieved to allow negotiations to proceed to the next phase.***<sup>6</sup>

Point 5 of the Guidelines indicates that *‘[w]e stand ready to engage in preliminary and preparatory discussions to this end in the context of negotiations under Article 50 TEU, as soon as the European Council decides that **sufficient progress has been made in the first phase towards reaching a satisfactory agreement on the arrangements for an orderly withdrawal.***<sup>7</sup>

The negotiating directives indicate in point 3 that the main objective of the Withdrawal Agreement is *‘to ensure an orderly withdrawal of the United Kingdom from the European Union and from the European Atomic Energy Community.’*

Furthermore, the negotiating directives state in point 10 that *‘these negotiating directives prioritise some matters which, at this stage, have been identified as necessary to ensure an orderly withdrawal of the United Kingdom from the Union. Other matters not covered by this set of negotiating directives, such as services, will be part of subsequent sets of negotiating directives.’*

In its conclusions of its meetings on 20 October 2017<sup>8</sup>, the European Council (Article 50) stated that *‘[i]n the light of the first five rounds of negotiations, taking into account the assessment presented by the Union negotiator and reaffirming its guidelines of 29 April 2017, the European Council:*

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<sup>4</sup> EUCO XT 20004/17, available at <http://www.consilium.europa.eu/media/21763/29-euco-art50-guidelinesen.pdf>.

<sup>5</sup> XT 21016/17, available at <https://www.consilium.europa.eu/media/21766/directives-for-the-negotiation-xt21016-ad01re02en17.pdf>

<sup>6</sup> Bold added.

<sup>7</sup> Idem.

<sup>8</sup> EUCO XT 20014/17, available at <http://www.consilium.europa.eu/media/23512/20-euco-conclusions-art50.pdf>.

• *welcomes the progress made regarding citizens' rights and invites the negotiator to build on the convergence achieved so as to provide the necessary legal certainty and guarantees to all concerned citizens and their family members who shall be able to exercise directly their rights derived from EU law and protected by the [W]ithdrawal [A]greement, including through smooth and simple administrative procedures and the role of the Court of [J]ustice of the European Union;*

• *acknowledges that, as regards Ireland, there has been some progress on convergence on principles and objectives regarding protection of the Good Friday Agreement and maintenance of the Common Travel Area, and invites the Union negotiator to pursue further refinement of these principles, taking into account the major challenge that the UK's withdrawal represents, including as regards avoidance of a hard border, and therefore expecting the UK to present and commit to flexible and imaginative solutions called for by the unique situation of Ireland;*

• *notes that, while the UK has stated that it will honour its financial obligations taken during its membership, this has not yet been translated into a firm and concrete commitment from the UK to settle all of these obligations' (point 1).*

The European Council (Article 50) furthermore stated that '*[a]t its next session in December, the European Council will reassess the state of progress in the negotiations with a view to determining whether sufficient progress has been achieved on each of the three above issues. If so, it will adopt additional guidelines in relation to the framework for the future relationship and on possible transitional arrangements which are in the interest of the Union and comply with the conditions and core principles of the guidelines of 29 April 2017. Against this background, the European Council invites the Council (Art. 50) together with the Union negotiator to start internal preparatory discussions' (point 3).*

### **3. The first phase of the negotiations**

The negotiating directives have provided for a clear structure and a united EU approach to the negotiations. Throughout the negotiations, the EU has maintained its unity and acted as one.

The Commission's Chief Negotiator, Michel Barnier, has made clear from the outset that the Commission was available to negotiate at any time. In practice, there have been six negotiation rounds with the United Kingdom:

- the first round on 19 June 2017;
- the second round from 17 to 20 July 2017;
- the third from 28 to 31 August 2017;
- the fourth from 25 to 28 September 2017;
- the fifth from 9 to 12 October 2017; and
- the sixth on 9 and 10 November 2017.

Subsequently, the Commission and United Kingdom negotiators have had constant direct contacts.

While progress has been made on a number of elements relating to the orderly withdrawal, in line with the Guidelines and the negotiating directives, the first phase of negotiations has given priority to three issues which have been identified as particularly important for ensuring an orderly withdrawal:

- a) the rights of citizens;

- b) the dialogue on Ireland/Northern Ireland; and
- c) the financial settlement.

In addition, the negotiations covered other separation issues, on which negotiators made limited progress:

- Euratom-related (nuclear specific) issues;
- ensuring continuity in the availability of goods placed on the market under Union law before withdrawal;
- judicial cooperation in civil and commercial matters;
- police and judicial cooperation in criminal matters;
- ongoing Union judicial procedures;
- ongoing Union administrative proceedings; and
- issues relating to the functioning of the Union institutions, agencies and bodies.

There were also discussions of general governance of the Withdrawal Agreement aspects not related to citizens' rights.

There were no discussions yet on the following issues for which the EU had presented essential principles papers on 21 September 2017:

- intellectual property rights (including geographical indications);
- ongoing public procurement procedures;
- customs-related matters needed for an orderly withdrawal from the Union; and
- use of data and protection of information obtained or processed before the withdrawal date.

**The following section addresses each of these issues which have been discussed during the negotiations in detail, based on the Joint Report, referred to above. Where the position of the United Kingdom negotiator is reflected, this is also done on the basis of the Joint Report.**

#### **4. The positions of the negotiators of the Commission and of the United Kingdom**

##### **a) Citizens' rights**

The Guidelines state: *'The right for every EU citizen, and of his or her family members, to live, to work or to study in any EU Member State is a fundamental aspect of the European Union. Along with other rights provided under EU law, it has shaped the lives and choices of millions of people. Agreeing reciprocal guarantees to safeguard the status and rights derived from EU law at the date of withdrawal of EU and UK citizens, and their families, affected by the United Kingdom's withdrawal from the Union will be the first priority for the negotiations. Such guarantees must be effective, enforceable, non-discriminatory and comprehensive, including the right to acquire permanent residence after a continuous period of five years of legal residence. Citizens should be able to exercise their rights through smooth and simple administrative procedures'* (point 8).

*Content of citizens' rights*

The Commission set out its position in the ‘*Essential principles on citizens’ rights*’ published on 12 June 2017. On 26 June 2017, the United Kingdom published the document ‘*The United Kingdom’s exit from the European Union - Safeguarding the Position of EU Citizens Living in the UK and UK Nationals Living in the EU*’.

The principles underlying the Union’s position are that the Withdrawal Agreement should protect the rights of Union citizens, United Kingdom nationals and their family members who, at the date of withdrawal, have enjoyed rights relating to free movement under Union law, as well as rights which are in the process of being obtained and the rights the enjoyment of which will intervene at a later date.

The negotiators have reached a fair and equitable common understanding, based on Union law concepts as interpreted by the Court of Justice of the European Union, on the protection of citizens who have built their lives on the basis of rights flowing from United Kingdom membership of the European Union.

The core principles of the common understanding between negotiators, which is built entirely on the negotiating directives given by the Council and reflects the priorities established by the European Parliament in its resolutions of 5 April and 3 October 2017, enable both Union citizens and United Kingdom nationals, as well as their respective family members, for the rest of their lives, to continue to exercise their rights derived from Union law in each other’s territories, where those rights are based on life choices made before the date which the Joint Report calls the ‘specified date’.

This ‘specified date’ should be the date of the United Kingdom’s withdrawal from the Union, without prejudice to discussions, in the second phase of the negotiations, on a possible transitional period and on appropriate adaptations flowing from it as regards the "specified date". In the Commission’s view, in case of any transitional period implying the continued application of the Union’s *acquis* on the fundamental freedoms, it is clear that citizens would need to be fully entitled to their rights to free movement as before the United Kingdom’s withdrawal, and that, therefore, the provisions of the Withdrawal Agreement on the content of citizens’ rights and on governance as regards those rights can only become applicable at the end of such transitional period. In other words, in such case, the ‘specified date’ should, in the Commission’s view, be defined not as the date of the United Kingdom’s withdrawal, but as that of the end of the transitional period.

The common understanding reflected in the Joint Report means that both Union citizens and United Kingdom nationals, as well as their respective family members can **continue to live, work or study** as they currently do under the same conditions as under Union law, benefiting from the full application of the prohibition of any discrimination on grounds of nationality. The only restrictions which apply are those derived from Union law.

Those who have not yet acquired permanent residence rights – if they have not lived in the host State for at least five years – will be fully protected by the Withdrawal Agreement, and be able to acquire permanent residence rights also after the United Kingdom’s withdrawal.

It has also been agreed that the Withdrawal Agreement will **protect the current rights of spouses, registered partners, parents, grandparents, children, grandchildren and a person in a durable relationship**, who do not yet live in the same State as the Union citizen or the United Kingdom national, to join them in the future.

In the Commissions view, the reunification right referred to in the previous paragraph shall also cover **future partners or spouses** of Union citizens and United Kingdom nationals, who are not yet partners or spouses at the 'specified date', as defined above. This important matter should be dealt with in the second phase of the negotiations and will inevitably be linked to the level of ambition of the future partnership between the EU and the United Kingdom.

According to the understanding, all **children will be protected** by the Withdrawal Agreement, wherever they are born before or after the United Kingdom's withdrawal, or whether they are born inside or outside the State where the responsible Union citizen or the United Kingdom national resides. The only exception foreseen concerns children born after the United Kingdom's withdrawal and for which the parent not covered by the Withdrawal Agreement has sole custody under the applicable family law.

#### *Applicable procedures*

In addition to the important substantial rights for citizens referred to above, the European Parliament and the Commission both attach particular importance to the existence of smooth and **simple administrative** procedures for citizens to exercise their rights. This aspect of the negotiation was discussed in detail between President Juncker and the European Parliament's Brexit Steering Group on 4 December 2017.<sup>9</sup> According to the Joint Report, only what is strictly necessary and proportionate to determine whether the criteria for lawful residence have been met, can be required, and any unnecessary administrative burdens will be avoided. This is all the more important as the "special status" that the United Kingdom will set up will be the sole procedure for EU citizens to avail themselves of the rights provided for in the Withdrawal Agreement. The negotiators have agreed that the procedures will be transparent, smooth and streamlined. Costs must not exceed that imposed on nationals for issuing similar documents. Those already holding a permanent residence document will be able to exchange it for the 'special status', free of charge.

The administrative procedures for applications for the 'special status' under the Withdrawal Agreement will be clearly specified therein: the Agreement will contain provisions that reflect the current Union law requirements concerning the evidence citizens shall provide to obtain the 'special status', and it will specify that the host State cannot require anything more than is strictly necessary and proportionate to determine whether the criteria for lawful residence have been met. Errors, involuntary omissions or non-respect of the deadline to submit the application will be dealt with under a proportionate approach. The overall objective is to ensure that the process is as clear, simple and non-bureaucratic as possible for the affected citizens. The Commission will pay particular attention to this aspect of the negotiation when drafting the Withdrawal Agreement and will seek to take into account the European Parliament's concerns.

In this context, it is particularly important to make sure that no citizen will be deprived of his or her rights under the Withdrawal Agreement until a final decision by the competent authorities, or a final judgment, on an application made for the 'special status' has been taken. This has been agreed by the negotiators. The Withdrawal Agreement will ensure that the same safeguards against any restriction of rights as those provided by Union law will apply.

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<sup>9</sup> It was also mentioned in a letter by Guy Verhofstadt, the Chair of the Brexit Steering Group to Michel Barnier on 29 November 2017, see <http://www.europarl.europa.eu/news/en/press-room/20171129IPR89108/brexit-progress-but-not-enough>.

Citizens will maintain their **right to healthcare, pensions and other social security benefits**, and if they are entitled to a cash benefit from one state, they may generally receive it even if they decide to live in another state. When citizens claim a benefit, also after the United Kingdom's withdrawal, previous periods of insurance, work or residence in the Union or in the United Kingdom will be taken into account.

#### *Governance of the Withdrawal Agreement as regards citizens' rights*

The Commission published its '*Position paper on Governance*' on 13 July 2017. The United Kingdom has not published any position paper on this topic. The principles underlying the Union's position as regards governance in relation to citizens rights' are that the citizens' rights set out in the Withdrawal Agreement should be granted as directly enforceable rights in both the United Kingdom and in the Union and that the competence of the Court of Justice of the European Union should be preserved with regard to the consistent interpretation and application of the citizens' rights set out in the Withdrawal Agreement. To this end, the common understanding reached by the negotiators provides that the Withdrawal Agreement will contain an explicit provision that citizens will be able to rely directly on the rights enshrined therein and that inconsistent or incompatible rules will be disapplied.

The United Kingdom negotiator has committed that the United Kingdom adopts primary legislation to incorporate fully the citizens' rights Part of the Withdrawal Agreement into its legal order. Once this primary legislation adopted, unless Parliament expressly repeals it in future, the provisions of the citizens' rights Part will prevail over inconsistent or incompatible legislation.

It is essential to ensure a consistent interpretation of citizens' rights enshrined in the Withdrawal Agreement, in the Union as well as in the United Kingdom. To this end, the common understanding reached by the negotiators, which recognises the role of the Court of Justice as the ultimate arbiter of the interpretation of Union law, provides that:

- United Kingdom courts or tribunals shall have due regard to relevant decisions of the Court of Justice of the European Union given after the withdrawal date;
- United Kingdom courts or tribunals should be enabled having had due regard to whether relevant case law exists, to ask the Court of Justice of the European Union, where they consider necessary, questions of interpretation of those rights. This mechanism should be available for United Kingdom courts or tribunals for litigation brought within 8 years from the date of application of the citizens' rights Part;
- exchange of case law between courts, regular judicial dialogue, as well as the possibility for the United Kingdom Government and the Commission to intervene in relevant cases before the Court of Justice of the European Union and before United Kingdom courts and tribunals respectively should be foreseen; and
- the implementation and application of citizens' rights in the Union should be monitored by the Commission acting in conformity with the Union Treaties. In the United Kingdom, this role will be fulfilled by an independent national authority. To ensure reciprocity and mirror the role of the Commission, the Commission considers that the independent national authority should have the power not just to receive to receive complaints by EU citizens resident in the United Kingdom who consider that their rights under the Withdrawal Agreement have been infringed, but also initiate appropriate legal actions before United Kingdom courts on their behalf. This issue will be reflected in the Withdrawal Agreement and the Commission will pay particular

attention to it in the second phase of the negotiations when the details of the role of the authority will be discussed.

It has been agreed that the approach described above does not prejudice future discussions on the general governance of the Withdrawal Agreement or any possible transitional arrangements.

#### **b) The dialogue on Ireland/Northern Ireland**

The Guidelines state: *‘The Union has consistently supported the goal of peace and reconciliation enshrined in the Good Friday Agreement in all its parts, and continuing to support and protect the achievements, benefits and commitments of the Peace Process will remain of paramount importance. In view of the unique circumstances on the island of Ireland, flexible and imaginative solutions will be required, including with the aim of avoiding a hard border, while respecting the integrity of the Union legal order. In this context, the Union should also recognise existing bilateral agreements and arrangements between the United Kingdom and Ireland which are compatible with EU law’* (point 11).

The United Kingdom published its position paper *‘Northern Ireland and Ireland’* on 16 August 2017. On 21 September 2017, the Commission published *‘Guiding principles for the Dialogue on Ireland/Northern Ireland’*.

Issues unique to Ireland, as recognised in the Guidelines and the negotiating directives, include:

- the protection of the gains of the peace process and of the Good Friday (Belfast) Agreement in all its parts;
- the maintenance of existing bilateral agreements and arrangements between the United Kingdom and Ireland, including the Common Travel Area; and
- specific issues arising from Ireland’s unique geographic situation, including the aim of avoiding a hard border between Ireland and Northern Ireland, while preserving the integrity of the Single Market.

Agreement between the negotiators was reached at an early stage in the dialogue on Ireland/Northern Ireland on the overarching common objectives which reflect those in the Guidelines and the negotiating directives. Negotiators also agreed that the commitments and principles in relation to Ireland/Northern Ireland will not pre-determine the outcome of wider discussions on the future EU-UK relationship, and must be upheld in all circumstances.

Within the common understanding, the United Kingdom negotiator committed that the United Kingdom would protect the operation and institutions of the Good Friday (Belfast) Agreement, and avoid a hard border, including physical infrastructure or related checks and controls. The United Kingdom also explicitly committed to the United Kingdom respecting Ireland’s ongoing EU membership and all of the corresponding rights and obligations.

The United Kingdom negotiator also provided further the necessary assurance that the United Kingdom would in the future operate the Common Travel Area – a bilateral arrangement between the United Kingdom and Ireland predating common EU membership – in full respect of Ireland’s obligations as an EU Member State, in particular without affecting the right to free movement of EU citizens to and from Ireland.

The negotiators recalled the roles, functions and safeguards of the Northern Ireland Executive, the Northern Ireland Assembly and the North-South Ministerial Council (including its cross-community provisions), as set out in the Good Friday (Belfast) Agreement.

The negotiators carried out an extensive mapping exercise of North-South cooperation, as a central part of the Good Friday (Belfast) Agreement. The exercise showed that this cooperation relies, to a significant extent, on the common EU legal and policy framework. It also identified regulatory divergence between Northern Ireland and Ireland as the biggest single risk to its continuation and future development.

Whilst the United Kingdom remains committed to protecting and supporting continued North-South cooperation across the full range of contexts and frameworks, including after withdrawal, the common understanding provides that the United Kingdom aims to achieve this protection and the avoidance of a hard border through the overall EU-United Kingdom relationship. This intention seems hard to reconcile with the United Kingdom's communicated decision to leave the internal market and the Customs Union.

Should these objectives not be met through the future relationship, the United Kingdom committed to proposing a specific solution to address the unique circumstances of the island of Ireland for agreement with the EU. The EU will need to ensure that any such solution does not affect Ireland's place in the internal market, and consequently the integrity of the internal market.

In the absence of agreed solutions, the United Kingdom committed to maintaining full alignment with those rules of the internal market and the Customs Union which, now or in the future, support North-South cooperation, the all-island economy, and the protection of the Good Friday (Belfast) Agreement. In this context, implementation and oversight mechanisms for the specific arrangements to be found will be established to safeguard the integrity of the internal market.

The Joint Report also contains a number of unilateral commitments by the United Kingdom.

As regards other elements of the Good Friday (Belfast) Agreement which are recalled in the EU's guiding principles for the dialogue on Ireland/Northern Ireland, the negotiators have agreed to examine possible arrangements for ensuring that EU citizenship rights of Irish citizens residing in Northern Ireland can continue to be enjoyed fully in the Union. In relation to fundamental rights and safeguards under the Good Friday (Belfast) Agreement, the United Kingdom committed to ensuring that no diminution of rights is caused by its departure from the EU.

These commitments will need to be translated into workable, practical solutions in the second phase of the negotiations. Against this backdrop, it is important that there is agreement between the negotiators to continue work on Ireland/Northern Ireland in a distinct strand of negotiations in the second phase. The Commission considers this issue to be of utmost importance.

Cross-border programmes benefitting North/South cooperation are of great value. In this context, the Commission is of the opinion that the PEACE and INTERREG programmes, to which the United Kingdom is a partner, should continue beyond the current programming period. To this end, the Commission intends to propose the continuation of these programmes, based on their existing management structures, in its proposal for the next Multi-annual Financial Framework, foreseen for May 2018.

### c) The financial settlement

The Guidelines state: ‘A single financial settlement - including issues resulting from the [Multi-annual Financial Framework] as well as those related to the European Investment Bank (EIB), the European Development Fund (EDF) and the European Central Bank (ECB) - should ensure that the Union and the United Kingdom both respect the obligations resulting from the whole period of the United Kingdom membership in the Union. The settlement should cover all commitments as well as liabilities, including contingent liabilities’ (point 10).

The Commission published its ‘Essential Principles on Financial Settlement’ on 12 June 2017. The United Kingdom has not published a position paper on the financial settlement.

The United Kingdom agreed to honour its share of financing of all the obligations undertaken while it was a member of the Union, in relation to the EU budget (and in particular the Multi-annual Financial Framework 2014-2020), the European Investment Bank, the European Central Bank, the Facility for Refugees in Turkey, EU Trust Funds, Council agencies and also the European Development Fund.

Against this backdrop, the Commission and the United Kingdom negotiators have agreed on a fair methodology to be followed to calculate the obligations to be honoured by the United Kingdom in the context of its withdrawal.

The principles underlying the agreed methodology are that:

- no Member State should pay more or receive less because of the United Kingdom's withdrawal from the Union;
- the United Kingdom should pay its share of the commitments taken during its membership; and
- the United Kingdom should neither pay more nor earlier than if it had remained a Member State. This implies in particular that the United Kingdom should pay based on the actual outcome of the budget, i.e. adjusted to implementation.

As regards the Union budget component of this financial settlement, the United Kingdom will contribute to, and participate in, the implementation of the EU annual budgets for the years 2019 and 2020 as if it had remained in the Union. It will also contribute its share of the financing of the budgetary commitments outstanding on 31 December 2020 (i.e. *Reste à liquider*) as well as its share of the financing of the Union's liabilities incurred before 31 December 2020 except for liabilities with corresponding assets. In addition, the United Kingdom will remain liable for its share of the EU's contingent liabilities as established at the date of withdrawal<sup>10</sup>.

The implementation of the agreed methodology and the schedule of payments will be based on the following principles:

- the United Kingdom will not finance any commitments that do not require funding from Member States, and will receive its share of any financial benefits that would have fallen to it had it remained a Member State;

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<sup>10</sup> For contingent liabilities related to legal cases as a result of participation in the budget, programmes and policies, the cut-off date will be 31 December 2020.

- United Kingdom payments relating to United Kingdom participation in EU annual budgets in 2019 and 2020 will be based on a United Kingdom share calculated as if the United Kingdom had remained a Member State. Beyond 2020, the United Kingdom share in relation to the EU budget will be a percentage calculated as the average of United Kingdom contributions to the budget over 2014-2020;
- United Kingdom payments arising from the financial settlement will become due as if the United Kingdom had remained a Member State;
- the financial settlement will be drawn up and paid in euro; and
- the second phase of negotiations will address the practical modalities for implementing the agreed methodology and the schedule of payments.

Following withdrawal from the Union, the United Kingdom will continue to participate in the Union programmes financed by the Multi-annual Financial Framework for 2014-2020 until their closure, except for the programmes in which the United Kingdom did not participate before and those which can give rise to contingent liabilities the United Kingdom will not be liable for after withdrawal. Participation in Union programmes will require the United Kingdom and United Kingdom beneficiaries to respect all relevant Union legal provisions.

As regards the European Investment Bank, the negotiators have agreed on principles ensuring continuation of the operational functioning of the European Investment Bank. The United Kingdom will provide a guarantee for an amount equal to its callable capital on the day of withdrawal for guaranteeing the stock of operations at this time. This guarantee will be maintained for a certain period and then decreased in line with the amortisation of this stock. The United Kingdom will also be reimbursed in instalments its paid-in capital, starting end of 2019 but will provide an additional guarantee replacing the reimbursed paid-in capital. Apart from these reimbursements, the European Investment Bank will not make any other payment, return or remuneration on account of the withdrawal of the UK from the European Investment Bank or on account of the provision by the UK of a guarantee. The United Kingdom will also maintain the European Investment Bank's privileges and immunities under Protocols 5 and 7 annexed to the Treaties throughout the amortisation of the European Investment Bank's stock of operations at the date of withdrawal.

Concerning the European Central Bank, the negotiators have agreed that the paid-in capital of the United Kingdom in the European Central Bank will be reimbursed to the Bank of England after the date of withdrawal.

The United Kingdom will honour the commitments it made before withdrawal for participating in the Facility for Refugees in Turkey and the EU Emergency Trust Fund for stability and addressing root causes of irregular migration and displaced persons in Africa, according to existing arrangements.

Finally, the United Kingdom will honour the total commitments it made before withdrawal in relation to the European Development Fund according to existing arrangements, including for payments related to its share of the outstanding commitments made under previous European Development Funds.

The Commission welcomes the United Kingdom Government's offer to discuss with Union Agencies located in London how the United Kingdom might facilitate their relocation, in particular as regards reducing the withdrawal costs.

## **Other separation issues**

The Guidelines state: *‘Also, the United Kingdom leaving the Union will impact EU businesses trading with and operating in the United Kingdom and UK businesses trading with and operating in the Union. [...] Negotiations should seek to prevent a legal vacuum once the Treaties cease to apply to the United Kingdom and, to the extent possible, address uncertainties’* (point 9); *‘The [W]ithdrawal [A]greement would also need to address potential issues arising from the withdrawal in other areas of cooperation, including judicial cooperation, law enforcement and security’* (point 14). The Guidelines also state: *‘Arrangements ensuring legal certainty and equal treatment should be found for all court procedures pending before the Court of Justice of the European Union upon the date of withdrawal that involve the United Kingdom or natural or legal persons in the United Kingdom. The Court of Justice of the European Union should remain competent to adjudicate in these procedures. Similarly, arrangements should be found for administrative procedures pending before the European Commission and Union agencies upon the date of the withdrawal that involve the United Kingdom or natural or legal persons in the United Kingdom. In addition, arrangements should be foreseen for the possibility of administrative or court proceedings to be initiated post-exit for facts that have occurred before the withdrawal date’* (point 16).

The Union communicated to the United Kingdom ten Essential Principles papers setting out its negotiating position on other separation issues, namely with regard to *Euratom-related issues (nuclear materials and safeguard equipment); ongoing Union judicial and administrative procedures; issues relating to the functioning of the Union institutions, agencies and bodies; goods placed on the market under union law before the withdrawal date; ongoing police and judicial cooperation in criminal matters; ongoing judicial cooperation in civil and commercial matters; intellectual property rights (including geographical indications); ongoing public procurement procedures, and customs-related matters needed for an orderly withdrawal from the Union.*

Agreement has been found on a number of issues but there remain areas where further discussion is required.

On **Euratom-related (nuclear specific) issues**, the Commission and United Kingdom negotiators have agreed principles for addressing the key separation issues relating to the United Kingdom’s withdrawal from Euratom. This includes:

- agreement that the United Kingdom will be responsible for international nuclear safeguards in the United Kingdom and is committed to a future regime that provides coverage and effectiveness equivalent to existing Euratom arrangements;
- agreed principles on ownership of special fissile material (save for material held in the United Kingdom by EU27 entities); and
- agreed principles on responsibility for spent fuel and radioactive waste.

Regarding Special Fissile Material held in the United Kingdom by EU27 undertakings, the United Kingdom has not yet accepted that Euratom rights should continue (e.g. right to approve future sale or transfer of these materials). Both sides agree that ultimate responsibility for spent fuel and radioactive waste remains with the State where it was produced, in line with international conventions and European Atomic Energy Community legislation. Agreement appears to be in sight but must be finalised in regard to the transfer to the United Kingdom of the equipment currently used by Euratom for the purpose of implementing safeguards. Finally, disagreement persists regarding the validity of the approvals of exports from the Union to the United Kingdom after withdrawal.

**On ensuring continuity in the availability of goods placed on the market under Union law before withdrawal** it has been agreed between the negotiators that:

- the goods placed on the market under Union law before withdrawal may freely circulate on the markets of the United Kingdom and the Union;
- there should be no need for product modifications or re-labelling;
- goods may be put into service where provided in Union law; and
- goods concerned should be subject to continued oversight.

Substantial work is still necessary to agree on the key notion of ‘placing on the market’. More fundamental disagreement persists on the EU’s intention to apply EU rules on importation to all animal-derived products as from the withdrawal date, irrespective of when they were placed on the market, as well as on the competence for performing EU compliance activities under Union law after withdrawal. On this last point, the Commission negotiator insists on any compliance activity post-withdrawal to be performed by competent authorities or bodies under current EU law, whilst the United Kingdom negotiator wants the United Kingdom to retain temporary (but potentially open ended) competence for such activities.

**On cooperation in civil and commercial matters** there is general consensus between the negotiators that:

- Union rules on conflict of laws should continue to apply to contracts before withdrawal date and non-contractual obligations where an event causing damage occurred before the withdrawal date;
- EU law on jurisdiction should continue to apply to legal proceedings instituted before the withdrawal date;
- as regards recognition and enforcement of judgments, relevant EU law should continue to apply with regard to judgments handed down before withdrawal; and
- relevant pending judicial cooperation should be finalised.

Work is still needed on whether EU law should continue to govern the recognition and enforcement of judgments handed down after withdrawal, but in proceedings that were ongoing on the withdrawal date. Finally, there is disagreement as to whether a choice of court clause concluded before withdrawal should trigger the application of EU law on recognition and enforcement of judgments in litigation after withdrawal.

**On police and judicial cooperation in criminal matters** there is broad agreement that:

- all structured and formalised cooperation procedures ongoing on the withdrawal date that have passed a certain threshold (to be defined) should be completed under Union law.

Additional work needs to be done on the list of the instruments concerned, and in order to agree on the need to identify an ‘end point’ ascertaining completion of the relevant procedures. Further discussions are also needed in order to clarify the agreement that EU instruments providing for procedural rights would continue to apply, throughout such procedures after withdrawal.

**On ongoing Union judicial procedures,** it has been agreed between the negotiators that:

- the Court of Justice of the European Union should remain competent for United Kingdom judicial procedures with the United Kingdom as applicant or defendant and for preliminary references originating in the United Kingdom, registered at the Court of Justice of the European Union on the date of withdrawal; and
- those procedures should continue through to a binding judgment.

There is however persisting disagreement between the negotiators on several issues including the question of the continued competence of the Court of Justice of the European Union in relation to facts having arisen before the United Kingdom's withdrawal, the enforceability of the decisions of the Court of Justice of the European Union after withdrawal and the possibility for the United Kingdom to intervene before the Court of Justice of the European Union in the future.

On **ongoing Union administrative proceedings** there is at present no position of the United Kingdom negotiator on the Union position that all pending administrative compliance procedures should be completed with a binding force and possibly result in binding subsequent judicial procedures.

On **issues relating to the functioning of the Union institutions, agencies and bodies**, the negotiators have agreed that:

- an arrangement which closely mirrors Union privileges and immunities should remain applicable to activities that took place before withdrawal and as regards new activities in the United Kingdom foreseen in the Withdrawal Agreement;
- both sides should continue to ensure compliance with obligations of professional secrecy; and
- classified information and other documents obtained by both sides whilst the United Kingdom was a Member State should retain the same level of protection as before withdrawal.

There remains disagreement on the role of the Court of Justice of the European Union with regard to the lifting of EU immunities. While the United Kingdom maintains that this question has to be examined in the context of the broader discussion on the role of the Court of Justice of the European Union, the Union position is that the involvement of the Court of Justice of the European Union in this case is different from any role for the Court of Justice of the European Union as a possible dispute settlement body for the Withdrawal Agreement.

With regard to the **general governance of the Withdrawal Agreement**, the Commission is of the view that more work is needed.

The Commission's '*Essential Principles paper on Governance*' set out the Union's proposal for a complete and effective governance mechanism. While some discussions have taken place on dispute resolution and the monitoring of the functioning of the Withdrawal Agreement, including the possibility of setting up a joint committee, significant divergences remain. More specifically, the United Kingdom has made clear its opposition to according a central role to the Court of Justice of the European Union, while the Commission has stressed the need to protect the autonomy of the Union and of its legal order, including the role of the Court of Justice, as underlined in the European Council guidelines of 29 April 2017. Further discussions are needed on the institutional arrangements to jointly manage and monitor the functioning of the Withdrawal Agreement (for example via a joint committee), on the crucial

question of how compliance with the Withdrawal Agreement by both sides can be effectively enforced, and on how disputes that may emerge in this regard should be settled.

## 5. Conclusion

**On the basis of the foregoing and the Joint Report of the negotiators, as well as the confirmation by Prime Minister May to President Juncker during their meeting on 8 December 2017 of the United Kingdom Government's endorsement of the Joint Report, the Commission recommends to the European Council (Article 50) to conclude that sufficient progress has been made in the first phase of the negotiations on the orderly withdrawal of the United Kingdom from the European Union, allowing the negotiations to proceed to their second phase.**

Should the European Council consider that sufficient progress has been made in the negotiations, the **Withdrawal Agreement** based on Article 50 of the Treaty on European Union should be drafted on the basis of the Joint Report and the outcome of the negotiations on other separation issues.

Negotiations should be complete by autumn 2018 to allow good time for the Withdrawal Agreement to be concluded by the Council after obtaining consent of the European Parliament, and to be approved by the United Kingdom in accordance with its own procedures before 29 March 2019.

The Guidelines of 29 April 2017 state that the negotiations may seek to determine **transitional arrangements** which should be in the interest of the Union. Such transitional arrangements would be based on Article 50 of the Treaty on European Union and would by their very nature be for a limited period of time. During such a potential transitional period, the entire *acquis* – the full corpus of EU law – would continue to apply in the United Kingdom. Any such transitional arrangements would require existing Union regulatory, budgetary, supervisory, judiciary and enforcement instruments and structures to apply. Should the European Council (Article 50) recognise that sufficient progress has been made, the Commission stands ready to begin work immediately on such transitional arrangements, which could also provide bridges to the future relationship.

If the European Council (Article 50) so decides, the Commission also stands ready to start exploratory discussions on the **future relationship** between the European Union and the United Kingdom.