

## The Brexit process: Moving to the second phase of negotiations

### SUMMARY

The first phase of Brexit talks between the EU and UK negotiating teams needed six rounds of discussion over seven months. Finally, on Friday 8 December, an agreement in principle on the three priority issues – citizens' rights, a financial settlement and Northern Ireland – was reached. The European Commission President, Jean-Claude Juncker, and the UK Prime Minister, Theresa May, endorsed a joint report setting out a common understanding on the future withdrawal agreement. Whilst a number of specific aspects are still under discussion, the European Council decided on 15 December that 'sufficient progress' had been achieved on the first-phase priority issues, and that negotiations could move on to the second phase – on transitional arrangements and the future EU-UK relationship – provided the commitments from the joint report are fully translated into the draft withdrawal agreement.

For the transitional period, the European Parliament and the European Council have made clear that all existing Union regulatory, budgetary, supervisory, judiciary and enforcement instruments and structures must apply, including the competence of the Court of Justice of the European Union, but with no UK participation in decision-making, since it would no longer be a member of the EU. Exploratory discussions on the framework for the future relationship will begin only after the adoption by the European Council of additional guidelines in March 2018. The UK has still to clarify its position on the type of trade deal it seeks with the EU.



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## First phase of Brexit negotiations

The two-year period for the UK and the EU to reach agreement on the arrangements for the UK's withdrawal started on 29 March 2017, when the UK government triggered Article 50 of the Treaty on European Union.<sup>1</sup> If no withdrawal agreement is reached within this period, the EU Treaties will automatically cease to apply to the UK from 30 March 2019, unless the European Council were to decide unanimously, and in agreement with the UK, to prolong the two-year period (Article 50(3) TEU). The 27 remaining Heads of State or Government adopted [political guidelines](#) for the negotiations on 29 April 2017, setting out a phased approach. In the first phase, a withdrawal agreement is to be negotiated, for which three priorities were set: the rights of EU-27 citizens in the UK and of UK citizens in the EU-27, the settlement of the financial obligations incurred by the UK and the issue of the border between Ireland and Northern Ireland. In a second phase – after 'sufficient progress' had been achieved – discussions would continue on possible transitional arrangements, as well as on the framework for the future EU-UK relationship.

The first-phase negotiations between the EU and UK negotiation teams, led respectively by Michel Barnier on behalf of the European Commission and by David Davis for the UK government, took six negotiating rounds over seven months. On 8 December, an agreement in principle on the three priority issues was reached, set out in a [joint report](#).

Whilst the joint report is a political declaration, and the exact text of the withdrawal agreement has yet to be drafted, it forms the basis on which both the Commission and the European Parliament recommended that the European Council declare that there had been sufficient progress, so that the second phase of Brexit talks could begin. After contradictory statements from the UK government on the binding nature of the commitments in the joint report, the European Parliament included in its [resolution](#) on the state of play of the Brexit negotiations, adopted on 13 December, that negotiations can only progress during the second phase if the UK government fully respects those commitments and if they are fully translated into the draft withdrawal agreement. The same condition is included in the European Council (in EU-27 configuration) [guidelines](#) for the second phase talks, adopted on 15 December. The European Council also decided that sufficient progress had been achieved on the three priority issues, so that negotiations can move on to the second phase – on transition and the framework for the future EU-UK relationship.

## From original positions to joint report

The joint report sets out a package on most issues under the three priorities, although some specific elements are still to be agreed. Notably, the arrangements set out in the joint report could still be 'adapted to the transitional agreement', and they are 'without prejudice to discussions on the future EU-UK relationship'. Furthermore, it states that the commitments will be reflected in the withdrawal agreement 'in full detail', whilst 'nothing is agreed until everything is agreed'. This last caveat has prompted some to claim that the upholding of the commitments in the joint report would be conditional upon agreement on a future trade deal between the EU and the UK. Rather, the caveat refers only to the withdrawal agreement, since according to Article 50(2) TEU, the withdrawal agreement will only 'take into account' the framework for the future relationship between the Union and the withdrawing Member State and cannot comprise such a future relationship agreement – which can only be finalised once the withdrawal has taken place.

The original positions of both parties on the three priority issues were far apart. On citizens' rights, the biggest controversy lay in whether EU-27 citizens living in the UK would retain existing EU rights or only obtain less extensive rights under UK law. Family reunification and the role of the Court of Justice of the EU (CJEU) were also major aspects of disagreement. The settlement of the UK's financial obligations incurred as a Member State were another stumbling block, with the parties disagreeing both on the principle as well as on the financial calculation. Both parties agreed from the beginning that there should be no hard border between Ireland and Northern Ireland after UK withdrawal, and that the functioning of the Good Friday/Belfast Agreement must not be endangered; however the border issue turned out to be one of the key issues in negotiations.

### Citizens' rights

#### *Residence rights under EU or UK law?*

Negotiations focused from the very beginning on residence rights, including the right to continue living, working or studying in another Member State, whilst enjoying equal treatment with nationals of the host state in nearly all aspects. The reciprocal approach (rights for EU-27 in the UK and for UK nationals in the EU-27) was the only aspect on which both sides seemed to agree from the beginning.

The EU side sought to ensure that citizens, resident in the UK or EU-27 on the withdrawal date, retain for life their **rights under Union law** (EU Treaties and EU secondary law, e.g. the Free Movement Directive) **as interpreted by the Court of Justice**. This would include the possibility to continue with acquisition of such rights (e.g. permanent residence) after the withdrawal date under current conditions. The UK, by contrast, suggested that citizens will not be able to 'carry forward' their EU free movement rights after withdrawal and proposed instead that EU-27 citizens residing in the UK at withdrawal, regardless of when they arrived, apply for a **new immigration status under UK law**, whose exact eligibility conditions would have been defined later.

The citizens' rights part of the joint report reflects the [joint technical note](#) on the EU and UK positions on citizens' rights of 8 December and refers to it for further details. The joint report envisages the withdrawal agreement preserving certain rights for citizens deriving from EU law beyond the UK's withdrawal from the EU, in particular the right of EU-27 and UK citizens to continue living, working and studying in their host state. Notably, the parties agreed to confer residence rights to EU-27 citizens in the UK and UK nationals in the EU-27 as established by **the EU Treaties and the Free Movement Directive 38/2004 and as interpreted by the CJEU** as of the withdrawal date, or the end of a possible transitional period during which the 'original' EU citizens rights would apply.<sup>2</sup> The application of EU law concepts deriving from the Free Movement Directive and CJEU case law means amongst other things that both economically active citizens such as workers, self-employed and job-seekers, and also economically inactive persons (students, pensioners), as long as the latter are economically self-sufficient,<sup>3</sup> would retain their residence and equal treatment rights, for instance regarding access to social benefits. These rights would be recognised for citizens who, at the date of the UK's withdrawal, have already lawfully exercised their free movement rights under EU law. Change in status will continue to be possible too. The five-year residence period necessary to obtain

#### Cut-off date

The EU position regarding EU citizens' rights took the date of entry into force of the withdrawal agreement as the cut-off date for the current status. Conversely, the UK sought to agree on a cut-off date earlier than the entry into force of the agreement, going back as far as 29 March 2017, when the UK triggered the Article 50 exit clause, in a bid to limit expectations of EU citizens arriving in the UK after the withdrawal notification.

permanent residence status (with no self-sufficiency requirements) would continue to apply too. However, any residence restrictions (expulsion, entry ban) on grounds of public policy or security related to **conduct after the withdrawal** (or end of transitional period) will be governed by national and not EU law. The greatest difference to the current residence status is that EU-27 citizens in the UK will need to apply for UK 'settled status' (see below) but this will be governed in substance by EU law.

The European Parliament declared in its December resolution on the Brexit negotiations that it will seek to guarantee future free movement rights across the whole EU for UK citizens currently resident in an EU-27 Member State.

#### *Family members*

The EU also sought to maintain rights of family members of EU citizens (spouses, registered partners, children under 21, dependent children and dependent direct ancestors), irrespective of their nationality, so that both family members of UK and EU27 citizens would still be able to join them after the withdrawal date, including **future family members**. By contrast, the UK proposed that future family members be subject to more restrictive rules applicable to non-EU nationals joining British citizens. Children of EU citizens with settled status would also have had to apply for settled status.

According to the joint report, **family reunification** in accordance with EU provisions would be possible **after the UK's withdrawal**, subject to certain limits: following pressure from Parliament, future children (born or adopted after withdrawal)<sup>4</sup> would continue to enjoy rights under EU law; others who become family members after withdrawal, would be subject to national immigration rules.

In its resolution of 13 December on the state of play of the Brexit negotiations, the European Parliament pointed to the need to extend the coverage of citizens' rights to future partners.

#### *Administrative requirements*

The EU position sought to maintain the declaratory character of **residence documents**, i.e. residence documents would not be a condition for an EU-27 citizen to be legally resident in the UK or a UK national in the EU-27. The UK, by contrast, wanted all EU citizens (except Irish) to have to apply for 'permission to stay', under a 'separate legal scheme in UK law', different from the current system.

The joint report gives the **possibility** to the UK and to the EU-27 Member States to require persons covered by the withdrawal agreement to **apply to obtain a status conferring residence rights**, so that the current declaratory character of residence documents could be turned into a constitutive one for the right to reside in the host state, meaning that people not granted a residence permit would not be entitled to reside there. However, residents will have two years to apply for such a permit under the agreement. Those already holding a permanent residence status under EU law would be issued a national document free of charge – after an identity, criminality and security check. It should also be noted that national authorities will have no discretion when applying the objective criteria set out in the withdrawal agreement, and that any administrative decisions will be subject to appeal as provided for in the EU Free Movement Directive.

In its December resolution, Parliament stated that these procedures remain an issue that needs to be addressed in order to ensure 'that the administrative procedure is light-touch, declaratory in nature and free of charge, placing the burden of proof on the UK authorities to challenge the declaration, and enabling families to initiate the procedure by means of a single form'.

*Social security*

The EU position aimed to ensure that EU citizens who have exercised their free movement rights under EU law do not suffer disadvantages in their **social security protection** post Brexit. This includes, under EU social security coordination measures, equal treatment with nationals, aggregation of periods of work and contributions made in other Member States, payment of contributions in one Member State only, and exportability of cash benefits (e.g. pensions and child benefits) so that they can be received in the Member State of residence. The UK by contrast proposed to depart from the current immediate equal treatment of workers and suggested that only citizens who acquire a settled status under UK law would be able to access benefits 'on the same terms as comparable UK residents'. The UK government had also proposed limiting the exportability of cash benefits for those not exporting them at the withdrawal date.

Under the joint report, coordination under EU law would continue to apply to citizens in the scope of the withdrawal agreement as well as to EU27 citizens who have worked in the UK in the past and to UK nationals who have worked in the EU-27, in order to ensure the accumulation of insurance and pension periods. As a consequence, certain social security benefits, such as child benefit and pensions, would continue to be exportable to another state. Furthermore, the European Health Insurance Card (EHIC) scheme will continue to apply to persons insured in the UK.

*Enforceability and role of the Court of Justice of the EU*

According to the EU position, all citizens' rights set out in the withdrawal agreement would be **directly**

**enforceable rights**. Furthermore, the Commission would have full powers for monitoring, and the **Court of Justice** full jurisdiction, over compliance with the protection of citizens' rights under the withdrawal agreement. National courts could or, under certain circumstances would be obliged to, refer a question for preliminary ruling to the CJEU on the interpretation of the provisions contained in the withdrawal agreement. Conversely, according to the UK, since the rights that would be granted to EU citizens would not be based on EU law but on UK law, they would have been enforceable only through the UK judicial system, without the possibility or obligation for UK courts to call on the CJEU. The commitments made in the withdrawal agreement would have had the status of international law.

The joint report acknowledges the UK's constitutional setting, notably the fact that it is a dualist state, meaning that international law is not automatically applicable but needs to be incorporated into national law by legislation. This has also been the case with EU law, incorporated into the UK legal order through the [1972 European Communities Act](#).

The UK would **implement** the withdrawal agreement through a parliamentary act, making express reference to the withdrawal agreement. That act could in theory be amended by subsequent parliaments, but the reciprocal approach of the agreement regarding UK nationals' rights in the EU-27 is meant to render such a repeal unlikely. The implementing act may not be challenged in court, but UK courts will be able to interpret it. In doing so, they would be obliged to take **due regard of relevant decisions of the CJEU**, with no limit in time for this obligation. The agreement would also establish a mechanism enabling, but not obliging, **UK courts to ask the CJEU for interpretation** of the rights covered by it. That mechanism would be available for cases brought before UK courts within eight years of the date of application of the citizens' rights provision, which may differ from the

**Role of the CJEU on citizens' rights**

- 1) Interpretation of EU concepts applicable to the withdrawal agreement.
- 2) UK courts have to have due regard to CJEU case law handed down after withdrawal.
- 3) Possibility of UK courts to ask the CJEU for interpretation of provisions of the withdrawal agreement (8 years).



withdrawal date if a transitional period is agreed during which the 'original' EU citizens rights apply. Whilst the Commission would monitor implementation on the EU side, the UK would establish an independent authority to deal, inter alia, with citizens' complaints.

Parliament pointed in its December resolution to the need to provide for the binding character of CJEU decisions in relation to the interpretation of citizens' rights provisions, as well as for the role of the future UK independent authority to act on citizens' complaints.

## Financial settlement

### *Controversial issues and outgoing positions*

The settlement of the UK's financial obligations in the context of its withdrawal from the EU has been controversial from the beginning. While the EU made clear its negotiating principles early on, the UK has not issued any position paper on the financial aspects of the withdrawal. The UK only [recognised](#) the existence of financial obligations towards the EU after withdrawal after the first round of negotiations concluded, but seemed to backtrack later on, [arguing](#) against the existence of a legal obligation to continue paying for commitments undertaken as EU-28 after the date of withdrawal. Finally, in a [speech](#) in Florence in September 2017, the UK Prime Minister pledged to honour the [financial commitments](#) undertaken by the UK during its EU membership, but maintained ambiguity as to what those commitments were. Importantly, the financial settlement was to be linked to an implementation or transition period following the UK's exit. Conversely, the EU has always maintained that commitments made by the EU-28 must be paid for by the EU-28, and rejected any link between the financial obligations and discussions on further arrangements such as on a transition period or on the future EU-UK relationship.

The European Council [guidelines](#) of April 2017 underline that 'a single financial settlement' should ensure that both the EU and UK respect their obligations deriving from the entire period of UK membership of the EU. The guidelines specify the financial settlement should cover 'all commitments as well as liabilities, including contingent liabilities'. The Council's negotiating [directives](#) of 22 May 2017 insist on the UK honouring its obligations undertaken as an EU Member State, which should be defined in euro. The directives specify the agreement should include a calculation of the total amount and a schedule of payments. Finally, they state the UK should fully cover the specific costs related to the withdrawal, such as the relocation of EU agencies based in the UK.<sup>5</sup> On 12 June 2017, the Commission position paper ([Essential principles on the financial settlement](#)) detailed the [elements](#) to be included in the financial settlement and a methodology for its calculation.

The EP has [supported](#) the general principles issued by the other EU institutions concerning the financial settlement, including the Commission's methodology on determining the payments. It further stated in its [resolution](#) of 3 October 2017 that the absence of clear proposals from the UK side has seriously impeded the negotiations.

### *Joint report*

The joint report of 8 December sets out a common understanding on the methodology for the settlement, including its components, the principles for calculating it and how it will be paid. The UK will continue participating in the implementation of the EU multi-annual budget up to 31 December 2020, as if it had remained a member (including revenue adjustments). It will contribute its share of the outstanding budget commitments at 31 December 2020 (*reste à liquider*), and also of the EU's liabilities incurred before 31 December 2020, with some exceptions. Moreover, the UK will remain liable for its share of contingent liabilities established at the withdrawal date, except those related to certain legal cases for which the cut-off date will be 31 December 2020. The UK will also

receive its share of recoveries or paid-in guarantees, excluding from EU assets related to space programmes (such as Galileo). Furthermore, arrangements for continued UK participation in the programmes of the current 2014-2020 EU budget have been agreed, until their closure and with the respect of all relevant EU legal provisions. Additionally, arrangements were agreed in principle as concerns other EU funds and facilities, the European Central Bank (ECB) and the European Investment Bank (EIB). The UK will respect its commitments under the Facility for Refugees in Turkey and the EU Emergency Trust for Africa. It will also remain party to the European Development Fund until the closure of the 11th EDF and respect all its commitments thereof. The paid-in capital of the UK in the ECB will be reimbursed to the Bank of England following the UK's withdrawal, while a system for reimbursing the UK's paid-in and callable capital in the EIB has also been agreed. Finally, the payments related to the financial settlement will be made as they become due (no lump sum or earlier expenditure required from the UK, unless the sides agree otherwise) and the settlement will be drawn up and paid in euro.

#### *Outstanding issues*

The next phase of the talks will settle details, including means of implementing the agreed methodology and the schedule of payments. The parties would also try to agree a simplified procedure for settling some elements of the payment schedule, and for UK participation in EU programmes, to avoid unnecessary administrative burdens. Discussions on reducing the withdrawal costs of the two relocating EU agencies will also take place. No final figure is included in the Joint report.

#### **Northern Ireland**

##### *Controversial issues and outgoing positions*

The unique circumstances of [Northern Ireland](#) have been recognised by both the UK and the EU since the beginning of the talks. The 1998 Good Friday (or Belfast) Agreement<sup>6</sup> has at its heart cooperation between Ireland and Northern Ireland, which is significantly reliant on the EU legal and policy framework, as acknowledged by both sides in the negotiations. North-South cooperation on the island is thus [significantly challenged](#) by the UK's decision to withdraw from the EU, and from the single market and customs union.

Therefore, the [overarching objectives](#) of talks on Northern Ireland and Ireland were agreed at an early stage, namely: the protection of the gains of the peace process and of the Good Friday Agreement in all its parts; the maintenance of existing bilateral agreements and arrangements between the UK and Ireland, including the Common Travel Area; avoiding a hard border between Ireland and Northern Ireland, while preserving the integrity of the single market, and other specific issues deriving from the unique situation of Northern Ireland. Furthermore, it was agreed that the commitments on Northern Ireland made in the first phase will be upheld in all circumstances and will not pre-determine discussions on the framework of future EU-UK relations.

These principles were in line with the European Council [guidelines](#) of April 2017 and the EP resolution of the same month, which both recognised the unique circumstances on the island of Ireland. The Council's negotiating directives underscored that nothing in the UK withdrawal agreement should undermine the objectives and commitments of the Good Friday Agreement, as well as the need to avoid a hard border, and respect EU law.

The UK published a [position paper](#) on the issue on 16 August 2017. While some aspects were consistent with the [preferences](#) of the Irish government and the European Council guidelines, it linked, however, the issue of avoiding a hard border between Northern Ireland and Ireland to discussions in the second phase of talks, on eventual customs

agreements and a free trade agreement between the EU and the UK. The paper remained vague as to how the border will be managed, if it were to be kept open.

The Commission transmitted its '[Guiding Principles for the dialogue on Northern Ireland/Ireland](#)' to the UK on 7 September. It emphasised the crucial importance of political commitment to protecting the Good Friday Agreement in all its parts, the gains of the peace process and the practical application of this on the island of Ireland. The paper underlined that it was the UK's responsibility to propose solutions to the challenges arising from the UK's departure from the EU, the customs union and the single market, including the avoidance of a hard border. The EP resolution of 3 October 2017 strongly supported this view and reiterated that any solution found for the island of Ireland could not predetermine discussions on the future EU-UK relationship.

The question of preventing a hard border between Ireland and [Northern Ireland](#) became the main sticking point in the negotiations. The proposed notion of continued regulatory alignment between Northern Ireland and Ireland provoked a breakdown in the talks, due to opposition from the Democratic Unionist Party (the Northern Ireland allies of Theresa May's government), before agreement was reached on 8 December 2017.

#### *Joint report*

The joint report sets out the following principles and commitments, which will be the basis for detailed arrangements in the next phase of the talks:

- the protection of the peace process and the Good Friday/Belfast Agreement in all its parts, including its practical application, which will be 'upheld in all circumstances, irrespective of the nature of any future agreement between the EU and the UK';
- the UK remains committed to avoiding a hard border on the island of Ireland, including any physical infrastructure or related checks and controls. This objective is to be achieved through the future EU-UK relations. However, should this prove impossible, the UK would propose specific solutions for Northern Ireland, and, failing agreement on this, commits to '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 1998 Agreement';
- no diminution of rights, including protection against all forms of discrimination, will be caused by the UK departure from the EU;
- the UK pledges that the Common Travel Area will operate in the future without affecting Ireland's obligations under EU law, in particular as regards freedom of movement of EU citizens;
- both the EU and UK will continue to honour their commitments under the Peace and [Interreg](#) funding programmes in the current multi-annual financial framework, with possibilities for future support to be examined favourably.<sup>7</sup>

Against this background, following the agreement on the joint report, the UK government also set out [six commitments](#) to Northern Ireland.

#### *Outstanding issues*

The EU and UK have agreed that the next phase of negotiations will need to address the specific mechanisms to be created by both sides to monitor and implement any arrangement. It will also set out specific arrangements for Northern Irish people with Irish citizenship – and thus EU citizenship, so that they may effectively exercise their EU rights and benefits. Importantly, agreement was reached on continuing work on the issue of Northern Ireland in a distinct strand of negotiations during the second phase.



In its [resolution](#) adopted on 13 December 2017, the EP called on the parties to ensure that the commitments made with respect to Northern Ireland / Ireland are fully enforceable, in order to ensure the EP's consent to the withdrawal agreement.

Notwithstanding the recent agreement in principle on Northern Ireland, many [experts](#) consider the issue largely unresolved. The wording of the common understanding ('full alignment') is considered prone to contradictory interpretations which will raise a new set of problems in future negotiations. The main [question](#) is whether the UK will be able to propose solutions that can convince the EU and Ireland that the Irish border remains invisible. Otherwise, it is widely assumed the only options are either to introduce a hard border on the island or for the whole of the UK to align itself with single market and customs rules, therefore effectively [remaining](#) in the single market and customs union. The question of the Irish border is thus likely to greatly influence the concrete proposals still awaited from the UK government on the future trade relationship with the EU.

### **Other separation issues**

The joint report states that the parties have not yet reached agreement on some other separation issues, whilst mutual agreement exists on aspects thereof. These are Euratom-related issues, the rules applicable to goods placed on the market under EU law before withdrawal, cooperation in civil and commercial matters, as well as police and judicial cooperation in criminal matters, ongoing Union administrative and judicial procedures, and issues relating to the functioning of the EU institutions and agencies.

### **Governance of the withdrawal agreement**

According to the [EU negotiators](#), the withdrawal agreement should establish a Joint Committee, in which the EU and UK are represented. The Joint Committee should be empowered to adopt, where necessary, appropriate measures to implement the solution agreed between the contracting parties. The EU proposed that the Court of Justice be in charge of disputes between the EU and the UK over compliance with the withdrawal agreement. Despite the original proposal by the UK that the withdrawal agreement be awarded international law status, the UK position did not contain any proposal for an international instance to oversee compliance with the withdrawal agreement.

Whilst addressing the role of the CJEU as regards citizens' rights, the joint report makes no reference to dispute-settlement mechanisms. Different options discussed by experts<sup>8</sup> include a separate court like the EFTA Court, with a UK judge and judges from the CJEU, or an arbitration body. In its [communication](#) to the European Council on the state of progress of the first-phase Brexit talks, the Commission states that more work is needed with regard to the general governance of the withdrawal agreement.

### **Opening of second phase of Brexit talks**

The European Council (Article 50) decided on 15 December, based on the Commission communication and the joint report, that sufficient progress had been made on the priority issues so that negotiations could move on to the second phase, related to transition and the framework for the future relationship. It called on the Union negotiator and the UK to complete the outstanding withdrawal issues, and to start drafting the withdrawal agreement. It underlined that negotiations in the second phase can only progress as long as all commitments undertaken during the first phase are respected in full, and translated faithfully into legal terms as quickly as possible.

### **Transitional agreement**

In her [Florence speech](#) on 22 September 2017, Theresa May stated that she would like to negotiate an 'implementation period of around two years'. She justified this with the time

gap between the UK's withdrawal from the EU and the entry into force of the future EU-UK relationship, which can be formalised only once the UK has left the EU and after ratification by all Member States. She proposed the 'implementation period' to be agreed under Article 50 TEU and to be strictly time-limited. May suggested that market access remains as under current rules but that some adaptations to the free movement rules would apply. She also proposed to bring forward to this period aspects of the future relationship framework, such as new dispute-resolution mechanisms.

The notion 'implementation period' and May's statements point to a new set of rules that allow the preliminary implementation of some of the aspects of the future relationship framework, whilst keeping some of the EU *acquis*. The European Council made clear, however, in its 15 December [guidelines](#) for the second-phase negotiations that, during a transitional period, all existing Union regulatory, budgetary, supervisory, judiciary and enforcement instruments and structures will apply, including the competence of the CJEU. The guidelines further highlight that, 'as the United Kingdom will continue to participate in the Customs Union and the Single Market (with all four freedoms) during the transition, it will have to continue to comply with EU trade policy, to apply EU customs tariff and collect EU customs duties, and to ensure all EU checks are being performed on the border vis-à-vis other third countries'.

In its December 13 [resolution](#), the European Parliament pointed out that transitional arrangements can only be agreed if they contain the right balance of rights and obligations and consist of the prolongation of the EU *acquis*, including rights of citizens, whilst the UK would no longer be part of the EU institutions and bodies. It furthermore clarified that any changes to the EU *acquis* which take effect during the transitional period must apply automatically to the UK and that a transitional period as agreed as part of the withdrawal agreement can only start once that agreement is in place. The European Commission put forward [recommendations](#) for the negotiations on the transitional agreement on 20 December, and the Council will adopt negotiating directives on that basis in January 2018. In particular, the Commission proposes that any transitional arrangements would not go beyond 31 December 2020, and envisages UK participation, without voting rights, in certain committee or expert group meetings during the transition.

### **Future relationship**

As regards the [future framework for EU-UK relations](#), the European Council stated its willingness to begin preliminary talks with the UK on identifying a common understanding, to take the form of a political declaration accompanying the withdrawal deal, as any agreement can only be concluded once the UK becomes a third country. However, [discussions](#) on trade, and other areas of cooperation, such as counter-terrorism, security, defence and foreign policy will begin only after additional guidelines for the talks are agreed, in March 2018. Preserving the integrity and proper functioning of the single market, including the four indivisible freedoms, and avoiding any upset to relations with existing third-country partners will be the guiding principles for the EU.

In its most recent resolution, the EP called for 'as close a relationship as possible between the EU and the UK', but also set out a series of principles that should underpin any framework for future relations: a third country cannot enjoy the same benefits as a Member State; protecting the integrity of the internal market and the four freedoms, without allowing for a sector-by-sector approach; ensuring the autonomy of EU decision-making; safeguarding the EU legal order and the role of the CJEU; the UK's adherence to the standards provided by international obligations, including fundamental rights, and certain EU policies, while ensuring an effective compliance mechanism in this respect;

safeguarding EU agreements with third partners; safeguarding of the financial stability of the EU and compliance with its regulatory and supervisory regime and standards; and, finally, a correct balance of rights and obligations.

As internal preparatory [discussions](#) continue within the EU, the UK still needs to clarify the nature of the 'bespoke trade deal' it seeks with the EU.

The UK has so far expressed its desire to build a new [strategic partnership](#), with an ambitious and comprehensive free trade agreement and a new customs agreement, as it would be leaving the single market and the [EU's customs union](#). During the first-phase negotiations, the UK government also issued a series of [future-partnership position papers](#), addressing cooperation areas such as security, law enforcement and criminal justice; foreign policy, defence and development; personal data; customs cooperation, science and innovation; cross-border civil judicial cooperation. Indeed new arrangements would need to be agreed at least on these issues, in order to ensure effective cooperation in the future between the EU and the UK.

#### *What type of economic and trade deal?*

In the EU's view, by ruling out participation in the EU single market, on the [model](#) of the EEA/EFTA countries, the UK is left with the [option](#) of an EU-Canada type trade deal (CETA).

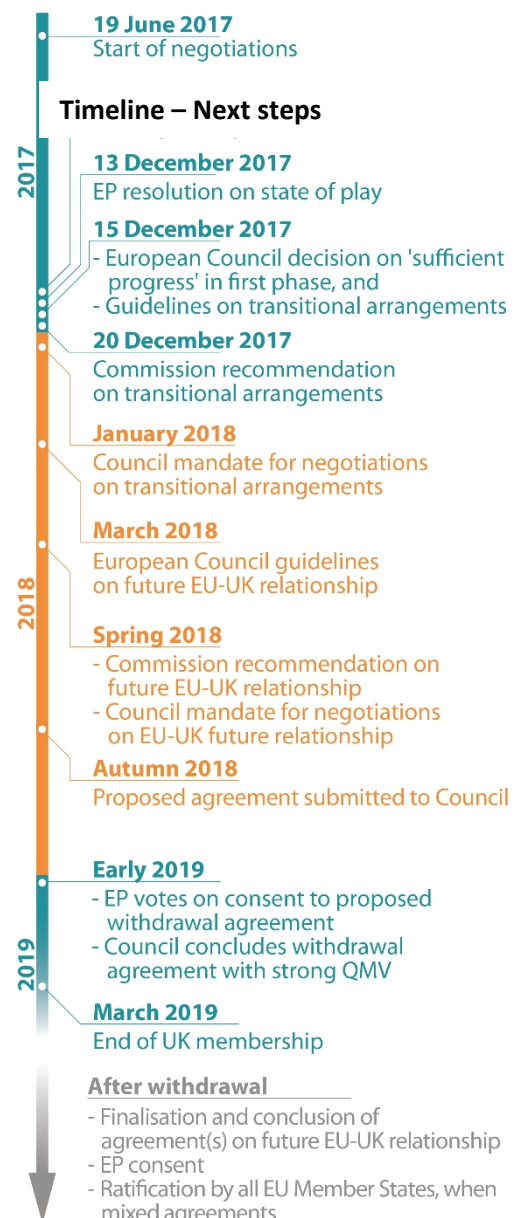
However, CETA is limited in terms of market access for services, which is an essential interest for the UK. A '[Canada plus-plus-plus](#)' option – meaning 'Canada plus the best of Japan, the best of South Korea and ... services' – was recently advanced by the UK chief negotiator, but no concrete proposal has been issued by the UK government. [Discussions](#) within the UK cabinet to establish the government's position on the future partnership are scheduled in December 2017.

[Experts](#) have also suggested an Association Agreement (Article 217 TFEU) modelled on the EU-Ukraine deal, which would provide for a deep and comprehensive free trade area, and also for political cooperation on foreign policy and counter-terrorism. The EP has also stated recently that an AA could provide an appropriate framework. A no-deal scenario with trade on WTO terms, seems a remote possibility at this point, but the one with the most damaging [economic consequences](#), particularly for the UK.

#### Next steps

According to the Commission, negotiations [need](#) to be finalised by autumn 2018, to allow for orderly UK withdrawal by 29 March 2019, as a withdrawal deal requires the consent of the European Parliament and UK approval in accordance with its own procedures. The EU-27 and the UK could extend the deadline by common accord. The referral of a draft agreement to the CJEU remains a possibility, with the implications for the schedule difficult to predict.

On 13 July 2017, the UK [government](#) introduced in the UK Parliament the [European Union \(Withdrawal\) Bill](#) that would revoke, as from the withdrawal date, the 1972 European



Communities Act, which gives effect to EU law in the UK, while transposing most existing EU law into UK law. The bill still faces [scrutiny](#) in the Parliament. A recently adopted [amendment](#) to the bill would prevent British ministers from using their powers to implement any exit deal agreed with the EU, before parliament has held a full vote on it. Another amendment relative to the precise UK withdrawal date will be voted on the 20th December. The UK government wants set in law the 29 March 2019 as the exit date, while some UK Members of Parliament argue this would make it difficult to extend the negotiation period should this be decided by the UK and the rest of EU Member States. The UK has also [announced](#) the withdrawal agreement will be directly implemented in domestic law, through the 'withdrawal act and implementation bill'.

## Main references

A. D'Alfonso, E.-M. Poptcheva, J. McElDowney, L. Tilindyte, [The Brexit negotiations: Issues for the first phase](#), EPRS, June 2017.

E.-M. Poptcheva, L. Tilindyte, [EU and UK positions on citizens' rights: First phase of Brexit negotiations](#), EPRS, July 2017.

## Endnotes

<sup>1</sup> See for the details of the Article 50 withdrawal procedure, E.-M. Poptcheva, [Article 50 TEU: Withdrawal of a Member State from the EU](#), EPRS, February 2016.

<sup>2</sup> See for more details the section on a possible transitional agreement below.

<sup>3</sup> E.-M. Poptcheva, [Freedom of movement and residence of EU citizens: access to social benefits](#), EPRS, 2014.

<sup>4</sup> According to the joint report, the children must be born to or adopted by two citizens protected by the withdrawal agreement or by one parent under the withdrawal agreement and another who is a national of the host state. This means e.g. that future children of an EU citizen residing in the UK at withdrawal and a third-country national or an EU citizen who was not resident in the UK on withdrawal date, would be subject to national instead of EU law.

<sup>5</sup> The European Banking Authority and the European Medicines Agency. The Council [voted](#) on 20 November 2017 on the relocation of the two agencies, to Paris and Amsterdam respectively.

<sup>6</sup> The Good Friday Agreement (Belfast Agreement) of 1998 is a multi-party agreement between the British and Irish governments and most political parties in Northern Ireland. Three areas are covered: the political arrangements and institutions within Northern Ireland; the relationship between Northern Ireland and Ireland, and the UK-Ireland relationship. Among the significant provisions are the principle of consent (which confirms Northern Ireland's place in the UK unless the majority of its population decides otherwise) and the guarantees of dual nationality (people of Northern Ireland can identify as either British or Irish or both).

<sup>7</sup> The EU has contributed with [financial support](#) to the peace process in Northern Ireland since 1989, through the EU's regional policy structural funds and EU contributions for the International Fund for Ireland. Between 1995 and 2013 there have been three EU PEACE programmes totalling €1.3 billion in EU funding. The Peace IV programme for the 2014-2020 period was launched in January 2016 with a budget of €270 million. The Interreg programme supports cross-border cooperation and has contributed with more than €1 billion in the region since 1991. The current Interreg programme has a budget of €240 million. For both Peace and Interreg, the EU funds 85 % of the budget, with the remainder assumed by the Northern Ireland Executive and the Irish government.

<sup>8</sup> See, for example, [The settlement of disputes arising from the United Kingdom's withdrawal from the European Union](#), study for the AFCO committee, Policy Department for Citizens' Rights and Constitutional Affairs, European Parliament, November 2017.

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