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★ European
Experts

Brexit: The EU's Negotiating Directives

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Introduction

This paper provides a commentary on the European Union's negotiating directives for the Article 50 negotiations with the UK. The directives were adopted by the Council of Ministers on 22 May 2017. Following some explanatory text below, the paper has the directives on the left-hand side of the page and the commentary by the Senior European Experts on the right.

Summary

Following the UK's notification of its intention to withdraw from the EU on 29 March 2017, the European Council, on 28 April, adopted guidelines for the withdrawal negotiations under Article 50 of the Treaty on European Union. The European Commission subsequently published a proposed mandate in the form of detailed negotiating directives for the opening of the negotiations. These directives have since been adopted by the Council alongside a decision to nominate the European Commission as the Union's negotiator; the lead negotiator is Michel Barnier.

The negotiating directives define the EU's approach to the negotiations, based on two separate phases:

- the first addresses the need for an orderly withdrawal from the Union, particularly as it affects the rights of citizens, businesses and international partners, and in relation to specific issues with respect to Ireland and Cyprus; it also addresses the question of settling the UK's disentanglement from the Union, notably its financial obligations;
- the second phase will address the framework for the UK's future relationship with the EU and possible transition arrangements; this phase will begin when the negotiators and the Council feel sufficient progress has been made on the first.

They also:

- give primacy to the Court of Justice of the European Union (CJEU) and the Commission in governance of the Agreement; and
- make clear that nothing is agreed until everything is agreed – the EU's standard approach to negotiations.

The directives respond to the approach in the UK's notification which proposed negotiating a deep and special partnership alongside withdrawal from the Union. Article 50 says that

the negotiations for a state's withdrawal shall take "account of the framework for its future relationship with the Union". The UK argues that its suggested approach reflects that requirement in Article 50.

Evaluation

The key objectives appear to be first, to protect the unity and integrity of the Union and its legal order, secondly to ensure the UK's withdrawal requires full settlement of all financial obligations due by the UK, and thirdly to maximise the Union's leverage in the negotiations over the future relationship. Like the UK, the Union gives priority to avoiding a hard border between the two parts of Ireland and to protecting the rights of EU citizens living in the UK and vice-versa. But its proposals for the latter are particularly far-reaching. Overall, the strategy appears to be to maintain control of the process and timing of negotiations and ensure the EU has satisfaction on its main withdrawal-related objectives.

Just as the UK's approach to these negotiations has not always appeared designed to create the most productive atmosphere, the Union's approach, the EU's attitude on phasing and early progress on financial matters and demands for an extensive role for the CJEU over citizens' rights could well make the negotiations difficult. The risk in the EU's approach is that making progress in the first phase may prove to be so difficult that there is insufficient time to complete the (very complex) second phase and the parties fail to reach any agreement at all. Such an outcome would be highly damaging for both sides.

DETAILED COMMENTARY

Annex to the European Commission's recommendation on negotiations with the UK¹

TEXT OF RECOMMENDATION	EXPLANATION AND COMMENTARY
Directives for the negotiation of an agreement with the United Kingdom of Great Britain and Northern Ireland setting out the arrangements for its withdrawal from the European Union.	<i>The Directives are the Commission's negotiating mandate. Paragraphs in the commentary below have the same number as the paragraph referred to in the Directives.</i>
I. OBJECTIVE OF THE WITHDRAWAL AGREEMENT	
1. Following the notification by the United Kingdom of Great Britain and Northern Ireland (hereinafter "the United Kingdom") of its intention to withdraw from the European Union, the Union shall negotiate and conclude a withdrawal agreement with the United Kingdom in accordance with	<i>1 & 2: The first 2 paragraphs reflect the legal framework – article 50 TEU. Note that these directives are about the withdrawal agreement, not about any agreement on the future UK-EU relationship, which has to be negotiated under Article 218(3) of the Treaty on the Functioning of the European Union.</i>

¹ European Commission, *Annex to the Recommendation for a Council Decision authorising the opening of the negotiations for an agreement with the United Kingdom of Great Britain and Northern Ireland setting out the arrangements for its withdrawal from the European Union*, COM (2017) 218 final, ANNEX 1, 3 May 2017

<p>Article 50 of the Treaty on European Union ("the Agreement").</p>	<p><i>Paragraph 19 establishes that negotiation of the future relationship will be subject to "new sets of negotiating directives" and that talks cannot proceed to this "next phase" until "sufficient progress" has been made on the terms of withdrawal. The UK will argue that this approach is deficient and not in accordance with the wording of Article 50 that the arrangements for withdrawal must take "account of the framework for its future relationship with the Union".</i></p>
<p>2. This Agreement will set out the arrangements for the withdrawal of the United Kingdom, taking account of the framework for its future relationship with the Union.</p>	
<p>3. The main objective of the Agreement is to ensure an orderly withdrawal of the United Kingdom from the European Union and from the European Atomic Energy Community. In these negotiating directives the term "the Union" means the European Union founded on the Treaty on European Union and on the Treaty on the Functioning of the European Union and/or, as the case may be, the European Atomic Energy Community founded on the Treaty establishing the European Atomic Energy Community.</p>	<p><i>3: The focus is on "orderly withdrawal". This reflects the Union's desire to keep separate the withdrawal and the future relationship agreements.</i></p>
<p>4. The Agreement will be negotiated in the light of the European Council guidelines and in line with the negotiating directives. The negotiating directives build on the European Council guidelines by developing the Union's positions for the withdrawal negotiations in full respect of the objectives, principles and positions that the guidelines set out. The negotiating directives may be amended and supplemented as necessary throughout the negotiations, in particular to reflect the European Council guidelines as they evolve.</p>	<p><i>4: This paragraph defines the European Council guidelines and the negotiating directives as the boundaries of the negotiation. It also makes clear that both the guidelines and the negotiating directives are expected to evolve during the course of the negotiations. This approach (negotiating directives for the Commission that are subject to updating by the European Council/Council) reflects standard practice for EU/third country negotiations.</i></p>
<p>II. NATURE AND SCOPE OF THE AGREEMENT</p>	
<p>5. The Agreement will be negotiated and concluded by the Union. In this respect, Article 50 of the Treaty on</p>	<p><i>5: The withdrawal agreement will be concluded by the Union, <u>not</u> the Union and its Member States. The decision will be</i></p>

<p>European Union confers on the Union an exceptional horizontal competence to cover in this agreement all matters necessary to arrange the withdrawal. This exceptional competence is of a one-off nature and strictly for the purposes of arranging the withdrawal from the Union. The exercise by the Union of this specific competence in the Agreement will not affect in any way the distribution of competences between the Union and the Member States as regards the adoption of any future instrument in the areas concerned.</p>	<p><i>made by “super” qualified majority i.e. at least 72 per cent of the 27 Member States representing 65 per cent of the population; and with the consent of the European Parliament. This keeps it within the framework of Article 50 and avoids any need for separate ratification by Member States. And it is another reason why the Commission will want to ensure that the future relationship is defined in a separate agreement.</i></p> <p><i>The last two sentences are included to prevent any suspicion of “competence creep” (for the benefit of remaining Member States).</i></p>
<p>6. The Agreement should recall that Union law (including all primary law, in particular the Treaty on European Union, the Treaty on the Functioning of the European Union, the Accession Treaties and the Treaty establishing the European Atomic Energy Community, as well as the secondary law and international agreements) ceases to apply to the United Kingdom on the date of entry into force of the withdrawal agreement ("withdrawal date").</p>	<p><i>6: This makes clear that EU law, including international agreements, will not apply to the UK as from the date of withdrawal. There is no indication of how this would fit in with any transition / implementation arrangements.</i></p>
<p>7. In accordance with Article 50 of the Treaty on European Union and with the European Council guidelines, the Agreement should also recall that Union law ceases to apply on the withdrawal date to the overseas countries and territories having special relations with the United Kingdom¹ and to the European territories for whose external relations the United Kingdom is responsible, to which the Treaties apply by virtue of Article 355 of the Treaty on the Functioning of the European Union. On the territorial scope of the withdrawal agreement and of the future framework, the</p>	<p><i>7: This extends the above legal clarity to overseas countries and territories (OCTs) whose relations with the EU are dependent on UK membership and to Gibraltar, (which is currently within the EU) and the Sovereign Base Areas in Cyprus (which are not).</i></p> <p><i>Paragraph 4 of the guidelines refers to the OCTs. Paragraph 24 in addition says on Gibraltar “no agreement between the EU and UK may apply to the territory of Gibraltar without agreement between Spain and the UK”.</i></p>

<p>negotiating directives should fully respect paragraphs 4 and 24 of the European Council guidelines.</p>	
<p>8. The Agreement should set a withdrawal date which is at the latest 30 March 2019 at 00:00 (Brussels time), unless the European Council, in agreement with the United Kingdom, unanimously decides to extend this period in accordance with Article 50(3) of the Treaty on European Union. The United Kingdom will become a third country from the withdrawal date.</p>	<p><i>8: The timetable reflects provisions of Article 50 (2 years unless there is consensus to extend).</i></p> <p><i>The UK will, unless there is an agreed extension of the Article 50 time frame, become a third country on 30 March 2019 irrespective of any transition period.</i></p>
<p>III. PURPOSE AND SCOPE OF THESE NEGOTIATING DIRECTIVES</p>	
<p>9. The European Council guidelines set out a two-phased approach to the negotiations. The first phase will aim to:</p> <ul style="list-style-type: none"> • 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 a Member State. 	<p><i>9 & 10: These paragraphs make clear the scope of the negotiating directives covers only the "first phase" of the negotiation (orderly UK withdrawal from the EU) and not the second (the framework of the future UK-EU relationship). This will enable the Commission to argue that it has no mandate to discuss the latter with the UK at this stage. The comments above about the reference to "future framework" in Article 50 raise the question of whether the EU's approach is legally sound or politically realistic.</i></p> <p><i>The scope is moreover limited to those matters which the Union considers to be strictly necessary to ensure an orderly withdrawal. These are defined and analysed below. The UK may of course consider other issues are also necessary to ensure an orderly withdrawal.</i></p>
<p>10. The present set of negotiating directives is intended for the first phase of the negotiations. In line with the aim established for the first phase of the negotiations by the European Council, 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</p>	<p><i>The mention of services is important as many services in the UK depend on EU regulation for their day-to-day operation (civil aviation, energy, financial services, and telecommunications are examples) and there could be substantial difficulties if these issues are not addressed in the withdrawal agreement.</i></p>

<p>negotiating directives, such as services, will be part of subsequent sets of negotiating directives.</p>	
<p>11. Safeguarding the status and rights of the EU27 citizens and their families in the United Kingdom and of the citizens of the United Kingdom and their families in the EU27 Member States is the first priority for the negotiations because of the number of people directly affected and of the seriousness of the consequences of the withdrawal for them. The Agreement should provide the necessary effective, enforceable, non-discriminatory and comprehensive guarantees for those citizens' rights, including the right to acquire permanent residence after a continuous period of five years of legal residence and the rights attached to it.</p>	<p><i>11: Safeguarding the rights of EU27 citizens living in the UK, and vice-versa, is defined as a top priority.</i></p> <p><i>The Union wants to pin this down in great detail (see below).</i></p>
<p>12. An orderly withdrawal of the United Kingdom from the Union requires settling the financial obligations resulting from the whole period of the UK membership in the Union. Hence, the methodology for the financial settlement based on the principles laid down in section III.2 has to be established in the first phase of the negotiations.</p>	<p><i>12: The Union also sees “settling the accounts” as a priority and asserts the methodology (though not the figures) for this must be established before it will move forward to talk about the future relationship (see below).</i></p>
<p>13. It has been identified at this stage that the Agreement should clarify the situation of goods placed on the market before the withdrawal date as well as of the ongoing procedures listed in section III.3, including judicial cooperation proceedings in civil, commercial and criminal matters, as well as administrative and law enforcement cooperation procedures.</p>	<p><i>13: The Union identifies – rightly – a need for legal provision to ensure that goods placed on the market before withdrawal continue to be legally marketed and to ensure that judicial proceedings under way at the time of withdrawal are protected. The paragraph also refers to other forms of justice and home affairs co-operation in order to cover issues such as the validity of European Arrest Warrants.</i></p>
<p>14. In line with the European Council guidelines, the Union is committed to</p>	<p><i>14: The Union wants to avoid a hard border on the island of Ireland “while respecting the</i></p>

<p>continuing to support peace, stability and reconciliation on the island of Ireland. Nothing in the Agreement should undermine the objectives and commitments set out in the Good Friday Agreement in all its parts and its related implementing agreements; the unique circumstances and challenges on the island of Ireland will require flexible and imaginative solutions. Negotiations should in particular aim to avoid the creation of a hard border on the island of Ireland, while respecting the integrity of the Union legal order. Full account should be taken of the fact that Irish citizens residing in Northern Ireland will continue to enjoy rights as EU citizens. Existing bilateral agreements and arrangements between Ireland and the United Kingdom, such as the Common Travel Area, which are in conformity with EU law, should be recognised. The Agreement should also address issues arising from Ireland's unique geographic situation, including transit of goods (to and from Ireland via the United Kingdom). These issues will be addressed in line with the approach established by the European Council guidelines.</p>	<p><i>integrity of the Union legal order". But it gives no indication of how this might be achieved other than through "flexible and imaginative solutions". Equally it accepts the need to retain the Common Travel Area. These broad objectives will be welcomed by the UK. Achieving these objectives will inevitably require discussion of issues – such as the rules governing trade in goods and controls on the free movement of people – that the EU side thinks should be considered only in the second phase. This suggests its insistence on separate phasing has its limits.</i></p> <p><i>The reference to "all of its parts" in the paragraph means that both the agreement between the parties to the Good Friday Agreement and the separate agreement between the British and Irish Governments allowing for Northern Ireland to join the Republic in future if it chooses to do so, should be assured in the withdrawal agreement.</i></p>
<p>15. In line with the European Council guidelines, the Union should agree with the United Kingdom on arrangements as regards the Sovereign Base Areas of the United Kingdom in Cyprus and recognise in that respect bilateral agreements and arrangements between the Republic of Cyprus and the United Kingdom which are compatible with Union law, taking into account Protocol 3 to the Act of Accession, the 1960 Treaty of Establishment and the associated Exchanges of Notes, in particular as regards safeguarding the rights and interests of those</p>	<p><i>15: This paragraph recognises the need to protect the rights of Cypriot citizens living and working in the UK's Sovereign Base Areas. But since the Sovereign Base Areas are not in the European Union and since no economic activity is permitted in the SBAs (by the 1960 Treaty of Establishment) this does not raise the sort of difficult issues that Gibraltar does.</i></p>

<p>Union citizens residing or working in the Sovereign Base Areas.²</p>	
<p>16. The Agreement should ensure the necessary protection of the Union's interests in the United Kingdom.</p>	<p><i>16: The meaning of this paragraph is unclear as there are later provisions on Union property etc.</i></p>
<p>17. The Agreement should contain provisions relating to the overall governance of the Agreement. Such provisions must include effective enforcement and dispute settlement mechanisms that fully respect the autonomy of the Union and of its legal order, including the role of the Court of Justice of the European Union, in order to guarantee the effective implementation of the commitments under the Agreement, as well as appropriate institutional arrangements allowing for the adoption of measures to deal with unforeseen situations not covered by the agreement and for the incorporation of future amendments to Union law in the Agreement.</p>	<p><i>17: This is one of the more helpful parts of these directives because it does not single out the primacy of the CJEU. The Union will insist on enforcement and dispute settlement mechanisms for the Agreement that fully respect the autonomy of the Union and its legal order – likely to include oversight by the CJEU. But the UK will presumably want mechanisms that also reflect its commitment not to accept the continuing jurisdiction of the CJEU. It seems likely some new joint monitoring institutions will be necessary, but the question of overall judicial authority may prove difficult (see below). This paragraph helpfully recognises the need for some joint monitoring arrangements. But the suggestion of future changes in EU law being subsequently incorporated into the agreement may cause problems for the British side unless such incorporation takes place by consensus.</i></p>
<p>18. In addition, in line with the European Council guidelines, a constructive dialogue should be engaged as early as practicable with the United Kingdom during the first phase of the negotiation on a possible common approach towards third country partners, international organisations and conventions in relation to the international commitments contracted before the withdrawal date, by which the United Kingdom remains bound, as well as on the method to ensure that</p>	<p><i>18: The EU will want the UK to take over its share of commitments under agreements with third countries (e.g. trade concessions) or international agreements (e.g. climate change commitments). This paragraph proposes that the EU and UK agree between themselves what those shares should be and then approach the third countries / international organisations concerned to secure their agreement. This seems sensible, though agreeing on the specific shares may not necessarily be straightforward; and nor will be getting third countries to agree with that sharing out.</i></p>

² Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded: Protocol No 3 on the Sovereign Base Areas of the United Kingdom of Great Britain and Northern Ireland in Cyprus, 2003 OJ L 236/33, pp. 940 -944

<p>the United Kingdom honours these commitments.</p>	
<p>19. As soon as the European Council decides that sufficient progress has been achieved to allow negotiations to proceed to the second phase, there will be new sets of negotiating directives. In this context, to the extent necessary and legally possible, matters that should be subject to transitional arrangements (i.e. bridges towards the foreseeable framework for the future relationship) and which are in the interest of the Union, will be included in those future sets of negotiating directives in the light of the progress made. Any such transitional arrangements must be clearly defined, limited in time, and subject to effective enforcement mechanisms. Should a time-limited prolongation of Union <i>acquis</i> be considered, this would require existing Union regulatory, budgetary, supervisory, judiciary and enforcement instruments and structures to apply. This approach will allow an efficient allocation of the limited time that Article 50 of the Treaty on European Union imposes for the conclusion of the Agreement by avoiding the need to address the same matter several times at different phases of the negotiations.</p>	<p><i>19: This paragraph indicates that fresh negotiating directives, dealing with the future relationship and possible transitional arrangements will only be adopted once the European Council has decided that “sufficient progress has been achieved”. This approach gives flexibility so that the talks can move on to the future relationship but there is no definition of “sufficient progress” and this risks a dispute, and even the breakdown of the talks, if the parties cannot agree when this point has been reached. But the paragraph is helpful on the concept of transitional provisions, explicitly stating that these could be bridges towards the longer-term agreement the UK is seeking. It implies that existing arrangements could be extended for a period after the UK has left. It also hints at the possibility of extending the two-year negotiating period in Article 50 for a time after the UK has formally ceased to be a Member.</i></p>
<p>III.1. Citizens' rights</p>	
<p>20. The Agreement should safeguard the status and rights derived from Union law at the withdrawal date, including those the enjoyment of which will intervene at a later date (e.g. rights related to old age pensions) as well as rights which are in the process of being obtained, including the possibility to acquire them under current conditions after the withdrawal date (e.g. the right of</p>	<p><i>20: The EU is keen to pin down the citizens' rights rules in great detail and to make them directly enforceable. The rights preserved by the Agreement will be ones that have already vested at the date of withdrawal; these will include things such as pension rights, which have vested but are only enjoyed at some later date. The EU's intention would appear to be that the legal situation for each person will crystallise as it was at the date of withdrawal. EU citizens who have been lawfully resident</i></p>

<p>permanent residence after a continuous period of five years of legal residence which started before the withdrawal date). This should cover both EU27 citizens residing (or having resided) and/or working (or having worked) in the United Kingdom and United Kingdom citizens residing (or having resided) and/or working (or having worked) in one of the Member States of the EU27. Guarantees to that effect in the Agreement should be reciprocal and should be based on the principle of equal treatment amongst EU27 citizens and equal treatment of EU27 citizens as compared to United Kingdom citizens, as set out in the relevant Union acquis. Those rights should be protected as directly enforceable vested rights for the life time of those concerned. Citizens should be able to exercise their rights through smooth and simple administrative procedures.</p>	<p><i>for 5 years will have a right of permanent residence. An EU citizen who, at the date of withdrawal, has been lawfully resident in the UK as a worker for 2 years, say, will be entitled to go on working here until he/she qualifies for permanent residence. If, however, after a further year, the worker gives up their job and moves to another country, they will no longer have a right of entry into or residence in the UK, though they will retain any rights (e.g. to an eventual pension) acquired during their period of employment.</i></p> <p><i>Moreover, the EU says that rights should be based on twin principles of “equal treatment amongst EU27 citizens and equal treatment of EU27 citizens as compared to UK citizens as set out in the relevant Union acquis”. That suggests that the rights of an EU citizen living/working in the UK at the time of withdrawal would not just be equivalent to those of UK citizens but would also be protected by the relevant EU rules too, regardless of whether the latter diverged from UK rules. This appears likely to be a difficult issue for the UK side.</i></p> <p><i>“Directly enforceable vested rights” raises questions as to how the rights will be enforced and which judicial body (both in EU27 and in UK) will oversee them. The Governance section (see below) implies it is for the CJEU to provide oversight.</i></p>
<p>21. The Agreement should cover at least the following elements:</p> <p>a) Definition of the persons to be covered: the personal scope should be the same as that of Directive 2004/38 (both economically active, i.e. workers and self-employed, as well as students and other economically inactive persons, who have resided in the UK or EU27 before the withdrawal date, and their family members who accompany or join them at any point in time before or after the withdrawal date). In addition, the</p>	<p><i>21: This paragraph describes who should benefit from the rights and what those rights should be. The persons concerned are those covered by the Citizens Rights Directive. The references to accompanying family members are likely to be another area of contention.</i></p> <p><i>The rights to be protected include “at least” rights of residence, social security, employment and establishment as laid down in current EU law.</i></p> <p><i>The reference to the right of permanent residence after five years being subject to a “simple and swift procedure” may well be a reference to the UK’s reluctance to grant this</i></p>

personal scope should include persons covered by Regulation 883/2004, including frontier workers and family members irrespective of their place of residence;

b) Definition of the rights to be protected: this definition should include at least the following rights:

i) the residence rights and rights of free movement derived from Articles 18, 21, 45 and 49 of the Treaty on the Functioning of the European Union and set out in Directive 2004/38 (covering inter alia the right of permanent residence after a continuous period of five years of legal residence and the right as regards access to health care) and the rules relating to those rights; any document to be issued in relation to the residence rights (for example, registration certificates, residence cards or certifying documents) should have a declaratory nature and be issued under a simple and swift procedure either free of charge or for a charge not exceeding that imposed on nationals for the issuing of similar documents;

ii) the rights and obligations set out in Regulation 883/2004 on the coordination of social security systems and in Regulation 987/2009 implementing Regulation 883/2004 (including future amendments of both Regulations) covering inter alia, rights to aggregation, export of benefits, and principle of single applicable law for all the matters to which the Regulations apply;

iii) the rights set out in Regulation 492/2011 on freedom of movement for workers within

right in practice, its use of an 85-page form to assess entitlement and its requirement for backdated proof of sickness insurance in the case of non-working EU citizens which the EU regards as disproportionate and discriminatory.

In respect of social security rights, the Union wishes citizens not just to benefit from current EU laws on social security co-ordination, but also from any future amendments to those laws. This needs some explanation and justification, bearing in mind that the UK will have no say over such amendments.

<p>the Union (e.g. access to the labour market, to pursue an activity, social and tax advantages, training, housing, collective rights as well as rights of workers' family members to be admitted to general educational, apprenticeship and vocational training courses under the same conditions as the nationals of the host State);</p> <p>iv) the right to take up and pursue self-employment derived from Article 49 of the Treaty on the Functioning of the European Union.</p>	
<p>22. For reasons of legal certainty, the Agreement should ensure, in the United Kingdom and in the EU27, the protection, in accordance with Union law applicable before the withdrawal date, of recognised professional qualifications (diplomas, certificates and other evidence of formal qualification) obtained in any of the Union Member States before that date. The Agreement should also ensure that professional qualifications (diplomas, certificates or other evidence of formal qualification) obtained in a third country and recognised in any of the Union Member States before the withdrawal date in accordance with Union law rules applicable before that date continue to be recognised also after the withdrawal date. It should also provide for arrangements relating to procedures for recognition which are ongoing on the withdrawal date.</p>	<p><i>22: This paragraph sensibly proposes continuing recognition of diplomas, certificates of qualification etc. obtained before the withdrawal date.</i></p>
<p>III.2. Financial settlement</p>	
<p>23. A single financial settlement – including issues resulting from the MFF as well as</p>	<p><i>23: This section asserts the need for a single financial settlement of the UK's</i></p>

<p>those related to the European Investment Bank (EIB), the European Development Fund (EDF) and the European Central Bank (ECB) – should ensure that both the Union and the United Kingdom respect the obligations resulting from the whole period of the United Kingdom membership in the Union. The negotiations relating to the methodology for the financial settlement should be based on the following principles.</p>	<p><i>outstanding obligations to the EU and proposes principles for the methodology of its calculation. No indication is given of the legal basis of the Union's claims.</i></p>
<p>24. There should be a single financial settlement related to:</p> <ul style="list-style-type: none"> • the Union budget; • the termination of the membership of the United Kingdom of all bodies or institutions established by the Treaties (e.g. the European Investment Bank, the European Central Bank²); • the participation of the United Kingdom in specific funds and facilities related to Union policies (e.g. the European Development Fund and the Facility for Refugees in Turkey). 	<p><i>24: The settlement should relate to all aspects of the UK's membership of the Union and related bodies.</i></p>
<p>25. This single financial settlement should be based on the principle that the United Kingdom must honour its share of the financing of all the obligations undertaken while it was a member of the Union.</p>	<p><i>25: The principle proposed is that the UK must honour its share of the financing of all obligations undertaken while it was a member of the EU. No mention is made of EU financial obligations or commitments to the UK or to UK persons (legal or natural), nor of the UK's share in EU assets, to whose acquisition and maintenance it has contributed. Nor is it clear what is the status of "obligations" of the Union that have not (yet) crystallised into specific payment obligations for Member States. Nor is there any analysis of how possible transitional arrangements could affect the calculations or their settlement.</i></p>
<p>26. In accordance with paragraph 10 of the European Council guidelines, this</p>	<p><i>26: The Union asserts that the settlement should cover contingent liabilities. It is not</i></p>

<p>covers obligations resulting from the MFFs, liabilities including pensions and contingent liabilities and any other obligations deriving from a basic act within the meaning of Article 54 of the Financial Regulation³. In addition, the United Kingdom should fully cover the specific costs related to the withdrawal process such as the relocation of the agencies or other Union bodies.</p>	<p><i>clear on what legal or political basis this assertion is made given that contingent liabilities do not necessarily become actual liabilities and may continue in EU budgets but never in fact materialise.</i></p> <p><i>The Union suggests the UK should fully cover costs relating to its withdrawal, including the relocation of agencies. This approach reflects the view of the EU that relocation of the agencies is a direct consequence of the UK's decision to leave. It makes no reference to a different approach under which the UK would only pay its own share of relocation costs.</i></p>
<p>27. The calculation method should use the amounts from relevant basic acts (including reference amounts), the financial programming and official consolidated annual accounts to be supplemented, as necessary, by making use of interim accounts audited by the European Court of Auditors. The obligations should be defined in euro.</p>	<p><i>27: The obligations are to be defined in euros – putting the entire exchange risk onto the UK.</i></p>
<p>28. On this basis, the calculation method of the United Kingdom's obligations towards the Union budget should be based on the own resources decision¹ in all its dimensions and take into account past data related to its share of the financing before the withdrawal date.</p>	<p><i>28: By referring explicitly to the own resources decision, the directives appear to acknowledge that the UK's rebate should be taken into account in calculating its financial obligations at withdrawal.</i></p>
<p>29. Modalities of payments should be agreed in order to mitigate the impact of the withdrawal on the budget for the Union and on its Member States.</p>	<p><i>29: This paragraph proposes that modalities of payments should be agreed to mitigate the impact on the EU's budget. This demonstrates how substantial upfront payments by the UK may be sought to avoid other net contributor Member States having to make up the shortfall from the UK's departure. This will be a point which will offer the UK potential leverage but the UK would doubtless want to ensure the impact on its own budget is also mitigated.</i></p>

<p>30. The Agreement should therefore contain:</p> <ul style="list-style-type: none"> a) A calculation of all obligations that the United Kingdom has to honour in order to settle its financial obligations toward the Union budget, all institutions or bodies established by the Treaties, and other issues with a financial impact. The calculated obligations may be subject to limited future technical adjustments. b) A schedule of payments to be made by the United Kingdom and the practical modalities for making these payments. c) Transitional rules to ensure control by the Commission (or, where applicable, another body responsible under Union law before the withdrawal date), the European Parliament, the Court of Auditors, OLAF and the power to adjudicate of the Court of Justice of the European Union for past payments/recovery orders to United Kingdom beneficiaries and any payments made to United Kingdom beneficiaries after the withdrawal date to honour all legal commitments (including possible loans) authorised by the responsible entity before the withdrawal date. d) Possible arrangements in relation to legal commitments or future legal commitments made towards United Kingdom beneficiaries after the withdrawal date (e.g. concerning the managing authorities for the payment of United Kingdom beneficiaries). e) Specific rules to address the issue of contingent liabilities assumed by the Union budget or specific 	<p><i>30: This paragraph outlines how the settlement might be set out in the Agreement.</i></p>
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<p>institutions or bodies or funds (such as those relating to financing provided by the European Investment Bank and the European Investment Fund).</p>	
<p>III.3. Situation of goods placed on the market and outcome of procedures based on Union law</p>	
<p>A. Goods placed on the market under Union law before the withdrawal date</p>	
<p>31. Agreement should ensure that any good lawfully placed on the single market on the basis of Union law before the withdrawal date can continue to be made available on the market or put into service after that date both in the United Kingdom and in the EU27 under the conditions set out in the relevant Union law applicable before the withdrawal date. Other matters, such as services, where there may be a need to reduce uncertainty or avoid a legal vacuum, will be covered by subsequent sets of negotiating directives.</p>	<p><i>31: This section proposes provision be made for goods in circulation on the date of withdrawal to be able to remain on the market. This would appear necessary in order to prevent market disruption before and after the withdrawal date.</i></p>
<p>B. Ongoing judicial cooperation in civil, commercial and criminal matters between Member States under Union law</p>	
<p>32. The Agreement should provide for arrangements relating to judicial cooperation proceedings in civil, commercial and criminal matters governed by Union law which are ongoing on the withdrawal date. It should establish in particular that such proceedings remain governed until their completion by the relevant provisions of Union law applicable before the withdrawal date.</p>	<p><i>32 & 33: These paragraphs provide continuity of application of judicial co-operation under EU law in relation to cases initiated and decisions reached prior to withdrawal</i></p>
<p>33. Regarding judicial cooperation in civil and commercial matters between the United Kingdom and the EU27, the Agreement should ensure that the recognition and enforcement of national judicial</p>	

<p>decisions handed down before the withdrawal date remain governed by the relevant provisions of Union law applicable before the withdrawal date. The Agreement should also ensure the continued application of the rules of Union law relating to choices of forum and choices of law made before the withdrawal date.</p>	
<p>C. Ongoing administrative and law enforcement cooperation procedures under Union law</p>	
<p>34. The Agreement should provide for arrangements relating to administrative and law enforcement cooperation procedures, including verification, governed by Union law which are ongoing on the withdrawal date. Such arrangements should in particular ensure that these procedures remain governed until their completion by the relevant provisions of Union law applicable before the withdrawal date. They should also establish rules for the possible use of information and data in law enforcement investigations and criminal proceedings ongoing on the withdrawal date. They should cover both information and data received/held by United Kingdom which originates from the EU27 or Union institutions, bodies, offices and agencies, and information and data received/held by the EU27 or Union institutions, bodies, offices and agencies which originates from the United Kingdom. They should comprise rules on the protection of personal data and classified information, including security data.</p>	<p><i>34: This paragraph provides for continuity in relation to administrative and law enforcement proceedings initiated before the withdrawal date.</i></p> <p><i>Note that this paragraph specifically refers to the UK holding data and the need for rules to govern its protection after Brexit.</i></p>
<p>D. Ongoing Union judicial and administrative procedures</p>	
<p>35. The Agreement should provide for arrangements relating to:</p> <ul style="list-style-type: none"> a) Judicial proceedings pending before the Court of Justice of the European Union on the withdrawal 	<p><i>35: This paragraph provides for continuity in relation to judicial proceedings or administrative procedures initiated before the withdrawal date. It also proposes to create the possibility of initiating judicial</i></p>

<p>date involving the United Kingdom, United Kingdom natural and/or legal persons (including preliminary references); the Court of Justice should remain competent to adjudicate in these proceedings and its rulings must be binding upon the United Kingdom;</p> <p>b) Ongoing administrative procedures in the Union institutions, bodies, offices and agencies concerning the United Kingdom (for example infringements proceedings, state aid) or, where applicable, concerning United Kingdom natural or legal persons;</p> <p>c) The possibility to commence both administrative procedures before the Union institutions and judicial proceedings before the Court of Justice of the European Union concerning the United Kingdom (for example infringements proceedings, state aid) after the withdrawal date for facts that have occurred before the withdrawal date, including the possibility for the UK courts or tribunals to address questions to the Court of Justice of the European Union;</p> <p>d) Continued enforceability of Union acts that impose pecuniary obligations and of judgments of the Court of Justice of the European Union, adopted or rendered before the withdrawal date or in the course of ongoing judicial and administrative proceedings.</p>	<p><i>proceedings against the UK in respect of matters occurring before withdrawal, as well as enforceability of Union acts that impose pecuniary obligations and of CJEU judgements adopted before the withdrawal date.</i></p>
<p>III.4. Other administrative issues relating to the functioning of the Union</p>	
<p>36. The Agreement should contain the necessary provisions relating to the protection of the property, funds, assets and operations of the Union and its institutions or bodies, and of</p>	<p><i>36: Contains provisions to protect Union property and personnel.</i></p>

<p>their personnel (including retired personnel) and members of their family, as provided for in the Treaties and the Protocols to the Treaties (in particular Protocol No. 7 on the Privileges and Immunities of the European Union).</p>	
<p>37. The Agreement should ensure, where appropriate, the transfer to the United Kingdom of the ownership of:</p> <ul style="list-style-type: none"> a) Special fissile material located on the territory of the European Atomic Energy Community which is currently the property of the said Community in accordance with Article 86 of the Treaty establishing the European Atomic Energy Community, the right of use of which is currently with a natural or legal person, whether public or private, in the United Kingdom; b) European Atomic Energy Community property located in the United Kingdom used for the purposes of providing safeguards in accordance with the Treaty establishing the European Atomic Energy Community. <p>The Agreement should also provide that the United Kingdom assumes all rights and obligations associated with the ownership of materials or property transferred and regulate other questions related to material and property under the Treaty establishing the European Atomic Energy Community, in particular safeguards obligations to be applied to the material referred to above.</p>	<p><i>37: This paragraph proposes transfer from Euratom to UK ownership of special fissile material and property in the UK, and a requirement for the UK to take on the associated responsibilities.</i></p>
<p>38. The Agreement should also provide that the United Kingdom ensures, within its jurisdiction, the continued respect by members of Union institutions, bodies, offices and</p>	<p><i>38: This paragraph proposes a provision for the UK to ensure continued observation of the obligation of confidentiality imposed on Union employees.</i></p>

<p>agencies, members of committees, officials and other servants of the Union of the obligations incurred by them under Article 339 of the Treaty on the Functioning of the European Union before the withdrawal date.</p>	
<p>III.5. Governance of the Agreement</p>	
<p>39. The Agreement should set up an institutional structure to ensure an effective enforcement of the commitments under the Agreement, bearing in mind the Union's interest in effectively protecting its autonomy and its legal order, including the role of the Court of Justice of the European Union.</p>	<p><i>39: This section concerns governance of the Agreement. It proposes an "institutional structure" to ensure effective application of the agreement and dispute settlement. These must protect the Union's autonomy and legal order including the role of the CJEU.</i></p>
<p>40. It should contain appropriate institutional arrangements allowing for the adoption of measures to deal with unforeseen situations not covered in the Agreement and for the incorporation of future amendments to Union law in the Agreement where this is necessary for the proper implementation of the Agreement.</p>	<p><i>40 & 41: In certain areas the EU wishes to make provision to deal with "unforeseen situations" and the incorporation of future amendments to EU law.</i></p>
<p>41. The Agreement should include provisions ensuring the settlement of disputes and the enforcement of the Agreement. In particular, these should cover disputes in relation to the following matters:</p> <ul style="list-style-type: none"> • continued application of Union law; • citizens' rights; • application and interpretation of the other provisions of the Agreement, such as the financial settlement or measures adopted by the institutional structure to deal with unforeseen situations. 	
<p>42. In these matters, the jurisdiction of the Court of Justice of the European Union (and the supervisory role of the Commission) should be maintained.</p>	<p><i>42: In these areas, the EU wishes to maintain the jurisdiction of the CJEU and the supervisory role of the Commission. Recalling the language of paragraph 39, the</i></p>

<p>For the application and interpretation of provisions of the Agreement other than those relating to Union law, an alternative dispute settlement should only be envisaged if it offers equivalent guarantees of independence and impartiality to the Court of Justice of the European Union.</p>	<p><i>UK might wish to argue that, no less than the Union, it has an interest in preserving the autonomy of its legal order. Fortunately, the paragraph leaves open the possibility of designing a compromise dispute settlement procedure involving some body other than the CJEU. This only likely to be possible for the EU if it met the same standards as CJEU.</i></p>
<p>43. The Agreement should foresee that any reference to concepts or provisions of Union law made in the Agreement must be understood as including the case-law of the Court of Justice of the European Union interpreting such concepts or provisions before the withdrawal date. Moreover, to the extent an alternative dispute settlement is established for certain provisions of the Agreement, a provision according to which future case-law of the Court of Justice of the European Union intervening after the withdrawal date must be taken into account in interpreting such concepts and provisions should be included.</p>	<p><i>43: This paragraph requires that any alternative system of dispute resolution should take account of the developing case law of the CJEU. This is the approach taken by the EU in connection with the European Economic Area and with Switzerland.</i></p>
<p>IV. PROCEDURAL ARRANGEMENTS FOR THE CONDUCT OF THE NEGOTIATIONS</p>	
<p>44. In line with the Statement of the Heads of State or Government of 27 Member States, as well as of the Presidents of the European Council and the European Commission, these negotiating directives establish the detailed arrangements governing the relationship between the Council and its preparatory bodies, on the one hand, and the Union negotiator on the other.</p>	<p><i>44: Note the absence of any mention of the European Parliament in this section.</i></p>
<p>45. The Union negotiator will conduct negotiations with the United Kingdom in continuous coordination and permanent dialogue with the Council and its preparatory bodies. In</p>	<p><i>45 & 46: These paragraphs set out how the Commission will involve the Council as the negotiations proceed.</i></p>

<p>this respect, in full compliance with the institutional balance set out by the Treaties, the Council and Coreper, assisted by the Working Party on Article 50, will provide guidance to the Union negotiator, in light of the European Council guidelines and in line with the negotiating directives.</p>	
<p>46. The Union negotiator will in a timely manner consult and report to the preparatory bodies of the Council. To that end, the Council will organise before and after each negotiating session a meeting of the Working Party on Article 50. The Union negotiator will provide in a timely manner all necessary information and documents relating to the negotiations.</p>	

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Senior European Experts

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