



The EU-UK withdrawal agreement

Progress to date
and remaining
difficulties



IN-DEPTH ANALYSIS

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This In-depth Analysis from the European Parliamentary Research Service (EPRS) looks at the current state of negotiations on the planned withdrawal of the United Kingdom from the European Union (Brexit). These negotiations produced agreement in principle in March 2018 on a major part of the draft withdrawal deal, including transitional provisions following Brexit. It aims to give an overview of the main points so far agreed, as well as of the remaining difficulties and divergences.

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Executive summary

With less than one year to go before the planned Brexit date of 30 March 2019, talks are continuing as regards the terms of the United Kingdom's (UK) withdrawal from the European Union (EU). Beginning in June 2017, the withdrawal negotiations have focussed on three key priority issues – citizens' rights, the financial settlement and the situation of Northern Ireland – alongside other 'separation' provisions (e.g. ongoing EU judicial and administrative procedures, Euratom related issues, data protection etc.). In addition, in December 2017, the European Council decided to begin negotiations on the terms of a transitional period as requested by the UK government.

On 19 March 2018, EU and UK negotiators announced that significant progress had been achieved regarding the draft withdrawal agreement: more than 75 % of the legal text had been settled, based on previous commitments undertaken by both sides in a joint report in December 2017. In particular, in the draft withdrawal agreement negotiators settled two of the priority issues in their entirety – citizens' rights and the financial settlement; and importantly also approved the proposed transitional arrangements – to cover a 21-month period following the UK's date of withdrawal from the EU until 31 December 2020. Furthermore, as regards the future governance of the agreement, it was agreed that a Joint Committee made up of an equal number of UK and EU representatives would assume responsibility for the implementation and application of the agreement. A few days later, the European Council (EU-27) welcomed this advance in the talks, which opened the door to discussions on defining the future framework of EU-UK relations, in accordance with the newly adopted European Council guidelines.

Despite these important steps towards reaching a withdrawal deal, divergences persist, particularly as regards two important elements: firstly, the jurisdiction and powers of the European Court of Justice (CJEU) as regards the interpretation and application of the agreement, as part of the dispute settlement process; secondly the issue of the border between Northern Ireland and Ireland after Brexit. The EU and UK agreed in principle that the Protocol on Northern Ireland/Ireland annexed to the draft agreement should include a default scenario, or backstop option, that would apply to the territory of Northern Ireland in the absence of any agreed solutions, with a view to avoiding the establishment of a hard border on the island of Ireland after Brexit. However, despite further talks in recent months the negotiators have yet to settle either of these issues, although some limited progress on other parts of the draft withdrawal agreement was announced in a joint statement on 19 June. The European Council meeting at the end of June welcomed this further progress from 19 June, but expressed its concern that no significant headway was achieved with regard to the backstop solution for Northern Ireland.

Negotiators are now aiming for October 2018 as the deadline for finalising the withdrawal deal, to allow time for the completion of approval procedures in the EU and the UK.

As part of these procedures, the European Parliament will have to give its consent to the deal. Having closely monitored the negotiations and provided input at every stage in the process, Parliament's resolutions have particularly emphasised the importance of upholding citizens' rights in the future deal, including throughout the transition period. Even with the part on citizens' rights now agreed, Parliament will continue to monitor the negotiations and push for further rights to be included in the deal. As regards the remaining unresolved issues, Parliament has expressed support on several occasions for the Commission's proposals.

Table of contents

1. Introduction	1
2. The draft withdrawal agreement: Structure and main points settled	3
3. The common provisions and final clauses of the agreement	6
3.1. Common provisions	6
3.2. Final provisions	7
4. Citizens' rights	7
4.1. Residence and related rights	8
4.2. Administrative formalities	9
4.3. Enforcement of rights and the role of the CJEU	10
5. The financial settlement	11
5.1. How much is the United Kingdom financial settlement?	12
5.2. The principles of establishing the financial settlement	12
5.3. UK participation in EU budget and EU programmes	13
5.4. UK contribution to EU liabilities	13
5.5. UK withdrawal from non-budget EU financial arrangements	13
6. The transition period	14
6.1. The transitional arrangements	14
6.2. Extending the transition period	17
7. Other separation issues	18
8. Institutional provisions	21
8.1. The consistent interpretation and application of the agreement and the CJEU	22
8.2. The institutional and dispute settlement mechanisms	23
9. Protocol on Northern Ireland/Ireland	24
10. Next steps	27
10.1. Concluding the withdrawal agreement	27
10.2. The future framework for EU-UK relations	28

1. Introduction

Official talks between the EU and the UK on a withdrawal agreement in accordance with Article 50 TEU began in June 2017. On 8 December 2017, negotiators reached a common understanding on the priority issues of the withdrawal deal (citizens' rights, the financial settlement upon the UK's withdrawal, and the situation of Northern Ireland),¹ set out in a joint report.² A week later, the European Council decided that sufficient progress had been achieved on the first-phase issues, and adopted guidelines on transition, thereby allowing the talks to proceed to the second phase.³ On 28 February 2018, the European Commission issued a proposed withdrawal agreement,⁴ translating the commitments contained in the joint report into a draft legal text. The Commission's draft included provisions on a transitional period, based on the supplementary Council negotiating directives of 29 January 2018.⁵ Discussions continued on the basis of this text.

On 19 March 2018, after weeks of intense negotiations, progress was made on some of the key issues of the withdrawal deal and an agreement was reached on the transitional arrangements to be put in place following Brexit.⁶ The Commission published a new version of the draft agreement.⁷ In this document, provisions in white and yellow signify that negotiations are still needed, whereas text in green indicates agreement has been reached. The European Council conclusions of 23 March 2018 welcomed the 'agreement reached by the negotiators on parts of ... the withdrawal agreement covering citizens' rights, the financial settlement, a number of other withdrawal issues and the transition,' but underlined that 'nothing was agreed until everything was agreed' and that further progress in negotiations was dependent on respecting all commitments undertaken. At the same time the 27 EU Member States (EU-27) approved the start of negotiations to reach an overall understanding on the future framework of EU-UK relations, which would be annexed as a Political Declaration to the withdrawal agreement and referenced in the agreement.⁸

¹ The European Council [Guidelines](#) of April 2017 set out a phased approach to the negotiations: first, the core issues of the withdrawal agreement (citizens' rights, a financial settlement, and Northern Ireland) would be discussed; in a second phase, arrangements for a transitional period, as requested by the UK, would be negotiated and preliminary discussions on the framework for the future EU-UK relationship would take place. The Council [negotiating directives](#) of 22 May 2017 confirmed this approach.

² [Joint report](#) from the negotiators of the European Union and the United Kingdom Government on progress during phase 1 of negotiations under Article 50 TEU on the United Kingdom's orderly withdrawal from the European Union, 8 December 2017. See also [The Brexit process: Moving to the second phase of negotiations](#), Carmen-Cristina Cîrlig, Eva-Maria Poptcheva, EPRS, European Parliament, 20 December 2017.

³ [European Council \(Article 50\) Guidelines](#), 15 December 2017. See also [Phase 2 of the Brexit talks: annotation of the EU27 negotiation position](#), S. Peers, EU Law Analysis blog, 25 January 2018.

⁴ [European Commission Draft withdrawal agreement](#) on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, 28 February 2018.

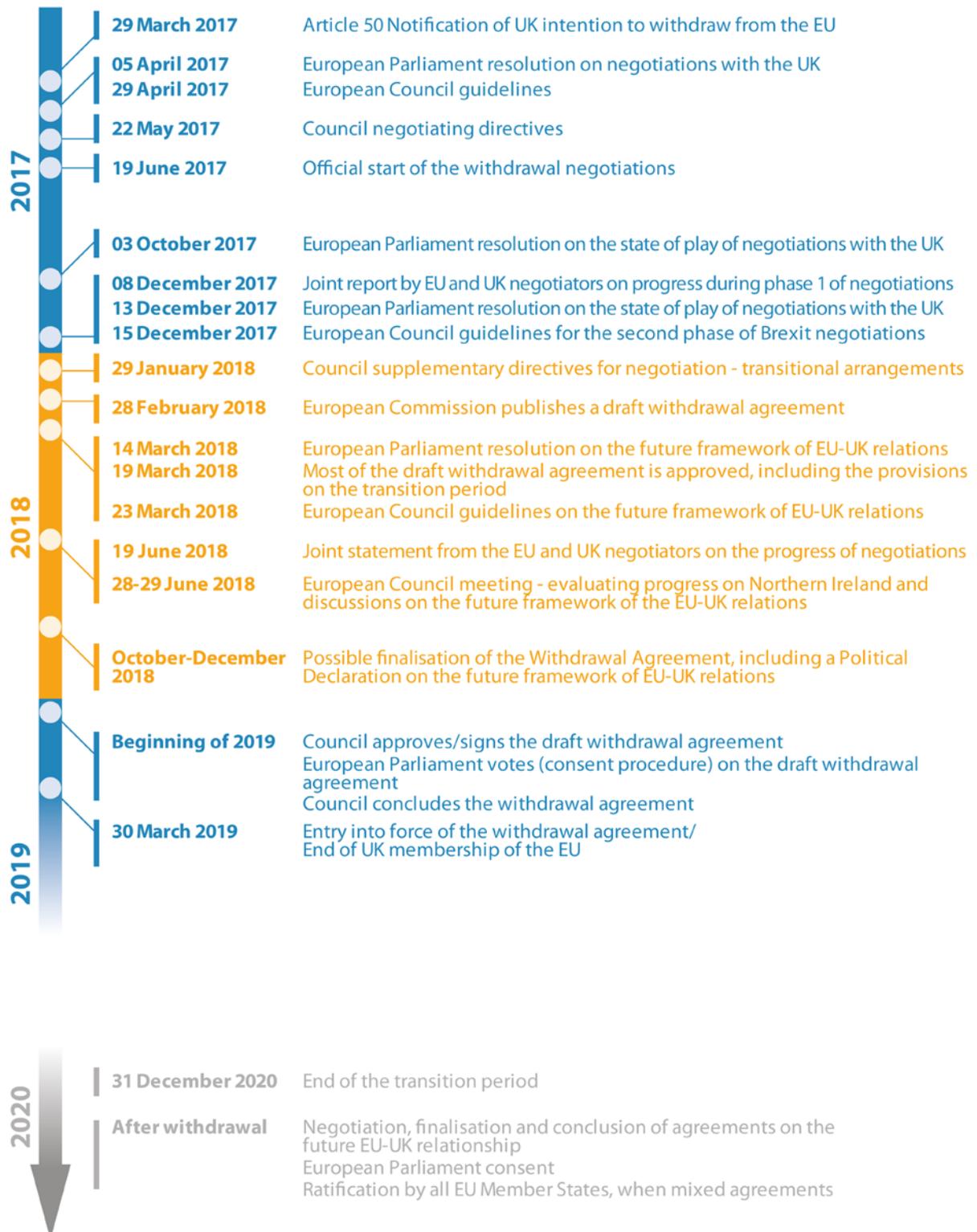
⁵ Annex to the Council Decision supplementing the Council Decision of 22 May 2017 authorising the opening of negotiations with the United Kingdom of Great Britain and Northern Ireland for an agreement setting out the arrangements for its withdrawal from the European Union – [Supplementary directives for negotiation](#), Council of the EU, 29 January 2018. See also [Brexit: Council Directives for Negotiations on Transition](#), House of Commons Library, Sylvia de Mars, Briefing paper CBP-8234, 9 March 2018.

⁶ [Press statement](#) by Michel Barnier following the latest round of Article 50 negotiations, 19 March 2018.

⁷ [Draft Agreement](#) on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, 19 March 2018.

⁸ [European Council \(Article 50\) guidelines on the framework for the future EU-UK relationship](#), 23 March 2018.

Figure 1: Timeline of key events in the Brexit negotiations



Source: EPRS.

2. The draft withdrawal agreement: Structure and main points settled

The draft text contains 168 articles structured in six parts and two protocols (which will have the same legal value as the main parts of the agreement), as well as some annexes, as follows:

- Part one on common provisions: includes the definitions of terms and concepts used throughout the agreement, as well as the territorial scope and the principles and methods governing the effect and implementation of the agreement. Some provisions in this chapter are still coloured white, indicating that negotiations are still needed.
- Part two on citizens' rights: sets out in legal terms the common understanding contained in the December joint report, with some changes. This part has been fully agreed by the negotiators.
- Part three on separation provisions: refers to issues that have not been discussed in detail during the first phase of the talks and which refer to procedures or situations not concluded at the end of the transition period, such as goods placed on the market; ongoing customs, VAT and excise matters; intellectual property; ongoing police and judicial cooperation in civil/commercial and criminal matters; protection of data; ongoing public procurement procedures; Euratom; ongoing EU judicial and administrative processes; privileges and immunities; and provisions relating to the functioning of the institutions. Many of these issues have not yet been agreed.
- Part four on transition: contains agreed transitional provisions, to be put in place following the day of UK withdrawal until 31 December 2020, to allow businesses and people enough time to prepare for the upcoming changes and avoid a cliff-edge UK withdrawal from the EU.
- Part five on financial provisions: contains the detailed financial settlement, the main principles of which were already agreed in the joint report of 8 December 2017.
- Part six on institutional and final provisions: contains provisions on the jurisdiction of the CJEU, on the dispute settlement mechanism, and institutional arrangements for the governance of the agreement. This part has not been agreed in its entirety.
- Two Protocols: the first relating to Ireland/Northern Ireland, and the second relating to the Sovereign Base Areas in Cyprus. Negotiations continue on both protocols.
- Annexes.

The Commission's first draft withdrawal agreement of 28 February 2018 – which translates the commitments undertaken in the joint report of 8 December 2017 in legal terms – represents the basis for the talks with the UK government. This draft incorporated the Commission's proposals on the transitional period,⁹ to which the UK government responded on 21 February with a paper on an 'implementation period',¹⁰ stressing that the EU and UK positions were in broad alignment, with the exception of a small number of areas. On 19 March, agreement was eventually reached on the transitional provisions in Part four of the draft withdrawal agreement, as well as on the citizens' rights and the financial settlement, based on the joint report. A Joint Committee has been agreed as the body responsible for the implementation and application of the withdrawal agreement. The date of entry into force of the withdrawal agreement has been set in principle at 30 March 2019.¹¹

⁹ [Transitional Arrangements in the withdrawal agreement](#), Position paper, European Commission, 7 February 2018.

¹⁰ [Draft Text for discussion: Implementation Period - Position Paper](#), UK Government, 21 February 2018.

¹¹ This date has been agreed in principle. Given the one-hour time difference between GMT in the UK and Central European Time, for the [EU](#), the UK will exit the EU on 30 March 2019, at 00.00 (CET), while for the UK this means on 29 March at 23.00 (GMT).

Compared to the initial version, the draft text of 19 March includes a series of changes, enumerated in a report by the Library of the House of Commons.¹² For example, a 'good faith' clause has been inserted in Article 4a. Article 32, which explicitly restricted UK citizens' freedom of movement to the EU Member State of their residence, was removed. Article 121 now refers to the transition period as a transition or implementation period; Article 124 (4) clarifies that the UK may 'negotiate, sign and ratify' international agreements during the transition period, but those agreements may not enter into force or apply during the transition, unless authorised by the EU. Article 152 on the creation of a UK Independent Authority to supervise the respect of citizens' rights provisions in the UK, mentions that this UK Authority will have equivalent powers to those of the Commission. Furthermore, in its paragraph 3 the article provides that the Joint Committee (the body to be responsible for governing the entire withdrawal deal) will carry out an assessment after eight years, when the Committee may decide to abolish the Independent Authority. Finally, Article 168 clarifies that the withdrawal agreement may not enter into force on the date set (30 March 2019) if the internal approval procedures have not been completed either in the EU or the UK. It also adds that, when notifying ratification, should the EU announce that a Member State has decided, for fundamental reasons, not to surrender its nationals under the European Arrest Warrant to the UK during the transition period, then the UK may declare, no later than one month after receipt of the Union declaration, that it will not surrender its nationals to that Member State.

The UK government listed a number of improvements secured in the draft withdrawal treaty text of 19 March, compared to the version put forward by the European Commission in February. They include:¹³

- the possibility for the UK to sign and ratify trade deals during the transition period, to be brought into force on 1 January 2021;
- the ability for the UK to act in international bodies in its own right during the transition period;
- freedom for the UK to move to future arrangements on foreign policy and defence collaboration as soon as they are ready and not to be bound to accept or apply EU decisions with which it does not agree;
- creation of a joint committee to oversee the transition agreement, with a clear commitment on both sides to act in good faith;
- wording to ensure that Gibraltar is included in the agreement;
- safeguards to ensure that the UK is consulted on fishing quotas for 2019, with a commitment that Britain's share of the total catch cannot change;
- agreement that UK citizens will be free to live and work in the EU during the transition period and a reduction from two years to six months in the proposed 'grace period' (from the end of the transition period) for EU citizens to apply for immigration status in the UK.

On the other hand, commentators have pointed to the main UK concessions in the draft withdrawal text of 19 March 2018, made in exchange for securing an agreement on a transition or implementation period to give UK businesses some certainty for the future.¹⁴ First of all, although its goal remains that the issue of Northern Ireland is solved in the future relationship agreement, the UK government has accepted EU proposals to include a 'backstop' option in the Protocol on Northern Ireland – a default scenario that would apply to Northern Ireland in the event of no other solution being agreed. The purpose would be to avoid a hard border on the island of Ireland after Brexit and support continued north-south cooperation, in respect of the 1998 Belfast Agreement. While the creation of a 'common regulatory area' proposed by the Commission was not agreed,¹⁵ the UK Prime Minister committed to including 'operational legal text for at least the so-called

¹² [Brexite: the draft withdrawal agreement](#), Library of the House of Commons, Briefing paper 8269, 23 March 2018.

¹³ [No 10 lists concessions UK secured in withdrawal treaty negotiation](#), *The Guardian*, 19 March 2018.

¹⁴ [The five costs of UK's pyrrhic Brexit victory](#), D. Roberts and A. Travis, *The Guardian*, 19 March 2018.

¹⁵ See the [Infographic on the EU's backstop proposal](#), European Commission, 11 June 2018.

backstop option set out in the joint report' in a withdrawal agreement.¹⁶ The 'backstop' option can be superseded at any moment by a subsequent agreement on Northern Ireland that could replace, in full or partially, the Protocol. Secondly, the provisions on fishing quotas were contested by many in the UK as a significant concession: accordingly, the UK accepts being bound by the current EU rules on fisheries during the transition. Concerning citizens, the UK has accepted the EU proposal that EU citizens arriving in the UK during the transition period would be granted the same rights as those arriving before Brexit day.

Moreover, although further progress has been announced just before the European Council meeting of 28-29 June,¹⁷ with regard to a series of separation provisions in part three,¹⁸ disagreement persists over some important issues which remain coloured white in the provisional agreement among which: governance of the treaty, including the essential question of the role and powers of the CJEU; ongoing judicial and police cooperation; the protection of data processed before the end of the transition; and geographical indications. The specific details of the Protocol on Ireland/Northern Ireland remain another challenging matter, regarding which discussions have not yielded any breakthrough. The UK government published a technical note on 7 June in which it set out proposed customs arrangements (but not proposals on regulatory arrangements) to implement the backstop solution.¹⁹ This note was discussed in the negotiations but was not seen as the basis of a solution by the EU negotiator.²⁰ This was reflected in the conclusions adopted by the European Council on 29 June, whereby the EU-27 expressed their concern that 'no substantial progress' had been achieved on agreeing a backstop solution for Ireland/Northern Ireland and insisted on the need for intensified efforts on this issue.²¹ As regards the inclusion of Gibraltar in the scope of the withdrawal agreement and the transitional provisions, the European Council conclusions of 23 March 2018 mention the need for intensified efforts – implying that the EU-27 position has not changed on making this reliant on reaching an agreement between Spain and the UK regarding Gibraltar. The European Council conclusions from June 2018 noted that the Gibraltar issue still needed to be agreed. Furthermore, work was still necessary on deciding new arrangements between the EU and the UK over its Sovereign Base Areas in Cyprus, as the specific protocol is incomplete and contains a placeholder for the related provisions.²²

¹⁶ See the [letter](#) sent by the UK Prime Minister to the President of the European Council, Donald Tusk, on 19 March 2018.

¹⁷ European Council (Art. 50), [Conclusions](#), 29 June 2018.

¹⁸ [Joint statement](#) from the negotiators of the European Union and the United Kingdom Government on progress of negotiations under Article 50 TEU on the United Kingdom's orderly withdrawal from the European Union, 19 June 2018.

¹⁹ [Technical note: temporary customs arrangement](#), UK government, 7 June 2018.

²⁰ [Slides on UK technical note on temporary customs arrangement](#), European Commission, 11 June 2018.

²¹ European Council (Art. 50), [Conclusions](#), 29 June 2018.

²² [What difference will the Brexit transition make?](#), A. Barker, M. Arnold, *Financial Times*, 19 March 2018.

3. The common provisions and final clauses of the agreement²³

3.1. Common provisions

The common provisions in part one of the draft withdrawal agreement (Articles 1-7) include: the objective of the agreement, the definitions of terms used throughout the text (e.g. Union law or Union citizen), its territorial application, methods and principles related to the implementation of the agreement, as well as articles on how references to Union law, to the Union and its Member States must be interpreted, among other things.²⁴

Most of this part has been agreed by the negotiators. Article 1 sets out the objective of the agreement, namely to establish arrangements for the withdrawal of the UK from the EU and Euratom. The territorial scope of the agreement (Article 3) covers the UK, its Overseas Countries and Territories and the Crown Dependencies (the Channel Islands and the Isle of Man), as well as Gibraltar to the extent EU law was applicable to Gibraltar before Brexit day. The territorial scope, including during the transition, should respect the European Council guidelines of April 2017, in particular as regards Gibraltar; according to the guidelines, the inclusion of Gibraltar in any withdrawal agreement is dependent on the resolution of its status in bilateral negotiations between Spain and the UK.

The only article where there is disagreement in part one is Article 4 on the 'methods and principles relating to the effect, the implementation and the application of this agreement', which refers to the domestic legislation the UK would need to adopt for the implementation of the agreement. The divergence relates however to the parts of the agreement other than citizens' rights, for which the article has been agreed in its entirety (see next chapter). In particular, Article 4 contains provisions on 'the interpretation and application of EU law concepts to which the agreement refers'. It requires namely that the withdrawal agreement has the same legal effect and rules of interpretation in the UK as in the EU. This will be achieved by the UK adopting primary domestic legislation, through which the provisions of the withdrawal agreement will be implemented. Moreover, concepts or provisions of Union law shall be interpreted and applied in accordance with the same methods and general principles as those applicable within the Union. Therefore, references to EU law in the agreement should be interpreted in accordance with the case law of the CJEU handed down before the end of the transition, while CJEU case law coming into effect after the end of the transition should be given 'due regard' by UK authorities.²⁵

As mentioned above, a new clause on 'good faith' has been included in Article 4a, seemingly at the request of the UK government, which was concerned about new EU legislation during the transition phase over which the UK would have no influence.²⁶

Article 6 confirms that the UK will no longer be represented in the institutions, bodies, offices and agencies of the Union, as well as lose decision-making and attendance rights in the meetings of the institutions. The UK will also be excluded from the decision-making and governance of the EU agencies, as well as from participation in meetings of expert groups (with the exceptions provided in the withdrawal agreement). Finally, at the end of the transition the UK loses access to all networks, databases and information systems established on the basis of EU law (Article 7).

²³ This and the following chapters consider the most important issues agreed by the negotiators in the draft withdrawal deal in detail, as well as the remaining challenges. The order may differ from the structure of the draft agreement.

²⁴ [Brexit: the draft withdrawal agreement](#), op. cit., pp. 12-13.

²⁵ [Dispute settlement and the ECJ in the draft withdrawal agreement](#), S. Peers, EU Law Analysis blog, 9 March 2018.

²⁶ [Brexit: the draft withdrawal agreement](#), op. cit., pp. 12-13.

3.2. Final provisions

The final provisions of the draft text contain three articles: Article 166 clarifies that the two Protocols on Northern Ireland/Ireland and Cyprus, as well as the Annexes are an integral part of the withdrawal agreement. Article 167 specifies the languages in which the authentic text of the agreement will be drawn up, and identifies the Secretary-General of the Council as the depositary. Finally, Article 168 contains the essential provisions on the entry into force and application of the agreement. While the first two articles have been fully agreed, the latter remains highlighted in yellow, indicating agreement in principle. It sets the date of entry into force of the agreement at 30 March 2019, unless one of the parties fails to transmit written notification to the depositary regarding the completion of internal procedures for the adoption of the agreement, in which case the agreement will not enter into force. The article also specifies which provisions will apply as from the end of the transition period, including parts two and three, with some exceptions, as well as the two Protocols (except Article 10 of the Protocol on Northern Ireland/Ireland regarding the Specialised Committee on Northern Ireland, which will be established earlier upon the entry into force of the withdrawal agreement). Finally, the article offers the option for Member States, under certain circumstances, to decline to surrender a national to the UK under the European Arrest Warrant during the transition period. The EU will transmit the notification on behalf of the Member State, in which case the UK may declare within one month that it will in turn not surrender its nationals to that Member State.

4. Citizens' rights

Part two of the draft withdrawal agreement covers citizens' rights and concerns millions of EU citizens on both sides of the English Channel who have availed themselves of their free movement rights and moved to live, work, study or retire in another Member State. The uncertainties they face as a result of Brexit have been well documented,²⁷ and both sides at the negotiating table (EU27 and UK) embraced protecting citizens' rights as an early priority in the negotiations. Compared to the issues of financial settlement or Northern Ireland, the part on citizens' rights was agreed upon relatively speedily – although some controversies persist(ed) and/or were subject to last-minute changes, removals or additions (e.g. the issue of continuing free movement of EU citizens during the transition period,²⁸ future free movement rights of UK nationals, or the position of future spouses/partners).

From the beginning, the aim of the EU negotiator has been to avoid disrupting citizens' lives due to the UK decision to leave the EU (or, at least, to keep such disruption to the minimum). The early position papers on the matter aimed at maintaining the 'same level of protection' post-Brexit as set out in Union law.²⁹ Arguably, the current draft withdrawal goes a long way to achieving this aim by safeguarding many – if not most – of the essential guarantees of EU free movement law for those who made use of it. At the same time, the many outstanding questions remain salient, and it is clear that certain categories of persons are likely to enjoy lesser protection than they do at present. Moreover, as is usually the case with regard to the complex body of EU free movement law, the devil lies in the detail – for reasons of space such details cannot be discussed in great detail here, but have been covered elsewhere.³⁰ Most importantly, the long-standing caveat that that **'nothing is agreed until everything is agreed'** still holds – despite the repeated (and still standing) calls from citizens'

²⁷ For a comprehensive compilation of case studies concerning the uncertainties faced by British citizens see, for example, [British in Europe](#). See also [Brexit: acquired rights](#), 10th report, European Union Committee, House of Lords, 2016.

²⁸ [No deal for EU citizens coming to UK during Brexit transition – PM](#), J. Elgot, A. Asthana, D. Boffey, *The Guardian*, 31 January 2018.

²⁹ [Essential Principles on Citizens' Rights](#), position paper, European Commission, 12 June 2017.

³⁰ [EU Law Analysis](#) blog, S. Peers.

groups to ring-fence their rights from other issues tackled during withdrawal negotiations.³¹ Consequently, the legal guarantees for citizens continue to depend on the success of the outcome of the overall negotiation process, which covers other issues – arguably more difficult to solve.

4.1. Residence and related rights

The citizens' rights part of the draft agreement covers residence rights and equal treatment (Articles 12-21), rights of workers and self-employed persons (Articles 22-24), recognition of professional qualifications (Articles 25-27) and social security coordination (Articles 28-31).

First and foremost, the draft agreement envisages that EU-27 and UK citizens residing on the basis of EU law before the end of the transitional period will essentially **maintain** the (residence) rights they currently enjoy, under the currently applicable conditions and limitations. As covered in depth in previous publications,³² these conditions vary depending on the category of persons concerned: workers, self-employed, (first-time) job-seekers, students, non-economically active persons (e.g. pensioners), and permanent residents. This protection includes rights which are **in the process** of being obtained: citizens will be able to acquire the right to **permanent residence** (i.e. right to residence which is no longer subject to conditions such as being a worker or having sufficient resources) after five years of lawful residence, even if such time period is completed **after** the end of the transition period (Article 14). This is irrespective of whether a person **changes status**, for example, becomes a worker after being a student or economically inactive after being a worker (Article 16(1)). However, the latest addition to the article seems to incorporate an important limitation to this principle by providing that 'persons who, at the end of the transition period, enjoy a right of residence as family members of Union citizens or UK nationals **cannot** become' right-holders in their own right.

The right of residence will continue to apply to **family members**, whether EU or non-EU, but with some limitations compared to the currently applicable standards under EU law. The right of residence is to include children adopted or born after the end of the transition period. However, the latest wording seems to remove the protection of future partners and spouses by expanding coverage only to those who 'were directly related' to an EU/UK citizen and resided outside the host state 'before the end of the transition period'. The current wording also seems to exclude, for example, the non-EU family members of returning migrants (known as *Surinder Singh* cases among free movement lawyers).

In a derogation from the current provisions, which provide for loss of the right to permanent residence after two years' absence from the host state, the draft agreement extends this period to five years (Article 14(3)). While this is longer than the currently applicable period, it should be kept in mind that, so far, under the generous EU free movement provisions, citizens leaving their host state for longer than two years lost their right to permanent residence but could later return (as workers, students etc.). Post-Brexit, this would no longer be the case. EU-27 citizens in the UK who travel abroad for personal or professional reasons would be returning to a non-EU country in which EU free movement law no longer applies. Conversely, United Kingdom nationals would, probably, return to a Member State as third country nationals (TCNs) – although this reading is currently being challenged before a court in the Netherlands.³³ In this context, citizens' groups, and the Parliament

³¹ Draft withdrawal agreement – [British in Europe's Comments, position paper](#) on guaranteeing citizens' rights, the 3million group; [comments](#) on Part II of the draft withdrawal agreement.

³² [The Brexit negotiations: Issues for the first phase](#), A. d'Alfonso, J. McEldowney, E-M. Poptcheva, L. Tilindyte, EPRS, European Parliament, 22 June 2017.

³³ [Does Member State withdrawal from the European Union extinguish EU citizenship?](#), C/13/640244 / KG ZA 17-1327 of the Rechtbank Amsterdam (the Amsterdam case), O. Garner, European Law Blog, 19 February 2018; UK nationals and EU citizenship: References to the European Court of Justice and the February 2018 decisions of the District Court, Amsterdam, [EU law analysis blog](#), A. Arnulf.

in its resolution of 14 March 2018, respectively called for a **lifelong right** for UK and EU-27 citizens to return.³⁴

To the great disappointment of UK nationals in the EU, the 28 February version of the draft agreement in Article 32 explicitly excluded **future free movement rights** for UK nationals to move throughout the EU, which attracted criticism from both the Parliament (resolutions of 13 December 2017 and 14 March 2018),³⁵ and citizens' groups. While the 19 March version omits this provision, this does not remove the uncertainty surrounding the essence, as the draft at different places uses the wording '**and continue to reside there thereafter**', as noted by, for example, British in Europe.³⁶

The draft agreement provides for maintenance of the rights to **equal treatment** for those covered by the agreement, with the currently applicable exceptions (e.g. exclusion from social assistance benefits during the first three months of residence, for first-time job-seekers or from study maintenance aid for students).

Articles 28-31 of the draft cover **social security coordination**. However, the latest additions and limitations to those articles make it difficult to grasp their full implications, as discussed elsewhere.³⁷ The draft essentially provides for continued application to persons covered (mainly those who 'are subject to the [social security] legislation' of either the UK or EU27 countries at the end of the transition period), of the 'rules and objectives' of EU social security coordination legislation. However, a late addition to Article 28 suggests that persons are covered only 'for as long as they continue **without interruption**' to be in one of the situations described involving both a Member State and the UK at the same time. **Planned** healthcare treatment under Regulation 883/2004 which has begun before the end of the transition period may continue until the end of the treatment (Article 29(3)). The rules on European Health Insurance Card (EHIC) healthcare will apply to a person who is staying in a Member State/UK at the end of the transition period **until the end of stay**. (Article 29a(1)(c)).

4.2. Administrative formalities

Under EU free movement law, national residence documents are '**declaratory**' in nature – they do not confer rights but merely attest to them.³⁸ In other words, a person is able to reside in a Member State as long as they fulfil the underlying conditions for residence, irrespective of whether or not they possess a document proving that right. While the initial EU position has been that it should stay this way, the draft agreement leaves it open for the EU-27 and the UK to opt for a system of residence permits, in which the possession of national residence documents is a precondition of enjoyment of rights, and which has been abolished by Directive 2004/38. This accommodates the initial UK position and echoes the plans of a 'settled status' as outlined in an earlier UK position paper of 26 June 2017

³⁴ [Detailed analysis of draft withdrawal agreement](#), British in Europe, 7 March 2018.

³⁵ European Parliament [resolution](#) of 13 December 2017 on the state of play of negotiations with the United Kingdom (2017/2964(RSP)), and European Parliament [resolution](#) of 14 March 2018 on the framework of the future EU-UK relationship (2018/2573(RSP)).

³⁶ [Brexit withdrawal agreement: English Cheddar will have more free movement rights than Brits in Europe](#), BIE response to agreed legal text, British in Europe, 19 March 2018.

³⁷ [The implications of the Revised European Commission Draft withdrawal agreement text for health, part 1: patients and reciprocal healthcare](#) (Updated 18 March 2018), T. K. Hervey, EU Law Analysis blog, updated 18 March 2018.

³⁸ As also confirmed by CJEU: 'issuance of a residence permit to a national of a Member State is to be regarded not as a measure giving rise to rights but as a measure by a Member State serving to prove the individual position of a national of another Member State', case [C-215/03, Oulane](#), para 18.

on the matter.³⁹ This was repeatedly criticised in European Parliament resolutions, which call for a 'declaratory' approach instead.

The draft agreement includes important guarantees regarding the application procedures for residence documents and specifies that such procedures must be **smooth, transparent and simple** (Article 17(1)(e)). Against the background of rising reports of cumbersome and erroneous application procedures in the UK, the article further specifies that the host state shall not require applicants to present more supporting documents than strictly necessary, and mandates responsible authorities to help the applicants to prove their eligibility and to avoid errors in such applications. Such authorities are further called upon to give applicants the opportunity to furnish supplementary evidence.

Despite these important guarantees, several uncertainties remain. For example, as regards UK nationals across the EU-27, it remains unclear for which system their host Member States will opt, and whether or not they will be required to obtain national residence documents as a condition for their lawful residence. EU-27 citizens in the UK who **already** went through the rather burdensome procedure⁴⁰ of obtaining a certificate of permanent residence will need to obtain a new document, albeit free of charge. The draft further allows systematic criminality and security checks on applicants.

Perhaps somewhat more worryingly for the category of economically inactive citizens, the application for national residence documents will entail verification of compliance with the conditions of residence, among which figure '**comprehensive sickness insurance cover**' and '**sufficient resources**'. Regarding the former, the UK has consistently refused to accept access to the National Health Service as such cover – an issue regarding which the Commission had begun an infringement procedure in 2012.⁴¹ The UK, in its technical note on citizens' rights and administrative procedures in the UK of 7 November 2017, committed to **waiving** the requirement of comprehensive sickness insurance when EU citizens apply for an immigration status.⁴² However, the fact that this commitment is not in the legal text of the draft agreement speaks for itself – this is not intended to become a legally enforceable right.⁴³

4.3. Enforcement of rights and the role of the CJEU

The draft withdrawal agreement clearly states that citizens 'shall be able to rely directly' on parts of the agreement concerning their rights, and any national incompatible or inconsistent provisions shall be set aside (Article 4 (1)). Provisions of the agreement referring to EU law concepts or provisions (e.g. 'worker', 'frontier worker', 'abuse of rights' or 'sufficient resources') are to be interpreted in conformity with relevant case law handed down before the end of the transition period, while subsequent case law is to be given 'due regard' (Article 4 (4) and (5)). Article 151 provides for the possibility for UK courts to request the CJEU give a preliminary ruling if a case starts within eight years from the end of the transition period. This is similar to the existing provisions,

³⁹ [Safeguarding the position of EU citizens in the UK and UK nationals in the EU - position paper](#), UK Government, 26 June 2017. The UK Home Office announced on 21 June 2018 the details of the planned EU Settlement Scheme. See [EU Settlement Scheme: Statement of Intent](#), 21 June 2018.

⁴⁰ [Application for a document certifying permanent residence or permanent residence card under the EEA Regulations](#), UK Visa and Immigration, Version 01/2018.

⁴¹ [Free movement: Commission asks the UK to uphold EU citizens' rights](#), press release, European Commission, 26 April 2012. See also the [answer](#) given by Commissioner Věra Jourová on behalf of the European Commission on 22 November 2016 regarding this matter.

⁴² [Technical note: citizens' rights, administrative procedures in the UK](#), UK Government, 7 November 2017.

⁴³ On the issue of comprehensive sickness insurance cover see, inter alia, G. Davies, [The UK and sickness insurance for mobile citizens: an inequitable mess for Brexit negotiators to address](#), European Law Blog, 17 March 2017; also G. Davies, [The State of Play on Citizens' Rights and Brexit](#), European Law Blog, 6 February 2018; S. Peers, [The Beginning of the End? Citizens' rights in the Brexit 'Sufficient Progress' deal](#), EU Law analysis blog, 9 December 2017.

except that such referral is currently obligatory, with some exceptions, for the highest courts (or courts 'against whose decisions there is no judicial remedy under national law). Moreover, Article 152 mandates the creation of an 'independent authority' to monitor the implementation of the above provisions concerning citizens' rights, which shall have 'equivalent powers to those of the Commission' to receive citizens' complaints, to conduct inquiries on its own initiative and to bring a legal action before a competent court.

The European Parliament and citizens' rights

The European Parliament⁴⁴ has made citizens' rights its first priority from the beginning of Brexit negotiations. Prior to the start of negotiations, Parliament's resolution of 5 April 2017 demanded the fair treatment of EU and UK citizens, and called for their respective rights and interests to be given full priority in the negotiations. Subsequently, Parliament emphasised that the agreement should 'incorporate the full set of rights citizens currently enjoy, such that there is no material change in their position', and also cover future children and future family members, ensure that required documents are declaratory in line with EU law, that any burdensome administrative procedures are avoided, and that all benefits defined in EU legislation are exportable.⁴⁵

In a statement of 19 March 2018, the Parliament's Brexit Steering Group welcomed the draft agreement, while noting that the Parliament reserved its right of scrutiny and that 'nothing is agreed until everything is agreed'. The Steering Group stated that the Parliament will continue to push for: UK citizens' right to be able to move freely within the EU-27, the rights of future spouses of EU nationals in the UK, as well as for the 'removal of any limitation on the return of EU citizens to the UK'. Regarding the future registration procedure for EU-27 citizens, on 24 April, the Brexit Steering Group, with the involvement of five parliamentary committees (Civil Liberties, Justice & Home Affairs (LIBE), Employment & Social Affairs (EMPL), Legal Affairs (JURI), Constitutional Affairs (AFCO), and Petitions (PETI)), held a meeting with the UK Home Office, in order to evaluate and assess the proposed system and to ensure that it is really 'smooth, transparent and simple and that any unnecessary administrative burdens are avoided'.⁴⁶ In response to the UK government's policy paper of 21 June 2018 – 'EU Settlement Scheme statement of intent' – the Parliament's Brexit Steering Group expressed a number of outstanding concerns, that would have to be taken into account by the UK government 'during the consultation and testing phase of the Scheme before its official launch'. In particular, these concerns relate to: the powers and responsibilities of the Independent Monitoring Authority to be established in the UK; the fees EU-27 citizens would have to pay for registration; the needs of vulnerable citizens, as well as the consequences of potential delays in the registration process.⁴⁷ A joint letter sent to the UK Home Secretary on 3 July 2018 by the EP Brexit Coordinator and the Chair of the LIBE committee further details these concerns.⁴⁸

5. The financial settlement

Financial provisions of the withdrawal agreement are based on the 8 December 2017 joint report agreed by the European Commission and the United Kingdom summarising progress made during the first phase of negotiations under Article 50 on the UK's orderly withdrawal from the EU.⁴⁹ The part of the joint report dealing with the financial settlement largely reflects the Commission's

⁴⁴ Visit the European Parliament homepage on [Brexit negotiations](#).

⁴⁵ Resolution of 5 April 2017 on [negotiations with the United Kingdom](#) following its notification that it intends to withdraw from the European Union, European Parliament; [Resolution](#) of 3 October 2017 on the [state of play of negotiations with the United Kingdom \(2017/2847\(RSP\)\)](#) European Parliament; Resolution of 13 December 2017 on the [state of play of negotiations with the United Kingdom](#), European Parliament.

⁴⁶ [Statement](#) by the European Parliament's Brexit Steering Group, 19 March 2018.

⁴⁷ [Statement](#) by the Brexit Steering Group on UK paper on EU citizens in the UK, Press release, 3 July 2018.

⁴⁸ [Letter](#) on behalf of the EP Brexit Coordinator and the Chair of the LIBE Committee to the Rt Hon Sajid Javid, Secretary of State for the Home Department, 3 July 2018.

⁴⁹ For more on the other issues in the joint report, see C. Cirlig and E. Poptcheva, [Sufficient progress in first-phase Brexit talks](#), EPRS, European Parliament, December 2017.

position paper 'Essential principles on financial settlement', which was published on 12 June 2017.⁵⁰ The UK government did not publish any paper outlining its position on the financial settlement. However, in the speech delivered in Florence on 22 September 2017, Prime Minister Theresa May recognised the UK's obligations to the EU budget when she said that 'the UK will honour commitments we have made during the period of our membership'.⁵¹ The joint report of 8 December established the main principles of the financial settlement, and the draft withdrawal agreement translated those commitments into detailed obligations on both the UK and the EU.

The European Parliament's views on the financial settlement

The European Parliament, in a resolution of 5 April 2017 on the Brexit negotiations, underlined that 'the United Kingdom must honour all its legal, financial and budgetary obligations, including commitments under the current multiannual financial framework, falling due up to and after the date of its withdrawal'.⁵²

Subsequently, on 3 October 2017, the European Parliament, in a resolution on the state of play of negotiations with the United Kingdom, set a condition on 'entering into discussions on other issues, including the framework for the future relationship between the European Union and the United Kingdom' on achieving substantial progress in settling the UK's financial obligations.⁵³

The European Parliament in its resolution of 13 December 2017 evaluated very briefly the financial settlement included in the joint report, concluding that the 'UK has clarified adequately what financial obligations it will honour as a departing Member State'.⁵⁴

5.1. How much is the United Kingdom financial settlement?

The withdrawal agreement does not refer to any estimate of the total amount of the financial settlement. However, it does describe the EU and the UK's future financial relations for the proposed transition years 2019 and 2020. As far as these two budgetary years are concerned, the UK will have the same rights and obligations as if it remained an EU Member State. Beyond 2020, the UK will remain liable to the EU, but those liabilities, and assets, are impossible to estimate, because they will result from outturns (some paid out well beyond 2020, such as pensions), among other things, and not from the current estimates. Further uncertainty as to the final total amount of financial settlement owed by the UK is added by, among other things, the changing pound to euro exchange rate, contingency of some EU financial activities, and payments resulting from closing the current and past EU Multiannual Financial Frameworks (MFF).

5.2. The principles of establishing the financial settlement

The withdrawal agreement sets several principles for the financial settlement. Firstly, the UK will not finance any commitments that do not require funding from Member States, and will receive a share of any financial benefits that would have been due to the UK had it remained a Member State. The UK opt-outs from EU programmes existing at the date of withdrawal will continue to apply in respect of the financial settlement. Secondly, except for UK payments relating to UK participation in EU annual budgets to 2020, the UK share in relation to the EU budget will be a percentage calculated as the ratio between the own resources made available by the UK during the 2014-2020 period and

⁵⁰ [Position paper transmitted to the UK: essential principles on the financial settlement](#), European Commission, 12 June 2017. For more on the Commission's position paper, academic commentary on the topic and press coverage, including estimates of the financial settlement, see A. D'Alfonso, E. Poptcheva, J. McEldowney, and L. Tilindyte, [The Brexit negotiations: Issues for the first phase](#), EPRS, European Parliament, June 2017.

⁵¹ [PM's Florence speech: a new era of cooperation and partnership between the UK and the EU](#), 22 September 2017.

⁵² Resolution of 5 April 2017 on [negotiations with the United Kingdom](#) following its notification that it intends to withdraw from the European Union, European Parliament.

⁵³ Resolution of 3 October 2017 on the [state of play of negotiations with the United Kingdom](#), European Parliament.

⁵⁴ Resolution of 13 December 2017 on the [state of play of negotiations with the United Kingdom](#), European Parliament.

the own resources made available by all Member States, including the UK, during the same period. Thirdly, payments arising from the financial settlement will become due as if the UK had remained a Member State. The UK's share of the liability related to pension and other post-employment benefits for EU staff and staff from the European Defence Agency, the EU Institute for Security Studies and the EU Satellite Centre, as established on 31 December 2020, will be paid when these amounts fall due. Fourthly, data for the calculation of UK obligations will be drawn up from publicly available sources where possible, and audited by the European Court of Auditors and auditors entrusted by the UK. The EU will provide the UK with the management and accounting information necessary to verify the components of the financial settlement in a timely manner. Finally, the financial settlement will be drawn up and implemented in euro.

5.3. UK participation in EU budget and EU programmes

The UK will participate in the implementation of the EU's annual budgets for 2019 and 2020 as if it were an EU Member State. However, any amendments to the 2014-2020 MFF Regulation⁵⁵ or the Own Resources Decision⁵⁶ adopted after the date of withdrawal will not apply to the UK. As far as outstanding commitments at the end of 2020 (known as *reste à liquider*, RAL) is concerned, the UK will contribute its share of the financing of the budgetary commitments. The EU rules on own resources shall continue to apply to the UK after 2020, including their availability, corrections and adjustments.

The UK shall be able to continue to participate in EU programmes financed under the 2014-2020 MFF until their closure. Entities located in the UK will be entitled to participate in such programmes. Participation in EU programmes will require the UK and UK beneficiaries to respect all relevant EU legal provisions, including co-financing. Accordingly, eligibility to apply to participate in EU programmes and EU funding for UK participants and projects will be unaffected by the UK's withdrawal from the EU for the entire lifetime of these projects.

5.4. UK contribution to EU liabilities

The UK will contribute its share of the financing of the EU's liabilities incurred before 31 December 2020 with certain exceptions. For those liabilities related to guarantees given by the EU budget to support financial operations (for example, loans for financial assistance, financial operations managed by the European Investment Bank (EIB) such as the European Fund for Strategic Investments (EFSI) or the external lending mandate, financial operations managed by other financial institutions, or EU budgetary financial instruments), UK liability will be limited to decisions on each financial operation adopted prior to the date of withdrawal. However, for contingent liabilities related to legal cases as a result of participation in the budget, programmes and policies, the cut-off date will be 31 December 2020. In the event of EU contingent liabilities for which the UK is liable being triggered, the UK will receive its share of any subsequent recoveries. In particular the UK shall be liable for its share of the EU liability for the pensions and other employee benefits rights accrued on or before 31 December 2020.

5.5. UK withdrawal from non-budget EU financial arrangements

The UK's paid-in capital held in the European Central Bank will be reimbursed to the Bank of England.

⁵⁵ Council Regulation (EU, Euratom) No 1311/2013 of 2 December 2013 laying down the multiannual financial framework for the years 2014-2020 (OJ L 347, 20 December 2013, p. 884).

⁵⁶ Council Decision 2014/335/EU, Euratom of 26 May 2014 on the system of own resources of the European Union (OJ L 168, 7 June 2014, p. 105).

The UK shall remain liable for the financial operations approved by the European Investment Bank before the date of entry into force of the withdrawal agreement. The UK share of the paid-in capital will be reimbursed in 12 instalments (until 2025), totalling almost €3.5 billion.

The UK shall remain party to the European Development Fund (EDF), which is governed by a separate international agreement and is outside the EU budget, until the closure of the 11th EDF. The UK will honour its share of the total commitments made under this EDF and the payments related to its share of the outstanding commitments made under previous EDFs. The UK share of the EDF Investment Facility from successive EDF periods shall be reimbursed to the UK as the investment matures.

The UK shall honour the commitments to the EU Emergency Trust Fund for stability and addressing root causes of irregular migration and displaced persons in Africa and to the Facility for Refugees in Turkey.

6. The transition period

In her speech in Florence in September 2017, the UK Prime Minister formally requested an implementation period following UK withdrawal, to last for around two years and to allow the necessary time for businesses and people to prepare for the changes arising from Brexit, thereby avoiding a cliff-edge UK departure from the EU.⁵⁷ This implementation period would also provide a 'bridge', in the UK's view, to the 'deep and comprehensive' future partnership it seeks with the EU. Talks on the arrangements for a transitional or implementation period started in January 2018, following the Council's supplementary directives for negotiation from 29 January 2018. On 7 February, the Commission published a position paper on the transitional arrangements which was included with minor modifications in the draft withdrawal deal published at the end of February.⁵⁸ The UK Government also issued three documents regarding an implementation period: a technical note on international agreements, a 'Draft text for discussion: implementation period', and a paper on EU citizens arriving in the UK during the implementation period.⁵⁹ Despite significant disagreement on some points,⁶⁰ intense negotiations took place to settle the transitional arrangements before the European Council (EU-27) adopted conclusions on the framework for future EU-UK relations on 23 March. On 19 March 2018, the EU and UK negotiators reached an agreement on the transitional arrangements to be included in the withdrawal agreement (Articles 121 to 126 of the draft).

6.1. The transitional arrangements

The transitional or implementation period would apply after the entry into force of the withdrawal agreement (in the current draft agreement that date is 30 March 2019) until no later than 31 December 2020 (Article 121). This has been proposed by the EU to coincide with the end of the current MFF. The transitional period will therefore last for a period of 21 months, during which the status quo would be preserved (a 'standstill' transition), based on the existing EU *acquis*, including the preservation of all four freedoms of movement. The UK will remain part of the Single Market and Customs Union after the date of withdrawal, until the 31 December 2020, bound by all obligations

⁵⁷ [PM's Florence speech: a new era of cooperation and partnership between the UK and the EU](#), United Kingdom Government, 22 September 2017.

⁵⁸ '[Transitional Arrangements in the Withdrawal Agreement](#)', position paper, European Commission, 7 February 2018.

⁵⁹ [Technical note on international agreements](#), policy paper, UK Government, 8 February 2018; [Draft text for discussion: implementation period](#), policy paper, UK Government, 21 February 2018; [EU citizens arriving in the UK during the implementation period](#), policy paper, UK Government, 28 February 2018.

⁶⁰ See in particular the table summarising the EU and UK positions, in [Brexit: the draft withdrawal agreement](#), Commons Library Briefing, No. 8269, 21 March 2018, p.44.

entailed by this membership. This means that trade and cooperation between the UK and the EU remains unchanged, and that the UK will continue to contribute to the EU budget and submit to the jurisdiction of the CJEU. Nevertheless, the UK will lose its decision-making powers and representation in all EU institutions, bodies and agencies, as provided for in Article 6 of the common provisions. The detailed provisions are set out in detail below:

- During the transition, the entire EU *acquis*/EU law will apply to the UK, including new acts adopted during the transition, with some exceptions. The latter concern those provisions that already do not apply to the UK (before Brexit), by reason of its opt-outs (set out in Protocols 15, 19 and 21 annexed to the EU Treaties) and of UK's non-participation in enhanced cooperation procedures. Moreover, other provisions that will not apply to the UK during the transition are the articles of the Treaty on European Union relating to the citizens' initiative (Article 11(4) TEU), to Council decisions approving enhanced cooperation (Article 20(2) TEU), to the European Council identifying the strategic interests and objectives of the EU (Article 22(1) TEU) and to EU competence in the common foreign and security policy (CFSP) and the common defence policy (Article 24(1) TEU), as well as Articles 39 and 40 of the Charter of Fundamental Rights of the European Union, and all acts adopted based on those provisions;
- Furthermore, the parties explicitly agreed that the UK will not take part in any enhanced cooperation set up after the withdrawal date, nor in any enhanced cooperation in the framework of which no acts had been adopted before withdrawal;
- EU law during transition will have the same legal effects in the UK as in the other EU Member States, and will be interpreted and applied in the same manner, in accordance with the methods and general principles applicable within the Union;
- Should an agreement between the EU and the UK on CFSP and CSDP related matters come into force during the transition, then the relevant provisions on CFSP in the Treaty will cease to apply to the UK. It should be noted that CFSP and CSDP are EU policies based largely on unanimous decision-making, therefore in absence of such an agreement to enter into force upon withdrawal, the UK will have no influence in decisions adopted in these areas during the transition;
- As concerns amendments during the transition period to those acts in the area of freedom, security and justice (Protocol 21), as well as the Protocol on Schengen (No 19) to which the UK opted in before Brexit, the procedure remains the same: the UK may give notification of its wish to participate in the amended measures. On the other hand, the UK may not participate in **new measures** adopted under these titles; according to Steve Peers, the current rule (not used so far) that the UK can be 'thrown out' of existing laws in this area if it does not opt in to measures amending those existing laws will still apply.⁶¹ The EU may invite the UK to cooperate under the terms of a third state under these new measures;
- The UK is excluded from the arrangements on Permanent Structured Cooperation (PESCO) set up under the CSDP (actually the UK decided not to participate in PESCO at the time of its adoption by the Council);⁶² however, the UK may be invited to participate in individual projects, under the conditions applicable to third countries;
- The UK (including its nationals, natural and legal persons residing in the UK) is also excluded from projects and programmes in implementation at the end of the transition or starting afterwards that would give access to sensitive information;
- The UK will have no right to submit proposals, requests or initiatives to the EU institutions; the UK Parliament will lose any right to object to new EU legislation under Protocol 1 on the role of the national parliaments in the EU, but will keep its right to be informed on any draft

⁶¹ [Phase 2 of the Brexit talks: annotation of the EU27 negotiation position](#), S. Peers, EU Law Analysis, 25 January 2018.

⁶² [Council Decision \(CFSP\) 2017/2315](#) of 11 December 2017 establishing permanent structured cooperation (PESCO) and determining the list of participating Member States.

legislative act or commission consultation documents in respect of proposals which are in the public domain;

- The UK may be invited to participate, as an exception and on a case by case basis, with no voting rights, in meetings or parts of meetings of expert groups of the Commission or other institutions, bodies and agencies, provided these meetings concern individual acts to be addressed to the UK during transition, or the participation of the UK is necessary for the effective implementation of EU law;
- In terms of the EU's external action, a few provisions refer to UK participation in the common commercial policy, as well as to EU foreign policy:
- During the transition period, the UK will continue to be bound by existing EU international agreements. To this end, the EU will notify the third parties that the UK is to be considered a Member State for the purposes of these agreements (in this respect the willingness of third countries to accept a roll-over of EU FTAs to the UK during transition will be essential). Nonetheless, the UK will not be represented in the bodies governing or set up by these agreements, unless it participates in its own right or is invited in order to ensure the effective implementation of these agreements. An important concession made by the EU in the draft agreement is that the UK may 'negotiate, sign and ratify international agreements entered into in its own capacity in the areas of exclusive competence of the EU, provided those agreements do not enter into force or apply during the transition period, unless so authorised by the Union';
- In accordance with the principle of sincere cooperation, the UK will refrain from any action or initiative in the field of external policy that would be prejudicial to the interests of the EU. In the case of CFSP decisions adopted by the EU with unanimity, a new provision allows the UK not to apply that decision, for 'vital and stated reasons of national policy', while refraining from any action that will conflict with or impede EU action based on that decision. However, the UK will be consulted on a case by case basis when coordination is needed. Finally, during the transition, the UK will not be able to lead any CSDP mission or operation, nor lead any mission or operation under Article 44 TEU (setting up a framework whereby the Council entrusts the implementation of an operation to willing Member States, when not all EU countries are willing or able to take part in that task);⁶³ it will neither provide operational headquarters for such missions, nor serve as a framework nation for the battlegroups.
- Specific provisions on fishing have also been agreed for the transitional period. In essence the UK remains part of the common fisheries policy during transition, and may only be consulted by the EU on the allocation of fishing quotas (opportunities). This also means that the UK retains the right to comment on the Commission's annual communication and other proposals on fishing opportunities, as well as scientific advice from the relevant bodies. The UK may also join, on invitation, the EU delegation in international negotiations on fisheries, 'with a view to allowing the United Kingdom to prepare its future membership in relevant international fora'. Many in the UK, in particular in the fishing industry, have criticised this aspect of the transition deal, and the government's concession on the issue, despite earlier promises that the UK would 'regain control over our own fisheries management' upon withdrawal.⁶⁴
- As regards supervision and enforcement, all institutional, supervision and enforcement mechanisms set up by EU law will apply to the UK during the transition. This means the CJEU will have full jurisdiction, including for the application and interpretation of the withdrawal agreement during the transition period (Article 126).

⁶³ See for example the [Military Advice on EEAS Food For Thought Paper \(FFT\) on Article 44 TEU](#), European Union Military Committee, 9 March 2015.

⁶⁴ See for example [FAQ: Behind the Brexit fisheries transition deal](#), K. Bolongaro, *Politico Europe*, 21 March 2018; and [Scots take hard line on Brexit fishing rights](#), Elisabeth O'Leary, Reuters, 19 March 2018.

The European Parliament's views on the transition period

The European Parliament's position has been consistent, that while transitional arrangements are indeed needed to ensure legal certainty and continuity, they must also be 'strictly limited both in time – not exceeding three years – and in scope, as they can never be a substitute for European Union membership'. Furthermore, in Parliament's view, transitional arrangements can only be agreed if they:

- contain the right balance of rights and obligations for both parties;
- preserve the integrity of the European Union's legal order, with the CJEU responsible for settling any legal challenges;
- consist of the prolongation of the EU *acquis*, including all the rights conferred to citizens in EU law, and the continued application of existing EU regulatory, budgetary, supervisory, judicial and enforcement instruments and structures to the UK, whilst the UK would no longer be part of the EU institutions and bodies; and
- are fully compatible with WTO obligations in order not to disrupt trade relations with third countries.

Parliament also clarified that any changes to the EU *acquis* that take effect during the transitional period must apply automatically to the UK and that a transitional period agreed as part of the withdrawal agreement can only start once that agreement is in place. Finally, the EP pointed out that during transition the UK will remain bound by the obligations stemming from the EU's international agreements and that any trade agreements with third countries negotiated by the UK after Brexit can only enter into force after the end of the transition period.

6.2. Extending the transition period

There is no provision in the draft text regarding the possibility of extending the transitional period beyond 31 December 2020. While the UK has requested a longer period of transition (of two years), EU negotiators decided against including an extension clause in the draft agreement. Some expect this issue to be revisited in the final stages of the talks, because the 21-month period is also considered by some Member States as too short to prepare future relations,⁶⁵ all the more because trade negotiations (which the UK wants concluded by the end of the transitional period) may in reality take around six years to finalise and ratify.⁶⁶ Also, the transition period of less than two years may be too short for business to prepare, in particular when business is not yet aware of what the future holds. On the other hand, a short transition period is one thing both sides agree on. Politically for the UK it will be difficult to accept an extended transition period in which they are a rule-taker, with no decision-making powers, and where the UK would need to continue contributing to the EU budget. Should the transition period be extended, the UK would need to make contributions to the EU budget within the next MFF, starting on 1 January 2021, in exchange for continued access to the internal market. Equally, for the EU, a longer transition period would mean a renegotiation of the terms of the future MFF and of the EU's own resources to accommodate the UK's continued participation,⁶⁷ and would be likely to be contested before the CJEU.⁶⁸ It must be pointed out that the choice of the legal basis is already contested, as Article 50 TEU makes no mention of transitional arrangements; some suggested that a more appropriate legal basis would have been Article 218 TFEU, meaning that transition would have to be agreed in a separate international – possibly mixed – agreement. The European Parliament had also envisaged a short transition period, of no longer than three years (see textbox above).

⁶⁵ [What difference will the Brexit transition make?](#), A. Barker, M. Arnold, *Financial Times*, 19 March 2018.

⁶⁶ [Brexit: Transition ... or Extension?](#), J. Bruton, The Institute for International and European Affairs, 29 January 2018.

⁶⁷ [Brexit: transition mode d'emploi](#), E. Fabry, M. de Toffol, Policy Paper 218, Institut Jacques Delors, 20 February 2018.

⁶⁸ [The Road to Transition...Paved with Good Intentions?](#), S. Douglas-Scott, UCL European Institute Brexit blog, 14 March 2018.

However, a report by UK parliamentarians suggested that, while aware of the legal and political implications, the government should 'seek a limited prolongation' to the 21 month transition or implementation period, should it prove to be insufficient to ratify the future partnership agreements and implement the necessary border infrastructure. It recommends that an extension clause is included in the withdrawal agreement that could be triggered with the approval of the UK Parliament. Moreover, the report concluded that the UK should actually 'seek a limited extension to the Article 50 time to ensure that a political declaration on the future partnership that is sufficiently detailed and comprehensive can be concluded' and use the subsequent transition/implementation period to conclude and ratify the specific agreements governing the future partnership. Essentially, this would entail unanimous agreement of the EU-27 and the UK on delaying Brexit day, an option included explicitly in Article 50 (3) TEU.⁶⁹

According to experts, if no extension clause is added to the draft withdrawal agreement, then there should be the possibility to sign a new treaty (adopted on a different legal basis to Article 50 TEU) extending the transitional arrangements, but this would need unanimity in the Council and likely national ratification. As mentioned above, the only situation where the transitional period may come to an end earlier is in the area of CFSP/CSDP, if the EU and the UK sign a treaty which would become applicable during the transition. A provision in part six allows for amendments to be brought to the agreement by the Joint Committee responsible for its implementation and application, but this is possible only for cases provided for in the agreement; therefore, it seems unlikely that an extension of the transition period could be taken only by way of the Joint Committee amending the text.⁷⁰ The other option of extending Article 50, while legally possible, would not bring much in terms of time for further negotiations, in the view of other experts.⁷¹ They point out that such an extension would be agreed by the EU for a few weeks at most, to avoid UK participation in the EP elections planned for the end of May 2019.

Finally, many underline correctly that the transitional arrangements are still dependent on reaching an agreement on the entire withdrawal deal, which includes the sensitive issue of the Irish border, according to the principle of 'nothing is agreed unless everything is agreed'. Commentators point out that disagreement over Northern Ireland still represents the main risk to the withdrawal deal, and that the recent agreement on transition and other points in the Article 50 deal allowing the negotiators to look at the future relations will only delay the inevitable crisis in the talks, without removing the possibility that Britain leaves the UK without a deal.⁷²

7. Other separation issues

Part three of the draft agreement sets out how to manage a series of processes that are ongoing in various areas at the end of the transition. Negotiations on these separation issues were moved beyond the first phase, as currently many of the provisions in this chapter have been agreed.

As regards the **goods placed on the market** before the end of the transition, but which continue to remain on the market after that date, all of the provisions in the draft withdrawal agreement were approved. This area has not been contentious, as both parties aimed at providing legal certainty and to minimise disruption to businesses and consumers. Accordingly, the current draft withdrawal agreement provides that goods placed lawfully on the market in the EU and the UK before the end

⁶⁹ [The progress of the UK's negotiations on EU withdrawal: December 2017 to March 2018](#), Exiting the European Union Committee, House of Commons, HC 884, 18 March 2018.

⁷⁰ [The Running Commentary Begins: Annotation of the proposed Withdrawal Agreement](#), S. Peers, EU Law Analysis blog, 8 February 2018.

⁷¹ [Britain has the legal power to withdraw Article 50—it should use it](#), J.-C. Piris, *Prospect Magazine*, 27 March 2018.

⁷² See [What difference will the Brexit transition make?](#), A. Barker, M. Arnold, *Financial Times*, 19 March 2018; [Last chance for an exit from Brexit?](#) Fabian Zuleeg, EPC, 29 March 2018; [Brexit transition: The can is kicked further down the road](#), Ian Dunt, Politics.co.uk, 19 March 2018.

of the transition may continue to circulate until they reach their end users, or be put into service. Live animals, germinal products and animal products put in circulation before the end of the transition may also circulate freely subject to specific EU laws. To achieve proper market surveillance of the goods listed above, the EU and the UK commit to exchange information between their supervisory authorities, including as regards specific categories of products (e.g. biocidal products, veterinary medicinal products etc.).

Agreement was reached in June 2018 on Article 42, which refers to exchanging information held by notified bodies – which are authorised conformity assessment bodies – in the UK and EU Member States in relation to their activities before the end of the transition. In principle, on the withdrawal date, the UK notified bodies⁷³ will lose their status as EU notified bodies, and in consequence will not be able to perform conformity assessment on EU products, pursuant to EU legislation. UK economic operators would need to hold a certificate delivered by an EU27 notified body in order to place products on the EU market. If they already hold a certificate issued by a UK notified body, then they could either apply for a new certificate issued by an EU-27 notified body or arrange for a transfer of the file and the corresponding certificate from the UK notified body to an EU-27 notified body, which would then take over the responsibility for that certificate.⁷⁴

All provisions in the draft text relating to **ongoing customs procedures** have been agreed. They relate to customs procedures applying to goods moving between the UK and EU (or vice-versa) that start before the end of transition and end afterwards, in accordance with the Union Customs Code.

On **value added tax (VAT) and excise duties**, the article regarding excise goods has been entirely agreed in March 2018, while on VAT the negotiators reached agreement in June.⁷⁵ Essentially, the EU VAT and excise arrangements will continue to apply to goods dispatched or transported from the EU to the UK and vice versa before the end of the transition but whose movement ended after that date. In Article 47 on VAT, two paragraphs added in June 2018 introduce a deadline (31 March 2021) for applications for refunds of VAT paid in another EU Member State by a taxable person established in the UK and vice versa, as well as for amendments to VAT returns with regard to services supplied in the UK or in the EU Member States before the end of the transition period.

The provisions on **intellectual property** have been partly agreed. In essence, an intellectual property right holder in the EU before the end of the transition will, without re-examination, become the holder of a comparable and enforceable intellectual property right in the UK under UK law, e.g. trademarks, registered designs and plant variety rights. Provisions on the protection of unregistered Community design and of databases have also been agreed, as well as provisions on how to deal with pending applications for first-time EU trademarks and Community plant variety rights. In June 2018, negotiators reached agreement on Article 56 regarding pending applications for supplementary protection certificates in the United Kingdom. The paragraph on geographical indications, designations of origin, traditional specialities guaranteed, or traditional terms (providing for the same rights and equivalent protection as the above) has not yet been agreed. Article 51 on the registration procedure also needs further negotiations.

Most of the chapter on **ongoing police and judicial cooperation in criminal matters** remains to be discussed, although there is agreement in principle on the necessity of completing the ongoing cooperation procedures (begun before the end of the transition period) under EU law. The relevant EU legislation is enumerated in Articles 58 (judicial cooperation) and 59 (law enforcement, police

⁷³ In the UK, the [United Kingdom Accreditation Service](#) provides accreditation for bodies seeking to undertake conformity assessment tasks under EU law.

⁷⁴ [Notice to stakeholders - Withdrawal of the United Kingdom and EU rules in the field of industrial products](#), European Commission, 22 January 2018.

⁷⁵ [Joint statement](#) from the negotiators of the European Union and the United Kingdom Government on progress of negotiations under Article 50 TEU on the United Kingdom's orderly withdrawal from the European Union, 19 June 2018.

cooperation) of the draft withdrawal agreement and include: the European Arrest Warrant (EAW); freezing and confiscation orders; mutual recognition of financial penalties; prisoner transfers; criminal records (after transition ends, replies to requests on information on criminal conviction cannot be sent through the EU ECRIS database); European supervision orders; European protection orders; European investigation orders; Joint Investigation Teams; cross-border surveillance and cooperation under Schengen; exchange of information under the second generation Schengen Information System; cooperation between the Financial Intelligence Units and the Asset Recovery Offices; and passenger name records. Under this section, agreement has been reached on the procedure to attest that judicial decisions or requests have been received before the end of the transition, as well as on the application of the EU directives on the right to interpretation and translation, and on the right to information in criminal proceedings, in respect of surrenders under the EAW.

The provisions on **ongoing cooperation in civil and commercial matters** have been agreed, mostly in March 2018, namely Article 62 on contractual and non-contractual matters (whereby the relevant EU laws covering contracts and damages in non-contractual matters will continue to apply to contracts concluded and events taking place before the end of the transition), Article 64 on ongoing judicial cooperation procedures (EU law will apply to all legally binding decisions taken and to all requests made before the end of the transition period), and Article 65, which provides that EU laws on legal aid and mediation agreements will apply to all requests received before the end of the transition period. Agreement was reached in June on the application of the relevant EU law to legal proceedings involving the UK that remain ongoing at the end of the transition (Article 63).

The issues relating to **data** obtained before the end of the transition or in application of the withdrawal agreement **and data protection** are largely left for further discussions.

Matters related to ongoing **public procurement** procedures were mostly agreed in March. The relevant EU law will continue to apply for public procurement procedures launched before the end of the transition period and not yet finalised by that date and for awards of contracts under framework agreements, launched before the end of the transition period until the expiration/termination of the framework. Negotiations led to agreement in June on a provision related to compliance with the non-discrimination principle, as well as on the law applicable to review procedures.

As concerns **Euratom** related issues, agreement has been reached on all the provisions included in the draft withdrawal agreement. At the end of the transitional period, instead of the European Atomic Energy Community established by the Euratom Treaty, the UK will assume responsibility for ensuring that all nuclear materials found on UK territory comply with the relevant international treaties and conventions, and for ensuring proper safeguards equivalent to those established by the Community. The UK also agreed to purchase the equipment and property located in the UK linked to the safeguards regime from the Community, and to assume ultimate responsibility for spent fuel and radioactive waste generated in the UK and present on the territory of a Member State at the end of the transition period. The UK will also ensure the fulfilment of the obligations undertaken by Euratom vis-à-vis third countries and international organisations with respect to nuclear material present on UK territory at the end of the transition period. One article (Article 79) referring to ownership and rights of use and consumption of fissile materials in the UK has been agreed in June 2018 with some minor modifications compared to the previous version included in the March draft. It provides that special fissile materials found in the UK at the end of transition at that point cease to be the property of Euratom, but of the persons or undertakings having the right of use and consumption (these may include other EU Member States, in respect to which the Community would retain the rights under the Euratom Treaty). With a view to implementing a national nuclear

safeguards regime following the UK's departure from Euratom, the UK Parliament has recently approved a Nuclear Safeguards Bill.⁷⁶

The chapter on **ongoing EU judicial and administrative procedures** is left to further negotiations, with two exceptions agreed in June 2018, namely Article 94 on administrative cooperation for matters related to indirect tax and Article 95 on mutual assistance for the recovery of claims related to taxes, duties and other measures. The chapter includes provisions on pending cases before the CJEU where the UK is a party before the end of the transition period, as well as on new proceedings before the Court initiated after the transition period, but in relation to events/facts occurring before the end of the transition (including failure to fulfil the obligations undertaken in part four on transition of the withdrawal agreement); on the binding force of the CJEU decisions in these cases, and their enforcement in the UK after the transition; on the right of the UK to intervene in proceedings and how representation before the CJEU is ensured during the transition period or in the cases given above. As regards the ongoing administrative procedures, the section follows the structure of the judicial part, whereby EU institutions and bodies continue to be competent for administrative procedures initiated before the end of the transition, as well as for new cases initiated after the end of transition but relating to facts occurring before. It also contains provisions on the enforcement and binding nature of administrative decisions, as well as on the jurisdiction of the CJEU in reviewing those decisions.

Finally, the provisions on **privileges and immunities** were agreed (covering the status of UK and EU/Member State representatives acting in EU institutions and bodies before the end of the transition or with respect to the application of the withdrawal agreement; but also settling issues regarding property, assets and benefits arising from UK membership in the EU institutions and agencies), as well as other issues relating to **the functioning of EU institutions and bodies**, e.g. obligations on professional discretion, secrecy and access to documents.

The European Parliament

In its resolution of 14 March 2018, Parliament called for an agreement to be found without delay on all separation provisions as set out in part three of the draft withdrawal agreement. It also called upon the UK to present a clear position, where it has not already done so, on all outstanding issues pertaining to its orderly withdrawal.

8. Institutional provisions

This part contains provisions related to governance of the agreement, including the role of the CJEU in ensuring the consistent interpretation and application of the agreement, the institutional provisions related to the management and supervision of the agreement and to the dispute settlement mechanism applicable. Most of the provisions on the CJEU contained in this part have been agreed by the negotiators, as well as the entire section on the institutional governance of the agreement. Most of the articles related to dispute settlement, including the role of the EU Court, were left for further discussions.

The CJEU's role and jurisdiction have been a controversial matter since the start of the talks. The UK government has repeatedly stated that Brexit will mean an end to the 'direct' jurisdiction of the CJEU over the UK. In its 'Enforcement and dispute resolution: a future partnership paper',⁷⁷ the UK government addresses the issue of enforcement and dispute settlement regarding the provisions of the withdrawal agreement. It takes the view that any rights and obligations of individuals and businesses based on the withdrawal agreement and the future relationship agreements will be

⁷⁶ [Nuclear Safeguards Act 2018](#), United Kingdom. The act received royal assent on 26 June.

⁷⁷ [Enforcement and dispute resolution: a future partnership paper](#), UK government, 23 August 2017.

given effect in UK domestic law and will have to be enforced in the UK courts (UK nationals and businesses in the EU would enforce their rights through the EU legal order and EU Member State courts). As regards dispute settlement, the UK's stated objective has been to negotiate a dispute resolution mechanism with the EU that will not give 'the courts of one party (...) direct jurisdiction over the other'. The paper goes on to exemplify 'precedents' of effective enforcement and dispute resolution in EU international agreements whereby the CJEU does not have direct jurisdiction over a third country. On the other hand, the EU's position as expressed in the Council's negotiating directives of 22 May 2017 is that the effective enforcement and dispute settlement provisions of the withdrawal agreement must 'fully respect the autonomy of the Union and of its legal order, including the role of the Court of Justice of the European Union'. An internal preparatory document presents the European Commission's views on the governance provisions of the withdrawal agreement: several sets of governance provisions will apply to different parts of the withdrawal agreement, each with a specific role for the CJEU. Accordingly, the withdrawal agreement will contain provisions on its overall governance; special governance for the citizens' rights chapter; governance provisions for the other separation issues; and the special governance relating to the transition period (during which the full jurisdiction of the CJEU will apply).⁷⁸ As mentioned above, the EU and UK managed to reach agreement on some of these provisions, while others present a more complex challenge.

8.1. The consistent interpretation and application of the agreement and the CJEU

As mentioned in section 4.3 above, EU and UK negotiators have agreed to the role of the CJEU as concerns part two of the withdrawal agreement on citizens' rights (Articles 151-152). References from courts in the UK on matters related to citizens' rights as laid down in the agreement may be submitted to the CJEU if the case has been introduced in first instance within eight years of the end of the transition period. If the case relates to the application process set out in Articles 17 and 17a of the agreement, then references for preliminary rulings to the CJEU must be made within eight years of the date that Article 17a begins to apply. The preliminary rulings handed down by the CJEU in the application of these provisions will have the same legal effects in the UK as they have for EU Member States, pursuant to Article 267 TFEU. The UK will establish an independent authority to monitor the implementation of the citizens' part of the agreement. That authority will have similar powers to the European Commission to conduct own initiative enquiries or enquiries based on complaints from citizens regarding alleged breaches of the commitments set out in part two of the agreement. It would also have the power to bring legal action before an UK court or tribunal following such complaints.

The provisions establishing CJEU jurisdiction concerning the separation issues in part three of the of the draft agreement and EU law aspects of the financial settlement in part five following the end of the transition period have not been agreed in their entirety.⁷⁹ Article 153 establishes EU Court jurisdiction as regards the failure to fulfil an obligation and the linked sanction procedure (Articles 258 and 260 TFEU) and the preliminary reference procedure (Article 267 TFEU). Whereas the UK has not yet agreed to the application of this article to the separation issues in part three, it has however accepted the application of EU law and CJEU jurisdiction under this article beyond 31 December 2020 as regards the EU own resources and UK participation in EU programmes and projects agreed under the MFF 2014-2020 until the closure of those programmes or projects.

⁷⁸ [Slides on Governance](#), European Commission, 19 January 2018.

⁷⁹ Please see [Dispute settlement and the ECJ in the draft withdrawal agreement](#), S. Peers, EU Law Analysis blog, 9 March 2018.

Agreement has also been reached on the participation of the UK on the same terms as Member States in procedures before the CJEU relating to questions for preliminary rulings addressed by Member States' courts on the interpretation of the withdrawal agreement.

The Commission may also participate through written or oral observations before courts in the UK dealing with cases under the citizen's rights part of the withdrawal agreement. The CJEU and the UK's highest courts will engage in regular dialogue in order to ensure the consistent interpretation of the withdrawal agreement.

8.2. The institutional and dispute settlement mechanisms

There is full agreement on the establishment of a **Joint Committee** (made up of EU and UK representatives), co-chaired by the EU and the UK, which will have responsibility for the implementation and application of the withdrawal agreement. The tasks of the Joint Committee are enumerated in Article 157: to supervise and facilitate the implementation and application of the agreement; to seek to prevent problems that may arise in the areas covered by the agreement, as well as to resolve disputes regarding the interpretation and application of the agreement; to consider any matter of interest in the areas covered by the agreement; and to adopt amendments to the agreement in the cases provide for by the agreement. The Joint Committee will adopt its own rules of procedure and will establish at least five specialised committees: on citizens' rights; on the other separation provisions; on the implementation of the Northern Ireland/Ireland Protocol; on the financial provisions; and on the implementation of the Protocol on the UK Sovereign Base Areas in Cyprus. The Joint Committee may change the tasks of or dissolve any of the specialised committees created. The Joint Committee will also have the power to adopt decisions that are legally binding on the EU and the UK in all areas covered by the agreement (they will have the same legal effect as the agreement) and make recommendations, by mutual consent (Article 159). Finally, it may take any other action in the exercise of its functions as decided by the UK and the EU; and will issue an annual report on the functioning of the agreement.

Concerning the dispute settlement section, negotiators have agreed to the principles of cooperation and exclusivity set out in Articles 160 and 161. Accordingly, the EU and UK will endeavour at all times to agree on the interpretation of the agreement and, through cooperation and consultation, strive to reach a mutually satisfactory resolution to all matters affecting its operation. They will only have recourse to the procedures provided for in the agreement. On the other hand, the negotiators have not yet approved the proposals on the settlement of disputes (Article 162), on dealing with non-compliance (Article 163) and on the Commission's proposal to suspending the (internal market) benefits for the UK during the transition period, if the EU considers the UK in breach of EU law (Article 165).

In particular, Article 162 states that the Joint Committee will receive any dispute submitted to it by the EU or the UK on the interpretation and application of the agreement, following which it will issue a recommendation to settle the dispute. It may also submit the issue for a binding ruling of the CJEU, to which the EU and the UK must abide. However, if the Joint Committee has neither issued a recommendation nor submitted the dispute to the CJEU within three months, then the matter may be submitted before the CJEU for a binding ruling, at the request of the EU or the UK.

The draft text envisages that, in cases of non-compliance with the decisions of the CJEU resulting from the proceedings in Article 162, the EU or the UK may bring the case directly before the CJEU, after the other party has submitted its observations. If, following this binding ruling, the respective party still does not ensure compliance, then the Court may impose a penalty payment or a lump sum. If, on the other hand, the non-compliance case is not submitted to the CJEU, the party in cause may decide to suspend parts of the withdrawal agreement other than the citizens' rights provisions; or parts of any other agreement between the Union and the United Kingdom, under the conditions set out in such agreement, making sure that the suspension is proportional to the breach of the

obligation. The suspension will not take effect earlier than 20 days after the decision has been notified to the other party, allowing for time to remedy the breach.

Article 165 contains one of the most controversial provisions as regards the UK.⁸⁰ The article refers to the possibility of suspending the UK's benefits derived from its participation in the internal market for a maximum period of three months (renewable), should the EU consider the UK in breach of an obligation under EU law during transition, in particular following a binding ruling or an order of the CJEU in accordance with Article 126 of the withdrawal agreement (which establishes CJEU jurisdiction during the transition period). The measure will be proportionate to the breach in law. The UK will have 20 days following the notification of the intended measure to remedy the situation, failing which the measure will apply.

The European Parliament

Parliament expressed support for the institutional provisions and the dispute settlement mechanisms set out in the draft withdrawal agreement as proposed by the Commission. In particular, Parliament approved the Commission's proposal in Article 165 of the draft withdrawal agreement regarding the suspension of benefits during the transition period in the event that the UK does not fulfil its commitments.

9. Protocol on Northern Ireland/Ireland

Both the EU and the UK have recognised, since the start of the talks, the unique circumstances of Northern Ireland, and committed to preventing a hard border on the island of Ireland and to fully respecting the 1998 Good Friday/Belfast peace agreement. However, the issue of Northern Ireland is now considered the single biggest challenge to agreeing a withdrawal agreement, and thus to the establishment of a transitional period after Brexit. At the heart of the matter lies the question of how to keep an open border between Northern Ireland and Ireland in the context of future divergence of standards and regulations between the UK and the rest of the EU, while simultaneously avoiding divergence between Northern Ireland and the rest of the UK.⁸¹

The UK government's position has been to solve the Irish border issue within the framework of the future trade and economic relationship⁸² (although the government's initial paper from August 2017 was vague on how to manage the border, should it remain open in the future), while the EU has insisted that Northern Ireland was a key issue for an orderly UK withdrawal.⁸³ In the EU's view, 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 internal market, including the avoidance of a hard border. Despite disagreements, the overarching objectives of talks on Northern Ireland were agreed at a rather early stage, namely: the protection for the gains achieved through 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 internal 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.

⁸⁰ Ibidem.

⁸¹ See [What difference will the Brexit transition make?](#), A. Barker, M. Arnold, *Financial Times*, 19 March 2018; [Brexit transition: The can is kicked further down the road](#), I. Dunt, *Politics.co.uk*, 19 March 2018; [UK fears Irish border could still kill Brexit transition deal](#), T. McTague and D. M. Herszenhorn, *Politico Europe*, 17 March 2018.

⁸² [Northern Ireland and Ireland: position paper](#), UK Government, 16 August 2017.

⁸³ [Guiding principles transmitted to EU27 for the Dialogue on Ireland/Northern Ireland](#), European Commission, 7 September 2017.

The 8 December joint report contains an important provision on Northern Ireland, making reference to three scenarios. The joint report states that 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 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'.

The wording in the joint report ('full alignment') is considered prone to contradictory interpretation rather than actually providing a solution to the existing problems. The proposed Protocol on Northern Ireland/Ireland attached to the draft withdrawal agreement enshrines the 'backstop option' (the third scenario), of maintaining Northern Ireland in alignment with the EU's internal market and customs union, effectively moving the border to the Irish Sea. While the UK government has reacted negatively to the Protocol, citing it as unacceptable, the EU has argued that the Protocol is merely the translation in legal terms of the commitments contained in the joint report.

While the core issues in the Protocol have not yet been agreed by the UK government, the parties agreed the preamble of the Protocol in principle (text in yellow), which recognises the unique circumstances on the island of Ireland, the need to protect the Good Friday agreement and North-South cooperation, and includes the pledge to avoid a hard border on the island. Importantly, the preamble clarifies that 'this Protocol is based on the third scenario of maintaining full alignment with those rules of the Union's 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, and that it applies unless and until an alternative arrangement implementing another scenario is agreed,' – for which discussions continue in parallel. The first article of the Protocol has also been agreed in principle. It relates to ensuring that there is no diminution of individuals' rights, as set out in the Good Friday Agreement, and that protection is provided against discrimination. Other provisions have been agreed in principle, such as those on the single electricity market, on state aid, on the protection of the financial interests of the EU and UK, and on unilateral safeguard measures in the event of 'serious economic, societal or environmental difficulties'.

Agreement has been reached on all the elements of:

- Article 2 related to the common travel area established between the UK and Northern Ireland (free movement of persons), whereby the UK commits to ensuring that the common travel area will continue to operate without affecting the obligations of Ireland under EU law.
- Article 8 regarding other areas of North-South cooperation, according to which the implementation of the Protocol will maintain the necessary conditions for North-South cooperation, including in the areas of environment, health, agriculture, transport, education and tourism, as well as energy, telecommunications, broadcasting, inland fisheries, justice and security, higher education and sport. Other areas may benefit from new arrangements between the UK and Ireland, but in full respect of EU law. The article also provides for the supervision of the Joint Committee established by the agreement, which may issue recommendations to the UK and the EU, including at the suggestion of the specialised committee.
- Article 10 which reiterates the creation of the Specialised Committee on Northern Ireland/Ireland and details its future tasks.
- Article 15, which includes an important provision on the prospect of a different, subsequent agreement on the matter of Northern Ireland/Ireland. In this event, that future agreement ('which addresses the unique circumstances on the island of Ireland, avoids a hard border and protects the 1998 Agreement in all its dimensions') will replace, as of the date of its application, the Protocol in full or in part.

The rest of the proposals in the Protocol have not been agreed by the UK, most importantly:

- The Commission's proposal in Article 3 on the creation of a 'common regulatory area comprising the Union and the United Kingdom in respect of Northern Ireland' which will constitute an area without internal borders in which the free movement of goods and North-South cooperation are ensured. This has been described by the EU negotiators as the 'backstop solution' that will guarantee that the joint commitments with respect to Northern Ireland will be upheld in all circumstances.
- Article 4 on the free movement of goods which effectively keeps Northern Ireland in the EU Customs Union, although excluding the territorial waters of the UK (thereby allowing Northern Ireland to exit from the common fisheries policy after the end of the transition). Accordingly, Northern Ireland remains bound by EU customs, VAT and excise duties legislation. The Joint Committee, acting on proposals from the Specialised Committee, will decide specific arrangements for the implementation of the Article, including 'a mechanism for revenue collection and distribution'.
- The articles relating to the provisions of EU law that will continue to apply to Northern Ireland in the field of agriculture, fisheries and environment.
- Article 11 on supervision and enforcement in relation to the common regulatory area. This article extends the powers of the EU institutions, including the jurisdiction of the CJEU, over the UK and its residents – and not only over Northern Ireland (one explanation of this provision relates to the fact that not all legislation related to the common regulatory area will be made in Northern Ireland, due to the UK devolution arrangement). The article is set to apply as long as the common regulatory area is in force (so arguably beyond the transition period). The extensive powers of the EU institutions as set out in this article have been questioned by some experts.⁸⁴
- The common provisions in Article 12, among which features the necessity to interpret EU law and concepts referred to in the Protocol in accordance with CJEU case-law, as well as the participation of UK representatives, upon invitation and on a case by case basis, to meetings referring to the implementation of the Protocol.

Despite persisting disagreement on the EU proposal on a common regulatory area, the UK Prime Minister, in a letter addressed to the President of the European Council on 19 March 2018, committed to including 'operational legal text for at least the so-called backstop option set out in the joint report' in the withdrawal agreement, although the UK government's efforts will continue to focus on providing a solution through the EU-UK future partnership and, if not sufficient to avoid a hard border, on 'additional specific solutions that can address those unique circumstances'.⁸⁵

Although the UK government has already made two proposals on how to avoid a hard border in the future, they have been considered as unrealistic or lacking sufficient detail.⁸⁶ The first consists of a customs partnership that would see the UK aligning its import regime to the EU's external customs border, with the UK acting as the external frontier for the EU, collecting tariffs and carrying out checks on imports. Experts believe that, even though this option could indeed remove the need for a customs border between the UK and the EU, the technical arrangements required for implementing it will take many years and see the UK continuing to align on customs with the EU, even beyond the end of the transition period. Furthermore some in the EU have assessed the option as unworkable. The second proposal refers to a streamlined customs arrangement between the UK and the EU that would minimise customs checks, but not completely eliminate them.

⁸⁴ [Brexit: the draft withdrawal agreement](#), Library of the House of Commons, Briefing paper 8269, 23 March 2018.

⁸⁵ See the [letter](#) sent by the UK Prime Minister to the President of the European Council, Donald Tusk, on 19 March 2018.

⁸⁶ [May plans 'customs partnership' to unlock Northern Ireland dilemma](#), G. Parker, J. Pickard, *Financial Times*, 1 April 2018. See also [Future customs arrangements - a future partnership paper](#), UK Government, 15 August 2017.

Moreover, as mentioned above, the UK government's technical note of 7 June 2018 containing proposal for the backstop (a 'temporary customs arrangement') has been assessed as flawed by the EU negotiator. Essentially, the note proposes that the entire UK (not just Northern Ireland) remain in the EU Customs Union as from the end of the transition/implementation period until a new future customs agreement is reached between the EU and the UK. The UK government has estimated that such a future agreement to replace the backstop could be in place by the end of December 2021. In response, the EU has argued that the UK proposal fails to address the issue of regulatory arrangements, while its time-limited nature cannot be compatible with the backstop principle. Finally, the EU has rejected extending the application of its customs union beyond Northern Ireland, to the entire UK, after the end of the transition.

The European Council meeting in June 2018, which was set to assess further progress on the issue, concluded that no substantial progress had been achieved on the backstop solution for Ireland / Northern Ireland. The EU-27 recalled on this occasion the commitments undertaken by the UK in this respect (in December 2017 and March 2018) and linked further progress in the negotiations to the full respect by the UK of those commitments.

In this context, the main question remains whether the UK is able to propose other solutions that can convince the EU and Ireland that the Irish border will remain invisible and 'frictionless'. 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 in the future with EU internal market and customs rules, scenarios politically unacceptable in the UK at present, together with the backstop scenario included in the proposed Protocol to the withdrawal agreement.⁸⁷

The European Parliament and the issue of Northern Ireland

On Northern Ireland, Parliament has taken the view that it is 'the responsibility of the UK Government to provide a unique, effective and workable solution that prevents a 'hardening' of the border, ensures full compliance with the Good Friday Agreement in all its parts, is in line with European Union law and fully ensures the integrity of the internal market and customs union'. It also specified that any solution found for the island of Ireland could not predetermine discussions on the future EU-UK relationship. In its March 2018 resolution, the EP welcomed the Protocol on Northern Ireland/Ireland, including the backstop option as proposed by the Commission. Furthermore, Parliament recalled the UK's commitment to ensure that 'there will be no reduction in rights, including social and democratic rights, safeguards and equality of opportunity as set out in the Good Friday Agreement, in line with the commitments of the joint report'.

10. Next steps

10.1. Concluding the withdrawal agreement

Talks on the withdrawal text are set to continue, as divergences persist. As a first important milestone, the European Council meeting at the end of June 2018, could not recognise substantial progress in the talks, in particular with respect to the Protocol on Northern Ireland/Ireland (but also concerning the joint political declaration on the future EU-UK relationship, regarding which the EU-27 called for 'further clarity as well as realistic and workable proposals from the UK').⁸⁸

The aim for both the EU and the UK is to agree on the final text of the deal by October 2018,⁸⁹ so that approval procedures in the EU and the UK can be concluded by 30 March 2019, when the entry into force of the withdrawal agreement is set. According to Article 50 TEU, the Council of the EU must

⁸⁷ [Brexit transition: The can is kicked further down the road](#), Ian Dunt, Politics.co.uk, 19 March 2018.

⁸⁸ European Council (Art. 50) meeting, [Conclusions](#), 29 June 2018. See also [EU approval of Brexit blueprint comes with Irish border warning](#), Daniel Boffey, Jennifer Rankin, The Guardian, 23 March 2018.

⁸⁹ Although agreeing a final text by October 2018 is increasingly considered to be an unrealistic objective.

approve the agreement with a 'super-qualified majority' (defined in this case as at least 72 % of the members of the Council, comprising at least 65 % of the population of the Member States – without the UK),⁹⁰ while the European Parliament must give consent by a simple majority of its Members (including Members of the EP elected in the UK). Ratification in the Member States is not required for the withdrawal agreement.⁹¹

In the UK, the government has pledged to hold a vote on a resolution in both Houses of Parliament, which 'will cover both the withdrawal agreement and the terms for the future relationship'.⁹² Either House could also use the procedure specified by the Constitutional Reform and Governance Act 2010 (CRAG) to object to ratification of the agreement, and in the case of the House of Commons, block ratification indefinitely.⁹³ If the withdrawal agreement is approved and concluded, the UK will implement it through the withdrawal agreement and implementation bill, which should be passed before Brexit day, so that its provisions can take effect on the withdrawal date.⁹⁴

10.2. The future framework for EU-UK relations

Article 50(2) TEU states that the agreement setting out the arrangements for a Member State's withdrawal shall take account of the framework of its future relationship with the EU. Following its decision in December 2017 to advance to a second phase in the talks, the European Council (EU-27) adopted specific guidelines on the future framework of EU-UK relations at its meeting on 22-23 March 2018.⁹⁵ The aim is to identify an 'overall understanding of the framework for the future relationship' between the EU and UK, which would be annexed as a political declaration to the withdrawal agreement and referenced within. The framework for the future relationship would therefore need to be agreed alongside the withdrawal agreement. Only after the UK has left the EU, can the specific agreement(s) governing the future relations be legally concluded.

According to the EU-27, 'strong and constructive ties will remain in both sides' interest and should encompass more than just trade',⁹⁶ an objective also echoed by the UK. The general aim of the UK government is to secure the 'most frictionless possible trade in goods and services' outside the Single Market and the Customs Union, through a 'new strategic partnership with the EU, including an ambitious free trade agreement (FTA) and a new customs arrangement'. Besides an economic partnership, the UK also seeks a strong and close future relationship with the EU in the fight against crime and terrorism, as well as in the field of foreign policy, security and defence. The UK has already proposed a new treaty with the EU on internal security, and a new partnership on foreign and defence policy cooperation.

While noting the UK's desire to leave the internal market and seek instead a free trade agreement with the EU, the European Council expressed readiness to adapt its guidelines should the UK's position on this issue change. In any case, in the European Council's view, an EU-UK FTA should be balanced, ambitious and wide-ranging, but must not undermine the proper functioning and

⁹⁰ Article 238(3)b TFEU.

⁹¹ See [Article 50 TEU: Withdrawal of a Member State from the EU](#), Eva-Maria Poptcheva, EPRS Briefing, February 2016, and [UK withdrawal from the European Union: legal and procedural issues](#), Jesús Carmona, Carmen-Cristina Cirlig and Gianluca Sgueo, EPRS In-Depth Analysis, March 2017.

⁹² [Brexit: the draft withdrawal agreement](#), Library of the House of Commons, Briefing paper 8269, 23 March 2018 and [Procedures for the Approval and Implementation of EU Exit Agreements: Written statement - HCWS342](#), D. Davis, Secretary of State for Exiting the European Union, UK government.

⁹³ [Parliament and the withdrawal agreement: What does a 'meaningful vote' actually mean?](#), J. Simson-Caird, The Constitution Unit Blog, UCL, London, 15 February 2018. See also the [Constitutional Reform and Governance Act 2010](#), United Kingdom.

⁹⁴ [New Bill to implement Withdrawal Agreement](#), Department for Exiting the European Union, UK government, 13 November 2017.

⁹⁵ [European Council \(Art. 50\) guidelines on the framework for the future EU-UK relationship](#), 23 March 2018.

⁹⁶ [European Council \(Article 50\) Guidelines](#), 29 April 2017.

integrity of the internal market. Like the UK, the EU-27 expressed 'readiness to establish partnerships in areas unrelated to trade and economic cooperation, in particular the fight against terrorism and international crime, as well as security, defence and foreign policy'. Cooperation in other areas of common interest, such as aviation, research, innovation, education and culture, is also considered.

The European Parliament and the EU-UK future relationship

The European Parliament has repeatedly stated its desire for fair and close future relations between the EU and the UK, following UK withdrawal from the EU. In its latest resolution of 14 March 2018, referenced by the European Council in its guidelines on the framework for the future EU-UK relations, Parliament reiterated its proposal to establish the future EU-UK relationship in the form of an association agreement. This association agreement, as outlined by the Parliament, would have a single coherent governance mechanism for the entire relationship and would include four pillars: trade and economic relations (a comprehensive EU-UK FTA); foreign policy, security, defence and development cooperation; internal security; and thematic cooperation (fisheries, aviation, research, innovation, culture, education etc.). As in the case of the withdrawal agreement, the European Parliament's consent will also be required for the future relationship agreement.

With the United Kingdom set to leave the European Union in less than one year's time, negotiations to finalise a withdrawal agreement, as provided for under Article 50 TEU, are coming up against an increasingly tight deadline. Recent progress in agreeing a number of key 'exit' issues prompted the decision to begin discussions on the future EU-UK relationship. However, significant challenges still remain before the conclusion of a withdrawal agreement, on which the transition period requested by the UK also depends.

This EPRS In-depth Analysis considers the draft withdrawal agreement published by the European Commission on 19 March 2018, as well as the (few) additional points settled in negotiations in the period up to June 2018. It seeks to provide an overview of the main areas already settled by the negotiators, as well as of those areas of persisting difficulty or disagreement.

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