

NON PAPER ON KEY ELEMENTS LIKELY TO FEATURE IN THE DRAFT NEGOTIATING DIRECTIVES

These draft negotiating directives are work in progress, reflecting our close co-operation with all Member States, the European Parliament and the General Secretariat of the Council. Following the sequencing set out in Article 50 TEU, the legal directives for the future negotiations can only be finalised after the adoption by European Council of the political guidelines, the final content of which the negotiating directives will fully take into account.

Explanation of our approach

1. The first draft negotiating directives are intended for the first phase of the negotiations. In line with the aim established for the first phase of the negotiations by the European Council, they would prioritise matters which, at this stage, have been identified as strictly necessary to ensure an orderly withdrawal of the United Kingdom from the Union. The negotiating directives will be amended and supplemented as necessary throughout the negotiations, in particular to reflect the European Council guidelines as they evolve and to cover the subsequent phase of the negotiations.
2. In the light of the above explanations, the draft negotiating directives will firstly address the issue of the citizens' rights. Safeguarding the status and rights of the EU27 citizens and their families in the United Kingdom and of the citizens of the United Kingdom and their families in the EU27 Member States is the first priority for the negotiations because of the number of people directly affected and of the gravity of the consequences of the withdrawal for them. The withdrawal agreement should provide the necessary comprehensive, effective, enforceable and non-discriminatory guarantees for those citizens' rights.
3. Secondly, an orderly withdrawal of the United Kingdom from the Union requires settling the financial obligations undertaken before the withdrawal date.
4. Thirdly, in order to avoid a legal vacuum and, to the extent possible address uncertainties, it has been identified at this stage that the Agreement should clarify the situation of goods placed on the market before the withdrawal date as well as of the ongoing procedures listed below, under C.
5. Fourthly, in line with the European Council guidelines, the Union is committed to continuing to support peace, stability and reconciliation on the island of Ireland. Nothing in this Agreement should undermine the objectives and commitments set out in the Good Friday Agreement and its related implementing agreements; the unique circumstances and challenges on the island of Ireland will require flexible and

imaginative solutions. Negotiations should in particular aim to avoid the creation of a hard border on the island of Ireland, while respecting the integrity of the Union legal order. Full account should be taken of the fact that Irish citizens residing in Northern Ireland will continue to enjoy rights as EU citizens; and existing bilateral agreements and arrangements between Ireland and the United Kingdom, such as the Common Travel Area, which are in conformity with EU law, will be recognised. The Agreement should also address issues arising from Ireland's unique geographic situation, including transit of goods (to and from Ireland via the United Kingdom).

6. Fifthly, in line with the guidelines of the European Council, the Union should agree with the United Kingdom on arrangements as regards the Sovereign Base Areas of the United Kingdom in Cyprus and recognise in that respect bilateral agreements and arrangements between the Republic of Cyprus and the United Kingdom which are compatible with Union law, in particular as regards safeguarding the status and rights of those Union citizens resident or working in the Sovereign Base Areas.

7. Sixthly, the Agreement should ensure the necessary protection of the Union's interests in the United Kingdom.

8. Lastly, the Agreement should contain provisions relating to its overall governance. Such provisions must include effective enforcement and dispute settlement mechanisms that fully respect the autonomy of the Union and of its legal order in order to guarantee effective implementation of the commitments under the Agreement.

9. As regards the agreement on a future relationship, it is recalled that such agreement between the Union and the United Kingdom can only be finalised and concluded once the United Kingdom has become a third country. Nevertheless, Article 50 of the Treaty on European Union requires that the framework for the future relationship with the Union is taken into account in the agreement setting out the arrangements for the withdrawal. To this end, if the European Council determines that sufficient progress has been achieved to allow negotiations to proceed to the next phase, an overall understanding with the United Kingdom on the framework for the future relationship should be identified during the second phase of the negotiations under Article 50.

10. Determining transitional arrangements under the withdrawal agreement, including bridges towards the foreseeable framework for the future relationship, depends on the identification of an understanding on the framework for the future relationship between the Union and the United Kingdom which will be determined in the second phase of the negotiations. Therefore, matters that could be part of such transitional arrangements will not be covered by the first recommended negotiating directives and will be identified at a later stage. This approach will allow an efficient allocation of the limited time that Article 50 of the Treaty on European Union

imposes for the conclusion of the Agreement by avoiding the need to address the same matter several times at different phases of the negotiations.

11. In addition, in line with the European Council guidelines, a constructive dialogue should be engaged as early as possible with the United Kingdom on a possible common approach towards third country partners, international organisations and conventions in relation to the international commitments contracted before the withdrawal date.

A. Citizens' rights

12. The Agreement should safeguard the status and rights derived from Union law at the withdrawal date, including those the enjoyment of which will intervene at a later date (e.g. rights related to old age pensions) both for EU27 citizens residing (or having resided) and/or working (or having worked) in the United Kingdom and for United Kingdom citizens residing (or having resided) and/or working (or having worked) in one of the Member States of the EU27. Guarantees to that effect in the Agreement should be reciprocal, and should be based on the principle of equal treatment amongst EU27 citizens and equal treatment of EU27 citizens as compared to United Kingdom citizens, as set out in the relevant Union acquis. Those rights should be protected as directly enforceable vested rights for the life time of those concerned.

13. The Agreement should cover at least the following elements:

- (a) **Definition of the persons to be covered:** the personal scope should be the same as that of Directive 2004/38 (both economically active, i.e. workers and self-employed, and inactive persons, who have resided in the UK or EU27 before the withdrawal date, and their family members who accompany or join them at any point in time before/after the withdrawal date). In addition, the personal scope should include persons covered by Regulation 883/2004.
- (b) **Definition of the rights to be protected:** this definition should include at least the following rights:
 - (i) the residence rights derived from Articles 21, 45 and 49 of the Treaty on the Functioning of the European Union and set out in Directive 2004/38 (same material scope, covering *inter alia* the right of permanent residence after a continuous period of five years of legal residence) and the rules relating to those rights; any document to be issued in relation to the residence rights (for example, registration certificates, residence cards or certifying documents) should have a declaratory nature and be issued under a simple and swift procedure either free of charge or for a charge not exceeding that imposed on nationals for the issuing of similar documents.
 - (ii) the rights and obligations set out in Regulation 883/2004 on the coordination of social security systems and in Regulation 987/2009

implementing Regulation 883/2004 (including future amendments of both Regulations) covering *inter alia*, rights to aggregation, export of benefits, and principle of single applicable law;

- (iii) the rights set out in Regulation 492/2011 on freedom of movement for workers within the Union (e.g. access to the labour market, to pursue an activity, social and tax advantages, training, housing, collective rights);
- (iv) the right to take up and pursue self-employment derived from Article 49 of the Treaty on the Functioning of the European Union.

14. For reasons of legal certainty, the Agreement should ensure, in the United Kingdom and in the EU27, **the continued recognition of diplomas, certificates and other evidence of formal qualification** obtained in any of the Union Member States before the withdrawal date, in accordance with Union law rules applicable before that date. It should also provide for arrangements relating to procedures for recognition which are ongoing on the withdrawal date.

B. Financial settlement

15. A single financial settlement should ensure that both the Union and the United Kingdom respect the obligations undertaken before the date of withdrawal. There should be a single financial settlement related to the Union budget and related to the termination of the membership of the United Kingdom of all institutions or bodies established by the Treaties such as the European Central Bank and the European Investment Bank as well as to the participation of the United Kingdom in specific funds and facilities related to Union policies (e.g. the European Development Fund and the Facility for Refugees in Turkey).

16. This single financial settlement should be based on the principle that the United Kingdom must honour its share of the financing of all the obligations undertaken while it was a member of the Union.

17. These obligations cover liabilities, including contingent liabilities, legal and budgetary commitments and any other obligations deriving from a basic act within the meaning of Article 54 of the Financial Regulation¹. In addition, the United Kingdom should fully cover the specific costs related to the withdrawal process such as the relocation of the agencies or other Union bodies.

18. The Agreement should define the precise way in which these obligations will be calculated. The calculation should be based on the official consolidated annual accounts of the Union, to be supplemented as necessary, by making use of interim accounts. As appropriate, the calculation should be made on the basis of data available either by the date of withdrawal or by the end of the year of withdrawal. The obligations should be defined in euro.

¹ Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation (EC, Euratom) No 1605/2002, OJ L 298, 26.10.2012, p. 1–96, as amended.

19. The calculation of the United Kingdom's obligations towards the Union budget and the funds should be based on the historical evidence of its share of the financing before the withdrawal date. For the institutions or bodies established by the Treaties, the share of the United Kingdom should be based on its share of the capital or guarantees.

20. Modalities of payments should be agreed in order to limit the impact of the withdrawal on the budget for the Union and to ensure that amounts owned by the United Kingdom called to cover or guarantee loans are returned in accordance with the maturity of the underlying loans.

21. The single financial settlement should therefore contain:

- (a) A calculation of the global amount that the United Kingdom has to honour in order to settle its financial obligations toward the Union budget, all institutions or bodies established by the Treaties, and other issues with a financial impact. The global amount may be subject to future annual technical adjustments. This calculation will also identify the amounts covering or guaranteeing loans which have to be reimbursed to the United Kingdom if uncalled, on the basis of the maturity of the loans.
- (b) A schedule of the annual payments to be made by the United Kingdom and the practical modalities for making these payments.
- (c) Transitional rules to ensure control by the Commission (or, where applicable, another body responsible under Union law before the withdrawal date), the Court of Auditors, OLAF and the power to adjudicate of the Court of Justice of the European Union for past payments/recovery orders to United Kingdom beneficiaries and any payments made to United Kingdom beneficiaries after the withdrawal date to honour all legal commitments (including possible loans) authorized by the responsible entity before the withdrawal date.
- (d) Specific possible arrangements in relation with legal commitments or future legal commitments made towards United Kingdom beneficiaries.
- (e) Specific rules to address the issue of contingent liabilities assumed by the Union budget or specific institutions or bodies or funds (such as loans made by the European Investment Bank).

C. Situation of goods placed on the market and outcome of procedures based on Union law

C.1. Goods placed on the market under Union law before the withdrawal date

22. The Agreement should ensure that any good lawfully placed on the market of the Union on the basis of Union law before the withdrawal date can remain on the market/be used for the first time /put into service after that date both in the United

Kingdom and in the EU27 under the conditions set out in the relevant Union law applicable before the withdrawal date.

C.2. Ongoing judicial cooperation between Member States under Union law

23. The Agreement should provide for arrangements relating to judicial cooperation procedures governed by Union law which are ongoing on the withdrawal date. It should establish in particular that such procedures remain governed until their completion by the relevant provisions of Union law applicable before the withdrawal date.

24. Regarding judicial cooperation in civil and commercial matters between the United Kingdom and the EU27, the Agreement should ensure the continued application of the rules of Union law relating to choices of forum and choices of law made before the withdrawal date. It should also ensure that the recognition and execution of national judicial decisions handed down before the withdrawal date in those matters remain governed by the relevant provisions of Union law applicable before the withdrawal date.

C.3 Ongoing administrative and law enforcement cooperation under Union law

25. The Agreement should provide for arrangements relating to administrative and law enforcement cooperation procedures, including verification, governed by Union law which are ongoing on the withdrawal date. Such arrangements should in particular ensure that these procedures remain governed until their completion by the relevant provisions of Union law applicable before the withdrawal date. They should also establish rules for the possible use of information and data in law enforcement investigations and criminal proceedings ongoing on the withdrawal date. They should cover both information and data received/held by United Kingdom which originates from the EU27 or Union institutions, bodies, offices and agencies, and information and data received/held by the EU27 or Union institutions, bodies, offices and agencies which originates from the United Kingdom. They should comprise rules on the protection of personal data.

C.4. Ongoing Union judicial and administrative procedures

26. The Agreement should provide for arrangements relating to:

- (a) Judicial proceedings pending before the Court of Justice of the European Union on the withdrawal date involving the United Kingdom, United Kingdom natural and/or legal persons (including preliminary references); the Court of Justice should remain competent to adjudicate in these proceedings and its rulings must be binding upon the United Kingdom;
- (b) Ongoing administrative procedures in the Union institutions, bodies, offices and agencies concerning the United Kingdom (for example infringements

proceedings, state aid) or, where applicable, concerning United Kingdom natural or legal persons;

- (c) The possibility to commence both administrative and judicial proceedings after the withdrawal date for facts that have occurred before the withdrawal date;
- (d) Continued enforceability of Union acts that impose pecuniary obligations and of judgments of the Court of Justice of the European Union, adopted or rendered before the withdrawal date or in the course of ongoing judicial and administrative proceedings.

D Other administrative issues relating to the functioning of the Union

27. The Agreement should contain the necessary provisions relating to the protection of the property, funds, assets and operations of the Union and of its personnel and members of their family, as provided for in Protocol (No. 7) to the Treaties.

28. The Agreement should also provide that the United Kingdom ensures, within its jurisdiction, the continued respect by members of Union institutions, bodies, offices and agencies, officials and other servants of the Union of the obligations incurred by them under Article 339 of the Treaty on the Functioning of the European Union before the withdrawal date.

E Governance of the Agreement

29. The Agreement should set up an institutional structure to ensure an effective enforcement of the commitments under the Agreement, bearing in mind the Union's interest in effectively protecting its autonomy and its legal order, including the role of the Court of Justice of the European Union.

30. It should contain appropriate institutional arrangements allowing for the adoption of measures to deal with unforeseen situations not covered in the Agreement and for the incorporation of future amendments to Union law in the Agreement where this is necessary for the proper implementation of the Agreement.

31. The Agreement should include provisions ensuring the settlement of disputes and the enforcement of the Agreement. In particular, these should cover disputes arising from:

- continued application of Union law;
- citizens' rights ;
- application and interpretation of the other provisions of the Agreement, such as the financial settlement or measures adopted by the institutional structure to deal with unforeseen situations.

32. In these cases, the jurisdiction of the Court of Justice of the European Union (and the supervisory role of the Commission) should be maintained. For the application and interpretation of provisions of the Agreement other than those relating to Union

law, an alternative dispute settlement should only be envisaged if it offers equivalent guarantees of independence and impartiality to the Court of Justice of the European Union.

33. The Agreement should foresee that any reference to concepts or provisions of Union law made in the Agreement must be understood as including the case-law of the Court of Justice of the European Union interpreting such concepts or provisions before the withdrawal date. Moreover, to the extent an alternative dispute settlement is established for certain provisions of the Agreement, a provision according to which future case-law of the Court of Justice of the European Union intervening after the withdrawal date must be taken into account in interpreting such concepts and provisions should be included.