



BRIEFING PAPER

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Brexit: 'sufficient progress' to move to phase 2

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Summary

The path to agreement (section 1)

On 15 December 2017 the European Council endorsed the European Commission's assessment that "**sufficient progress**" had been made in the Brexit negotiations for the EU and the UK to move on to phase two of the Brexit negotiations. This came after a series of stops and starts, as the two sides grappled with the three priority issues in phase one: citizens' rights, the financial settlement and the Irish border question.

The November negotiations had not produced much movement on any of the three areas. The EU Chief Negotiator, Michel Barnier, issued an ultimatum, giving the UK two weeks to come up with proposals which would satisfy the EU – and in the case of the Irish border issue, the Government of Ireland in particular.

On 8 December, after intensive discussions, the EU and UK announced that a **Joint Report** had been agreed which satisfied the "sufficient progress" criterion, and that therefore the negotiations could move on to phase two in January 2018.

But phase two will not include the detail of future trade relations. The Joint Report calls for "an agreement as early as possible in 2018 on **transitional arrangements**". There will be another separate mandate for **negotiations on a future trade framework** in late March 2018.

The European Parliament adopted a **resolution** on 13 December also recommending that the EU27 agree to move to phase two.

The Commission's assessment that sufficient progress had been made, as set out in the Joint Report and Commission Communication of 8 December, was endorsed by the EU27 at the **European Council** meeting on 14-15 December.

The Joint Report (section 2)

The Joint Report has been described as "a summary of the negotiations toward the legally binding withdrawal agreement, rather than any sort of legally binding text of its own. It focuses on achievements in the three priority areas for phase one and notes progress on other separation issues that have not yet been settled.

Citizens' rights (section 2.2)

The negotiators reached a "common understanding" on how to provide reciprocal protection for EU and UK citizens exercising "rights derived from Union law and based on past life choices".

The CJEU will have indirect influence in that UK courts will take CJEU case law into account. For eight years after Brexit UK courts will be able, if they want, to approach the CJEU for an interpretation of citizens' rights.

The European Commission and an independent national authority in the UK will monitor the implementation of citizens' rights.

EU citizens and their family members will have a "short, simple, user friendly" application form to register for status in the UK and will be given two years to register at a low cost.

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The grounds for eligibility for post-Brexit national status will largely follow current EU law on eligibility for rights of residence.

Future family reunion rights (for family members not living with the EU/UK citizen on the cut-off date) will depend on the family's circumstances at that time: pre-existing spouses will be able to join their partner after Brexit under the same conditions as current EU law, but future partners or spouses would be subject to national immigration law.

Social security coordination rules will continue to apply to EU citizens who, on the cut-off date, are or have been covered by the UK social security system, and UK nationals who are or have been covered by the system of an EU27 state.

EU or UK citizens who are away from the host country for more than five years will lose residency rights.

There is no guarantee that UK citizens who move from one EU State to another will maintain all the rights after Brexit.

The financial settlement (section 2.3)

The underlying principles of the methodology agreed in the Joint Report are that:

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

In accordance with these principles, the UK will pay its share of the current EU Budget, which runs to 2020, and some payments will be made after 2020, based on the average of UK contributions between 2014 and 2020. The UK will pay as payments become due and will be reimbursed for what it has paid to the European Investment Bank and the European Central Bank.

The UK will not pay for the relocation of the two London-based EU agencies.

The Irish border (section 2.4)

The peace process established by the Good Friday Agreement will be upheld and a hard border between Ireland and Northern Ireland will be avoided.

If the withdrawal agreement cannot avoid a hard border between Ireland and Northern Ireland, the UK will propose "specific solutions to address the unique circumstances of the island of Ireland".

If there is no agreed solution, the UK will maintain "full alignment" with the rules of the Single Market and customs union which support North - South cooperation and the Good Friday Agreement.

While the Joint Report sets out the objectives in relation to the Irish border, there is little detail about how they might be achieved. There has been significant focus on what the phrase "full alignment" means in the event of no agreed solution.

Other separation issues (section 2.5)

The Joint Report and Commission Communication outline areas where there has been limited agreement (e.g. Euratom-related nuclear specific issues) or no discussion yet (e.g. intellectual property rights).

New EU negotiating guidelines on transition (section 3)

The European Council adopted new guidelines for phase two of the negotiations on 15 December 2017. These insist that “negotiations in the second phase can only progress as long as all commitments undertaken during the first phase are respected in full”.

The new guidelines allow the EU to start negotiating a ‘standstill’ transition period, when the UK would be outside the EU but bound by the whole of the EU *acquis*. They also envisage ‘preliminary and preparatory discussions’ on the framework for the future UK-EU relationship, once additional guidelines have been adopted.

Other developments

Brexit in Parliament (section 4.1)

The main recent Brexit developments in Parliament are:

- a Commons debate on a second referendum with three options;
- agreement on a new ‘Brexit sifting committee’ to examine statutory instruments made under the EU (Withdrawal) Bill;
- a Government defeat on Parliament having a ‘meaningful vote’ on the withdrawal agreement; and
- Government amendments to fix ‘exit day’ for the purposes of the EU (Withdrawal) Bill as 11pm on 29 March 2019.

Parliamentary committees have also continued to publish a large number of reports and other documents on Brexit.

UK remains outside EU defence initiative (section 4.2)

The UK Government did not sign a Joint Notification by 23 EU Member States setting out their intention to utilise the Permanent Structure Cooperation (PESCO) mechanism to further European Scrutiny and Defence. The UK will therefore have no decision-making rights over its governance or veto over its future strategic direction.

Emissions Trading Scheme: first Brexit-related regulatory change agreed (section 4.3)

On 30 November the EU Climate Change Committee agreed to implement safeguard measures for the EU Emissions Trading Scheme to protect it in the event of a hard Brexit.

On 11 November the Environment Secretary announced that there would be a new independent UK environment watchdog to protect UK wildlife, land, water and air after Brexit.

1. The path to agreement

On 15 December 2017 the European Council endorsed the European Commission's assessment that "sufficient progress" had been made in the Brexit negotiations for the EU and the UK to move on to phase two of the Brexit negotiations. This came after a series of stops and starts, as the two sides grappled with the three priority issues in phase one: citizens' rights, the financial settlement and the Irish border question.

Late November: not enough progress yet ...

The EU chief negotiator Michel Barnier said at a [speech](#) at the Berlin Security Conference on 29 November that sufficient progress had not yet been made in the Brexit negotiations to move on to discussions on future relations. This was despite many reports of a new UK 'offer' of more money for the financial settlement.¹ The UK press reported that the Government had agreed to pay around €50 billion (£44 billion), although the Government did not confirm this figure.

Talks among officials continued during the week of 27 November on the three priority areas: citizens' rights, the financial settlement and the Ireland/Northern Ireland border. Michel Barnier confirmed at a speech in Berlin on 29 November that if no agreement was reached before the European Council meeting on 14 – 15 December, the start of trade talks would be pushed into the future.

At the beginning of December the Brexit negotiators intensified efforts to reach agreement in the outstanding areas of negotiations ahead of a meeting between Theresa May and Commission President Jean Claude Juncker on 4 December. This was the deadline for sufficient progress to have been achieved for the negotiations to move on to phase two.

Start, stop, start

On 30 November there were reports that UK proposals to avoid a 'hard border' in Ireland could facilitate progress. In Ireland this potential 'movement' was also reported to have increased confidence that agreement would be reached before the December European Council. Early December turned into a continuous, intensive negotiating round.

However, within days there was a setback. The Democratic Unionist Party (DUP) objected to any solution that would mean a Brexit outcome for Northern Ireland that was different from the rest of the UK. The Scottish First Minister, Nicola Sturgeon, said there was "no good practical reason" why Scotland could not stay in the Single Market if a special deal was agreed to avoid a hard border in Ireland.² The Scottish Conservative leader, Ruth Davidson, said that if regulatory alignment in

"The negotiations on the United Kingdom's withdrawal are a complex task that we carry out with reason and determination, without aggression or naivety: 'there is no place for Schadenfreude in Brexit'. There is neither revenge nor punishment in our mission".
[Michel Barnier](#), 29 November 2017

¹ For information on the financial settlement, see Commons Library briefing 8039, [Brexit: the exit bill](#) 29 November 2017 and Financial Times, [Brexit bill battle turns to presentation rather than hard cash](#), 29 November 2017.

² See, e.g. [The Herald, 4 December 2017](#); [Holyrood, 5 December 2017](#)

different areas was the requirement for a frictionless border, “then the Prime Minister should conclude this must be on a UK-wide basis”. The Mayor of London, Sadiq Khan, [tweeted](#) on 4 December that there were “Huge ramifications for London if Theresa May has conceded that it’s possible for part of the UK to remain within the single market & customs union after Brexit. Londoners overwhelmingly voted to remain in the EU and a similar deal here could protect tens of thousands of jobs”. It looked as if the progress heralded just days earlier was going to unravel.

But reporting on progress on 5 December in [response](#) to an urgent question from the Opposition Brexit Secretary Keir Starmer, David Davis said the two sides were “now close to concluding the first phase of the negotiations and moving on to talk about our future trade relations”. He spoke of “much common understanding”, agreement on both sides “that we must move forward together” and said “all parties remain confident of reaching a positive conclusion in the course of the week”.

Keir Starmer called on the Government to abandon its ‘red lines’ (leaving the Single Market and the Customs Union) if these threatened the break-up of the Union. Mr Davis insisted (c 897) “we will not be treating any part of the United Kingdom differently from any other part”. Nigel Dodds (DUP) thought the Irish Government had “set back Anglo-Irish relations and damaged the relationships built up within Northern Ireland in relation to the devolution settlement. That damage will take a long time to repair” (c 899).

Early December: ‘sufficient progress’ is announced

After a long negotiating session on 7-8 December, compromises were agreed which allowed the Commission President, Jean Claude Juncker, to say that he thought “sufficient progress” had been made to move to phase two of the negotiations. But his assessment would have to be endorsed by the EU Member State Heads of State and Government in the European Council on 14-15 December.

In addition to a [Joint Report](#) from the UK Government and the EU setting out what had been agreed so far, the Commission published a [Communication to the European Council \(Article 50\)](#) on the state of progress of the negotiations.

European Parliament resolution on progress

The European Parliament adopted a [resolution](#) on the state of play of negotiations on 13 December 2017, in which it adopted the Joint Report³ and recommended that the EU27 decide on 15 December to move to phase two.

But the resolution was not a complete endorsement of the achievements of the negotiations. It pointed to several outstanding

³ By 556 votes to 62, with 68 abstentions

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citizens' rights issues which must be resolved before the withdrawal agreement can be finalised in a "clear and unambiguous legal text".

The EP also emphasises that it will accept a framework for the future EU-UK relationship as part of the withdrawal agreement "only if it is in strict concordance" with the following principles:

- a third country that does not apply the same obligations as a Member State cannot enjoy the same benefits as an EU or EEA Member State;
- the integrity of the internal market and the four freedoms is protected (no sector-by-sector approach);
- autonomy of the EU's decision-making;
- safeguarding EU legal order and role of CJEU;
- UK's adherence to international human rights standards and obligations and EU legislation and policies on the environment, climate change, consumer protection, fight against tax evasion and avoidance, fair competition, data protection and privacy, trade, social and workers' rights, "with a clear enforcement mechanism to ensure compliance";
- safeguarding EU agreements with third countries and organisations, including the EEA Agreement;
- safeguarding financial stability of EU and compliance with its regulatory and supervisory regime and standards;
- a correct balance of rights and obligations, including commensurate financial contributions.

The EP also reiterated an earlier proposal that an EU-UK association agreement "with a robust and independent dispute resolution mechanism" could provide "an appropriate framework for the future relationship".

The EP recommended progressing to phase two of the negotiations, provided that they are "conducted in good faith", that the UK Government "fully respects the commitments it made in the Joint Report and if these commitments are fully translated into the draft Withdrawal Agreement".

Prime Minister's statement in the Commons

The Prime Minister Theresa May made a [statement](#) in the Commons on 11 December on the Joint Report and the Commission's assessment that sufficient progress had been made in the first phase of the negotiations to move on:

We have argued robustly and clearly for the outcomes we seek: a fair and reciprocal deal that will guarantee the rights of more than 3 million EU citizens living in the UK and 1 million UK nationals living in the EU, so that they can carry on living their lives as before; a fair settlement of the accounts, meeting our rights and obligations as a departing member state in the spirit of our future partnership; and a commitment to maintain the common travel

area with Ireland, to uphold the Belfast agreement in full and to avoid a hard border between Northern Ireland and Ireland while upholding the constitutional and economic integrity of the whole United Kingdom.

Many commentaries on the Joint Report suggested the Government had made concessions and caved in to EU demands. Mrs May set out how the UK had succeeded in removing the jurisdiction of the Court of Justice of the EU (CJEU): the UK courts would only have to pay “due regard” to relevant CJEU case law “where appropriate” and “just as they already decide other matters with reference to international law when it is relevant”; and:

In the interests of consistent interpretation of citizens’ rights, we have agreed that where existing law is not clear, our courts—and only our courts—will be able to choose to ask the ECJ for an interpretation prior to reaching their own decision, but this will be a very narrow remit and in a very small number of cases, and unlike now the courts will not be obliged to do so; this will be voluntary. The case itself will always be determined by the UK courts, not the ECJ, and there will also be a sunset clause, so after eight years even this voluntary mechanism will end.

The conversations on the financial settlement had been “tough”, but the Prime Minister said the agreement was “conditional upon a number of principles we have negotiated over how we will ultimately arrive at a fair valuation of these commitments, which will bring the actual financial settlement down by a substantial amount”. She concluded that it was

A fair settlement for the British taxpayer, who will soon see significant savings compared with remaining in the European Union. It means we will be able to use that money to invest in our priorities at home, such as housing, schools and the NHS, and it means the days of paying vast sums to the European Union every year are coming to an end.

The financial settlement is discussed in section 2.2 below.

Mrs May confirmed the Government’s “guarantee that there will be no hard border between Northern Ireland and Ireland”, and insisted “that nothing in this process will alter our determination to uphold the constitutional and economic integrity of the whole United Kingdom”.

European Council (Article 50) meeting 14–15 December

The Commission’s assessment that sufficient progress had been made, as set out in the Joint Report and Commission Communication of 8 December, was endorsed by the EU27 at the European Council (Article 50) meeting on 15 December.

In her Maidenhead constituency, the Prime Minister told reporters this was “an important step on the road to delivering the smooth and

“These are the actions of a responsible nation honouring the commitments that it has made to its allies”.

Theresa May, 11 December 2017, on agreement on the financial settlement in the Joint Report

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orderly Brexit that people voted for in June of last year” and that “rapid progress” would be made on an implementation (transition) period.⁴

Theresa May’s Chief of Staff, Gavin Barwell, [tweeted](#) that remainers should be “reassured”.

Donald Tusk warned, however, that agreeing a deal by the March 2019 deadline will be “dramatically difficult” and that the second phase would be “more demanding, more challenging than the first phase”.⁵

French President Emmanuel Macron said the EU27 had maintained their unity, the integrity of the Single Market and the respect of common rules, and would “make sure in the next phase to keep these same principles”. He insisted there would be no bilateral discussions with the UK in the next round of negotiations. German Chancellor Angela Merkel said the decision to move on to phase two represented “quite significant progress”,⁶ but that the negotiations would get “even tougher”.⁷

⁴ [Guardian, 15 December 2017](#)

⁵ [Mail online, 15 December 2017](#)

⁶ [Guardian, 15 December 2017](#)

⁷ [BBC News, 15 December 2017](#)

2. The Joint Report and Commission Communication on state of progress

2.1 Is the Joint Report legally binding?

David Davis said on the Andrew Marr Show on 10 December that the Joint Report is not legally binding, but a statement of intent.⁸ He has also said the agreement will be honoured whatever the outcome.

An academic commentary on the Joint Report argues that although it is not legally binding in international law, it has political weight:

... while the Joint Report is not legally binding under the terms of the Article 50 TEU or under the Vienna Convention on the Law of Treaties 1969, the general principle of *pacta sunt servanda* in international law would require the UK to follow good faith principles in its future dealings with the EU, as it entered the Article 50 negotiations in good faith (which is also a general principle of law recognised in EU law).

A further practical consideration at this stage in the process is that unilateral 'walking away' or rescinding on these pledges would result in a significant loss in international reputation, meaning that neither the UK nor the EU is likely to try to turn their back on the content of the Report unless by mutual agreement in further negotiations.⁹

The Joint Report does not have the usual elements of an international treaty, such as a date of entry into force or signatures of the parties. However, there are no formal requirements for defining something as a "treaty". Instead, the 1969 Vienna Convention on the Law of Treaties states that the crucial issue is whether the parties express their "consent to be bound".

Professor Steve Peers argues that the crucial passage from both a legal and a political viewpoint is paragraph 5. This says that "nothing is agreed until everything is agreed", the joint commitments "shall be reflected in the Withdrawal Agreement in full detail", "this does not prejudice any adaptations that might be appropriate" for any

⁸ ['Brexit: David Davis wants 'Canada plus plus plus' trade deal'](#), BBC news online, 10 December 2017

⁹ Commentary on the Joint Report. A 'Constitutional Conundrums: Northern Ireland, the EU and Human Rights' Project Report, Sylvia de Mars (Lecturer, Newcastle University), Aoife O'Donoghue (Professor, Durham University), Colin Murray (Senior Lecturer, Newcastle University), Ben Warwick (Lecturer, University of Birmingham)

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transitional agreements agreed in phase 2, and is "without prejudice to discussions on the framework of the future relationship".¹⁰

Professor Peers concludes therefore that "the Joint Report is a summary of the negotiations toward the legally binding withdrawal agreement, rather than any sort of legally binding text of its own".

The European Parliament's [resolution](#) following the Joint Report sets out its view that the document is however politically binding: "negotiations can only progress during the second phase if the UK Government fully respects the commitments it made in the Joint Report".

2.2 Citizens' rights

The [Joint Report](#) and accompanying [Technical Note](#) from the UK Government and the EU set out what has been agreed on citizens' rights, and the Commission's [Communication](#) provides an overview with some commentary on the Commission's position.

The practical implications of the agreement for EU and UK citizens who have exercised their free movement rights before exit day are discussed in more detail in the following documents, by way of case studies and answers to FAQs:

- A [Q&A memo published by the European Commission](#) (12 December 2017)
- GOV.UK pages on '[UK nationals in the EU: what you need to know](#)'; '[Status of EU citizens living in the UK: what you need to know](#)', and '[Example case studies: EU citizens' rights in the UK](#)'

Box 1: How secure is the agreement on citizens' rights?

The actual 'deal' on citizens' rights will be set out in the Withdrawal Agreement. The Joint Report and accompanying papers provide an outline of what the negotiators have agreed it will cover, but there are still some unresolved issues. Citizens' rights campaigners are calling for citizens' rights to be made a distinct strand in the second phase of talks, in a bid to ensure that their interests are not overshadowed by other issues.

The agreement on citizens' rights has not been ring-fenced, and therefore for as long as there is uncertainty over whether the EU and UK negotiators will ultimately reach agreement on a withdrawal deal, there will be uncertainty over the future status and entitlements of EU and UK expats.

Main areas of agreement

What will be the 'cut-off' date?

The Joint Report refers to citizens' positions before and after "the specified date". It has been agreed that this should be the date of the UK's withdrawal from the EU (which is expected to be 29 March 2019).

¹⁰ Professor Steve Peers, '[EU law expert: how binding is the Brexit 'deal'?](#)', The Conversation, 12 December 2017

However, this could change if there is an agreement on transitional arrangements in the second phase of the negotiations.

The Commission's view is that if there is to be a transitional period during which all current EU law continues to apply, the specified date should become the end of the transitional period.¹¹

Who will be covered by the agreement?

The citizens' rights part of the Withdrawal Agreement will apply to those UK and EU citizens who have exercised their free movement rights in the EU27/UK respectively on the specified date, and their family members (as defined by [Directive 2004/38/EC](#), the 'Free Movement' or 'Citizens' Directive). It will also apply to people working as frontier workers on the specified date.¹²

Experts have identified various categories of people who may be unable to benefit from the rights to be provided for in the Withdrawal Agreement, either because they are deliberately excluded from its scope, or because of the way it is applied in practice (**see Box 2 below**).

Future family reunion rights

Certain family members who are not residing in the host Member State on the specified date will keep an entitlement to join an EU/UK family member at a later date under the same conditions as current EU law, for the lifetime of the EU/UK national 'right holder'. Namely:

- All family members (spouse, registered partner, children dependent parents) who were related to the EU/UK right holder on the specified date and are still related at the time of seeking to join the EU/UK family member
- Children born or legally adopted after the specified date:
 - to parents who are both covered by the Withdrawal Agreement, or if one parent is covered by the Withdrawal Agreement and the other is national of the host State; or
 - to a parent who is covered by the Withdrawal Agreement and has sole or joint custody of the child.

Family reunion rights will depend on the family's circumstances on the "specified date".

The post-Brexit rights of entry and residence for partners in a "durable relationship" will be determined by national law if they did not reside in the host Member State on the specified date, there was an existing and durable relationship on the specified date, and it continues to exist.

Family reunion rights after the specified date for family members not covered by the above provisions will be determined by national law.

¹¹ Commission Communication, p.5

¹² "Frontier worker": an EU citizen pursuing genuine and effective work as an employed or self-employed person in a different Member State to where they live.

The Commission is of the opinion that future partners or spouses of EU and UK citizens who are not partners or spouses on the specified date should have the same family reunion rights as current partners and spouses. However, it considers that this issue should be dealt with during the second phase of negotiations "and will inevitably be linked to the level of ambition of the future partnership between the EU and United Kingdom".¹³

Administrative procedures for applying for national status post-Brexit

The UK Government has succeeded in getting the freedom to require EU citizens living in the UK to apply for the status and rights conferred by the Withdrawal Agreement.

Although the focus of attention has been on the UK's plans to require EU citizens to register their residence in the UK post-Brexit, given that everything in the agreement is reciprocal, it is possible that some or all of the EU27 States may similarly require UK citizens to transfer to a national status (although they would be able to continue with the current 'declaratory system' if they preferred).

The Withdrawal Agreement will specify various conditions and protections which the national registration system must uphold. These reflect undertakings previously made by the UK Government about the proposed new registration system for EU nationals in the UK, and include that:

- People should be given "adequate time of at least two years" to apply for such status. In the meantime, they will have the rights provided by the Withdrawal Agreement.
- People who do not apply in time for status will not be considered to have status at the end of the period, although a proportionate approach will be taken to those who miss the deadline "with good reason".
- Procedures for applying for status will be "transparent, smooth and streamlined". For example, States may only require what is strictly necessary and proportionate to determine whether the applicant falls within the scope of the Withdrawal Agreement; a principle of "evidential flexibility" will apply; and residence documents will be issued free of charge or at a cost no greater than that imposed on nationals for similar documents.

Giving evidence to the House of Lords EU Justice sub-committee on 12 December 2017, Brandon Lewis, Minister for Immigration, said that the Government intends to have its registration system operational by mid-2018, with status decisions being issued before the Withdrawal Agreement is finalised:

Going forward, as I have said, I think that the Government's intention is clear in the fact that before we potentially end the

¹³ Commission Communication, p.6

negotiations we will have started to grant settled status from the second half of 2018. As we have said from the beginning, we do not want EU citizens to leave; we want them to stay. We will be progressing on that basis. I am immensely confident that ultimately we will get a deal for the wider negotiations as well. But people who are granted settled status will have it and they will be able to stay.¹⁴

There has been considerable debate, and scepticism, about whether the Home Office will be able to design and implement such a system in time.

As Oxford University's Migration Observatory has observed, how the UK's registration system operates in practice will raise "tricky operational and political questions" for the Home Office.¹⁵ It notes that there will be inevitable tensions within the aspiration of designing a light-touch registration system capable of timely processing of the anticipated volume of applications, which is user-friendly and operates with a presumption of success, but which is also robust enough to prevent ineligible or fraudulent applications from succeeding.

Deciding eligibility for status and the scope to refuse applications

The grounds for eligibility for post-Brexit national status (in the UK context, 'temporary' or 'settled' status) will largely follow current EU law on eligibility for rights of residence (i.e. the Citizens' Directive 2004/38/EC).

Applicants will be covered by the citizens' rights part of the Withdrawal Agreement whilst they wait for a final decision or appeal outcome on their application.

However, states will be able to remove from their territory applicants who submit "fraudulent or abusive" applications, before the outcome of an appeal.

The Withdrawal Agreement will specify procedural safeguards and rights of appeal, which will be as per the Citizens' Directive.

The eligibility criteria for acquiring temporary and permanent residence under the Withdrawal Agreement will follow existing provisions in the Citizens' Directive:

- People who have been exercising their free movement rights (i.e. as a worker, self-employed person, student, self-sufficient person or family member) for less than five years will be eligible for temporary residence (as per Articles 6 and 7 of the Directive)

Not all EU citizens in the UK will qualify for temporary or settled status in the UK

¹⁴ See House of Lords EU Justice Sub-Committee, [Uncorrected evidence Brexit: citizens' rights, 12 December 2017](#) Q17

¹⁵ Migration Observatory, [The Burden of Proof: How Will the Application Process Work for EU Citizens After Brexit?](#), 13 December 2017

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- People who have five years' continuous lawful residence under EU law will be eligible for permanent status - 'settled status' in the UK (as per Articles 16-18 of the Directive).¹⁶

As per the Directive, the UK/EU27 states will be able to apply more favourable provisions if they wish. The UK Government has indicated that it does not intend to apply the Directive's comprehensive sickness insurance requirement (which applies to self-sufficient people and students) but, unless this commitment is put into the Withdrawal Agreement, it will not be legally binding. This is a matter of concern to EU citizens' rights campaigners, given that a future change of government policy on the issue could potentially deny residence rights to a significant number of applicants.

People who already have a permanent residence card issued under the Directive will be able to exchange it free of charge, subject to certain checks.

People who get permanent residence under the Withdrawal Agreement will lose it if they are absent from the host Member State for more than five years. On the face of it, this is more generous than what the Directive provides – currently, rights of permanent residence are lost after an absence of two continuous years (the same is also true for non-EEA nationals who have Indefinite Leave to Remain in the UK). However, at the moment, an EU national who loses permanent rights of residence can simply re-enter the host Member State and start to build up a new period of qualifying residence by exercising their free movement rights once again. This option will not be available after Brexit, since the citizen's eligibility to re-enter the host Member State will depend on its national immigration laws.

In line with proposals previously outlined by the UK Government, grounds for exclusion from status based on criminal conduct before the specified date will reflect the provisions in the Directive, but grounds for exclusion based on conduct after the cut-off date will reflect national law (which, in the UK context, is more punitive).

The Joint Report does not give any detail about what in practice will happen to those citizens who require national status but do not apply for it or have their application refused.

Box 2: Which EU citizens might be left without legal status post-Brexit?

Experts have identified certain categories of EU citizens who are currently resident in the UK but may not be able to obtain status under the agreement made thus far:

- EU citizens who cannot show that they have been exercising their Treaty rights – e.g. elderly people who are not 'self-sufficient'

¹⁶ In certain circumstances, a right of permanent residence can be acquired sooner than five years, for example, if a 'worker' reaches retirement age or becomes permanently incapacitated.

- EU citizens who fail to apply for status – e.g. because they are unaware they need to, because they miss the deadline, because they are unable to navigate the application process
- EU citizens who cannot satisfy the evidentiary requirements – e.g. because they have been doing casual ‘cash in hand’ work, or because they arrive in the UK close to the cut-off date and don’t have sufficient proof of residence
- EU citizens with complex cases – e.g. because they have long gaps in their residence which need individual scrutiny
- EU citizens who are deemed to be making an invalid, fraudulent or ‘abusive’ application
- There is also some uncertainty over whether the Withdrawal Agreement will apply to family members who currently have residence rights derived from certain case law, such as ‘Surinder Singh’ partners and ‘Zambrano’ carers.

Individuals who do not have status will be deemed to be unlawfully resident in the UK. They will be subject to a range of practical restrictions on daily life (e.g. no permission to work, no access to welfare benefits or free NHS treatment, no ‘right to rent’, etc.) and liable to removal from the UK.

It is difficult to quantify how many people might fall into the above categories, but given that over 3 million citizens will need to apply for status, it has been noted that “even if only a few percent were affected the number could be in the tens or even the hundreds of thousands”.¹⁷

Some UK citizens living in EU27 States might encounter similar difficulties, if their host country decides to require them to apply for a national status when their rights under current EU law expire.

[sources: Migration Observatory, [The Burden of Proof: How Will the Application Process Work for EU Citizens After Brexit?](#), 13 December 2017; Free Movement Blog, [‘How Many EU Citizens will be criminalised after Brexit?’](#), 13 December 2017]

Social security rights

Long-standing provisions in EU law “coordinate” social security schemes for people moving within the EU, which also apply to non-EU EEA countries and Switzerland. The provisions – now in EC regulations 883/2004 and 987/2009 – do not guarantee a general right to benefit throughout the EEA; nor do they harmonise the social security systems of the Member States. The primary function of [social security coordination](#) is to support free movement throughout the EEA by removing some of the disadvantages that migrants might encounter by, for example:

- prohibiting discrimination in relation to access to benefits on grounds of nationality;
- clarifying which state is responsible for paying benefits in particular cases;
- allowing a person’s periods of employment, residence and contributions paid in one EEA country to count towards entitlement to benefit in another country (“aggregation”); and

¹⁷ Migration Observatory, [The Burden of Proof: How Will the Application Process Work for EU Citizens After Brexit?](#), 13 December 2017, p.10

- allowing people to take certain benefits abroad with them to another EEA state ("exportation")

The Joint Report states that the social security coordination rules will continue to apply to EU citizens who, on the date of withdrawal, are or have been covered by the UK social security system, and UK nationals who are or have been covered by the system of an EU27 state. The rules will also continue to apply to EU and UK nationals covered by the Withdrawal Agreement by virtue of residence.

So, for example, for those covered all relevant social security benefits will continue to be exportable both to EU states and the UK as under the current EU rules; and all social security benefits, including old age pensions, will continue to be uprated in accordance with national rules. The rules on aggregation of periods of social security insurance will also continue to apply to those who have previously exercised free movement rights. The European Commission's [Q&A Memo](#) gives examples of how individuals would be affected.

There will be a need for a jointly agreed mechanism to incorporate any changes to EU rules on the coordination of social security systems in the Withdrawal Agreement.

Legal effects of the Withdrawal Agreement

The Withdrawal Agreement "should enable citizens to rely directly on their rights" as set out in the Agreement, and states that "inconsistent or incompatible rules and provisions will be disapplied". The Withdrawal Agreement will be legally binding on the EU institutions and Member States.

In addition, the UK will legislate for a Withdrawal Agreement and Implementation Bill to implement the Agreement and incorporate citizens' rights into UK law. The Bill will provide that the citizens' rights provisions will prevail over other incompatible legislation, unless the Act is expressly repealed by Parliament.

However, there has been some questions over whether these provisions could actually have the desired effect under UK constitutional law.¹⁸ Another Commons Library Briefing Paper (on clause 9 of the EU (Withdrawal) Bill and implementing the withdrawal agreement) provides more information on this.¹⁹

Measures to ensure there is a consistent interpretation of citizens' rights by the UK and EU27

The Joint Report and technical note set out agreed measures intended to ensure that citizens' rights are protected and consistently interpreted

Citizens' rights will be enshrined in the Withdrawal Agreement and UK primary legislation and will have primacy over incompatible or inconsistent rules

¹⁸ See for example Professor Mark Elliott, '[The Brexit agreement and citizens' rights: Can Parliament deliver what the Government has promised?](#)', Public Law for Everyone blog, 11 December 2017; Paul Daly et al, '[Brexit and EU Nationals: Options for Implementation in UK Law](#)', Cambridge University, 7 December 2017

¹⁹ [EU \(Withdrawal\) Bill: clauses 9, 8 and 17](#), Commons Library Briefing Paper 8170, 11 December 2017

and applied in the UK and EU27 states, including an agreement on the future jurisdiction of the Court of Justice of the European Union (CJEU):

- Where the citizens' rights part of the Withdrawal Agreement uses Union law concepts, these are to be interpreted in line with pre-Brexit CJEU case law.
- The UK courts shall have "due regard" to relevant CJEU decisions issued after Brexit.
- For the first 8 years that the citizens' rights part of the Withdrawal Agreement is in force, UK courts and tribunals will be able to refer questions of interpretation to the CJEU, if they consider it necessary in order to make a ruling on a case before them (i.e. if there is no clear case law already). The Withdrawal Agreement should set out the mechanism for this.
- There should be an ongoing exchange of case law and regular judicial dialogue between the UK courts and CJEU, in order to further support consistent interpretation of the citizens' rights part of the Withdrawal Agreement.
- The UK Government will have the right to intervene in relevant cases before the CJEU, and the European Commission will have the right to intervene in relevant cases before the UK courts and tribunals.
- The European Commission will monitor the implementation of citizens' rights by the EU27 States. An independent national authority will be responsible for monitoring implementation in the UK, and there should be regular exchange of information between the Commission and UK Government. The detailed role of the UK's authority will be discussed during the second phase of the negotiations. In the Commission's view, it should mirror the Commission's role, including having a power to initiate legal actions before the UK courts.²⁰

The requirement for UK courts to have "due regard" to CJEU decisions post-Brexit goes further than the provisions in the European Union (Withdrawal) Bill (which gives UK courts the option to take account of CJEU case law post-Brexit where they consider it appropriate to do so).²¹

The European Commission's memo says that eight years will be long enough for the CJEU to rule on the most significant issues, although EU citizens' rights campaigners argue that eight years is not sufficient to ensure their rights are fully protected for their lifetime.

The Prime Minister's [statement](#) in the Commons on 11 December suggested that referring questions to the CJEU during the eight year

²⁰ Communication, p.7

²¹ See Library briefing *The European Union (Withdrawal) Bill: Supremacy and the Court of Justice*, 8 November 2017:
<http://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-8133>

period will be at the voluntary initiative of the UK courts, and there is no indication that the CJEU's ruling will be legally binding in such cases. In the Prime Minister's view, there will be a "very narrow remit" for the courts to exercise this power in a "very small number of cases". Nevertheless, the courts' use of the power could be controversial.

Lady Hale, President of the Supreme Court, asked in October for guidance from Parliament on how much weight to give CJEU judgements after Brexit, saying: "We will do what parliament tells us to do. We would like parliament to give us as much clarity as possible."²²

It is not known yet whether the role of the independent national body in the UK will be given to an existing organisation or a new one. It is also unclear whether it will have the same powers (and equivalent resources) as the European Commission.

Box 3: Have the European Parliament's red lines on citizens' rights been satisfied?

The European Parliament's [resolution](#) on 12 December 2017 recommending that the talks move on to the second phase reiterated that its support for the final withdrawal deal will be dependent on resolution of several outstanding issues, which mostly relate to citizens' rights:

- extending coverage of citizens' rights to future partners
- a light-touch, declaratory administrative procedure must be available for EU and UK citizens applying for "permanent residence status"
- European Court of Justice decisions on citizens' rights must be binding, and the role of the ombudsman created to act on citizens' complaints must be defined
- the right of free movement for UK citizens currently residing in the EU27 Member States must be guaranteed
- the UK's commitments on Northern Ireland must be implemented.

Related issues to be discussed during the second phase of negotiations

A range of issues were deemed to be outside the scope of the first phase of negotiations:

- the right of UK nationals in the EU27 to live and work in a different Member State post-exit
- the rights of posted workers
- future healthcare arrangements (such as the EHIC card for UK citizens travelling to the EU post-exit)
- future decisions on the recognition of professional qualifications
- recognition of licences and certificates that are currently recognised EU-wide

²² [UK's new supreme court chief calls for clarity on ECJ after Brexit](#), The Guardian, 5 October 2017.

- lawyers practicing under home title
- territorial scope of economic rights, particularly secondary establishment and cross-border provision of services; and
- family reunion rights for future spouses of EU and UK citizens.

UK citizens in the EU: left in limbo?

In some respects, the negotiations thus far have given more clarity over the position for EU citizens living in the UK than for UK citizens living in the EU.

For example, very little is known about what plans any of the other EU27 States might have to require UK citizens to apply for a national status, or what the criteria and process for granting such status might be.

Furthermore, as things currently stand, there is no agreement on whether UK citizens living in EU27 Member States will retain free movement rights across the EU after the UK's exit. Securing these rights has been identified as a priority for UK expats, who argue that it would be unfair if they did not keep the same free movement rights as EU citizens living in the UK.

The memo for the Commission rejects the idea that UK citizens will become "land locked" in their host Member State after the UK's exit, pointing to the measures adopted under the EU's common immigration policy to facilitate intra-EU mobility for third-country nationals, such as the Long-term residents Directive, and the Blue Card Directive for skilled workers. However, taken in combination these fall far short of full free movement rights.

Can the UK Government effectively prevent a diminution of UK expats' rights in the EU, whilst it is seeking greater control over EU citizens' rights in the UK? Professor Steve Peers thinks not:

The awkward fact here is that, due to the inherent reciprocity in this aspect of the talks, the UK government could not be an effective advocate for retaining UK citizens' rights in the EU27 – because of its primary interest was in curtailing rights of EU27 citizens in the UK.²³

2.3 The financial settlement

Introduction

The European Commission [set out its position](#) on the financial settlement ahead of negotiations. The EU's position was built on the principle that the UK should honour its share of all the financial commitments made by the EU while the UK was a member.

²³ EU Law Analysis, '[The beginning of the End? Citizens' rights in the Brexit 'Sufficient Progress' deal](#)', 9 December 2017

The UK Government made no formal response to the EU's position; nor was there a position paper from the UK on the financial settlement. Instead, the UK probed the EU's position in negotiations in an attempt to bid down the EU's position.²⁴

Negotiations reached a deadlock in October as the UK was not in a position to be explicit about which financial commitments it was prepared to honour. Reports in the media in mid- to late November suggested that a sub-committee of the UK Cabinet had decided to honour more of the EU's financial commitments.²⁵ In late November 2017 it appeared that an agreement-in-principle had been reached on the settlement between the UK and the European Commission.^{26,27} No formal announcement was made at this stage. On 8 December, the agreement reached on the financial settlement formed part of the [Joint Report](#).

Underlying principles of the agreement

A methodology for calculating the financial settlement was agreed in the Joint Report. The underlying principles of the methodology are that:

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

The final point means that the UK will not be required to make any payments earlier than would have been the case if it had remained a Member State, unless agreed by both sides. For instance, as discussed below, the UK agrees to contribute towards the pensions of EU employees. The payments to EU employees are made annually in the EU's budgets and the UK will make annual contributions towards these costs. The UK will make a stream of EU pension related payments.

²⁴ Exiting the EU Committee, *The progress of the UK's negotiations on EU withdrawal*, 28 November 2017, HC 372 2017-19, [para 53](#)

²⁵ [Theresa May's cabinet agrees to pay more to break Brexit deadlock](#), *The Guardian*, 20 November 2017; [Brexit: UK 'ready to pay more to the EU'](#), *BBC*, 21 November 2017; [Tory backlash as Boris Johnson and Michael Gove agree in Cabinet to increase £20bn Brexit divorce bill](#), *The Telegraph*, 21 November 2017

²⁶ [Exclusive: Britain and the EU agree Brexit divorce bill](#), *The Telegraph*, 29 November 2017

²⁷ [UK bows to EU demands with breakthrough offer on Brexit bill](#), *FT*, 29 November 2017; [UK could pay £50bn Brexit divorce bill after bowing to EU pressure](#), *The Guardian*, 29 November 2017; [Brexit: UK divorce bill offer worth up to 50bn euros](#), *BBC*, 29 November 2017

Commitments arising from the EU Budget

UK participation in Union annual budgets to 2020

The UK will continue to contribute to, and participate in, the EU Budget in 2019 and 2020. Any changes made to the Budget or its financing after the withdrawal date (March 2019) will not apply to the UK. In November 2017, the Office for Budget Responsibility (OBR) – the UK’s public finances watchdog – forecast that the UK will contribute around €15 billion in 2019 and €16 billion in 2020.²⁸

The UK’s rebate will continue to apply.²⁹ The rebate was introduced in the 1980s to correct for the UK making relatively large net contributions to the EU Budget. The rebate is paid one year in arrears, so for instance the rebate paid in 2019 is based on the 2018 Budget. The Joint Report proposes that the UK shall receive a rebate in 2021 on its 2020 contributions. The OBR forecasts that the UK’s rebate in 2021 will be around €5 billion.³⁰

The agreement says that the UK and EU may consider simplifying the rebate in the second phase of negotiations.

EU Budget outstanding commitments (*reste à liquider*)

In their annual Budget the EU commits to some future spending without making payments to recipients at the time. The commitments will become payments in the future. The EU refers to outstanding commitments as *reste à liquider* (RAL). The UK will contribute towards the financing of the RAL outstanding at 31 December 2020.

The total applicable RAL will be adjusted to account for the actual amount that will be implemented. An adjustment will be made for ‘decommitments’ – commitments that are cancelled as they are not going to be converted into payments – and assigned revenues, which are largely revenues from non-EU countries to EU programmes.

At the end of 2016, the EU’s total accumulated RAL was €239 billion.³¹ The extent to which this will be adjusted for decommitments and assigned revenues won’t be known until they happen. Media reports suggest that UK Government officials expect that the UK’s share of RAL could be in the region of €21 billion - €23 billion over time.³² It appears that the UK’s figure assumes a greater proportion of decommitments than the EU usually assumes.³³

²⁸ OBR, [Economic and fiscal outlook – November 2017](#), supplementary table 2.27. These figures exclude the customs duties and levies collected by the UK on behalf of the EU.

²⁹ The Library briefing [The UK’s contribution to the EU budget](#) discusses the rebate.

³⁰ *ibid*

³¹ European Commission, [Consolidated accounts of the European Union and Financial Statement Discussion and Analysis](#), June 2017, [Table 4.5](#)

³² Bloomberg, [Brexite deal in Brussels: What the Fine Print Says and What it Means](#), 8 December 2017

³³ FT, [Brexite bill could rise beyond UK estimate of €40bn-€45bn](#), 8 December 2017

Liabilities

The UK will share the financing of the EU's liabilities incurred before 31 December 2020. Liabilities with corresponding assets will be excluded, as will assets and liabilities related to the spending and financing of the EU Budget. Box 3 lists the excluded assets and liabilities.

The pensions and other benefits of EU employees look like being the most significant liabilities included in the settlement. Like the UK civil service pension scheme, the EU's pension scheme is unfunded and operates on a 'pay-as-you-go basis', which sees costs being covered by the EU Budget as they arise.

At the end of 2016, the EU's liabilities for pensions and other employee benefits stood at €67 billion.³⁴ This figure is an estimate of what these future payments are worth now – it is based on discounting the future payments by a rate that adjusts for the time value of money. Therefore it isn't possible to say precisely at this time what the will have actually paid once all the annual payments for EU pensions have been made.

Box 3: Assets and liabilities excluded from the financial settlement

The Joint Report provided a list of the assets and liabilities that would not be included in the financial settlement.

Assets

- Union financial assistance loan assets and the associated balance sheet liabilities
- assets corresponding to property, plant and equipment and provisions related to the Joint Research Centre nuclear sites dismantlement
- lease-related obligations and all provisions other than in respect of fines, legal cases and financial guarantee liabilities
- intangible assets and inventories
- assets and liabilities relating to the management of foreign currency risk
- accrued and deferred income
- assets relating to Union space programmes (EGNOS, Galileo and Copernicus) are not part of the financial settlement. The UK's past contribution to the financing of space assets could be discussed in the context of possible future access to the services offered.

Liabilities related to the Budget and its financing

- Outstanding pre-financing advances
- Receivables
- Cash
- Payables, and accrued charges including those related to the European Agricultural Guarantee Fund (EAGF) or already included in the budgetary RAL will not be included for the calculation of liabilities.

Contingent liabilities

The UK will remain liable for its share of the EU's contingent liabilities as established at the date of withdrawal. These liabilities include those

³⁴ European Commission, [Consolidated accounts of the European Union and Financial Statement Discussion and Analysis](#), June 2017, [page 18](#)

related to financial operations – for instance for financial guarantees given on loans and financial assistance programmes – and legal cases. [Box 4](#) discusses an example of a contingent liability. [Box 2 5 Contingent](#)

Box 4: Contingent liabilities

Contingent liabilities are potential liabilities that may occur depending on the outcome of an uncertain event in the future. They relate mainly to financial guarantees given (on loans and financial assistance programmes) and to legal risks.

An example contingent liability: the European Financial Stabilisation Mechanism

The European Financial Stabilisation Mechanism (EFSM) was created in 2010 as a temporary fund to provide loans to EU Member States in financial difficulty. The EFSM used the EU Budget as a guarantee to borrow money on financial markets, which it then subsequently lent to countries which require the funding. The EFSM is no longer used to fund new loans, but the outstanding loans still exist.

If the countries which receive EFSM loans fail to repay them, then the EU Budget bears the cost. If, as a result of this, additional money is required to fund the EU Budget, further contributions from EU Members may be required. This is where the UK currently has a contingent liability.

For those contingent liabilities related to financial operations, the UK's liability only be affected by decisions adopted before the date of withdrawal.

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.

If any contingent liabilities are triggered, the UK will receive any subsequent recoveries from meeting those liabilities. The UK will also receive its share of paid-in guarantees when the financial operations associated with some contingent liabilities decline.³⁵

The UK's share

Some of the financial commitments discussed above are accounted for on an EU-wide basis. The Joint Report suggests that the UK's share of these commitments should be based on the UK's percentage share of total contributions to the EU Budget over 2014 – 2020. The exception is the UK's continued participation in Budget 2019 and 2020 – here there is no need to calculate a UK share.

In its original [position paper](#) the EU expected the UK's share to be calculated using the same approach, but only covering the period 2014 – 2018. It is thought that including contributions in 2019 and 2020 may make the UK's percentage share lower.³⁶ This is because following the EU referendum result the pound fell relative to the euro, and has remained at a lower level since. This makes the UK economy appear

³⁵ The UK will also receive a share of the net asset of the European Coal and Steel Community in liquidation and of the European Investment Fund decided before the withdrawal date, as the financial operations supported by these mature.

³⁶ FT, [Britain prepares case to cut Brexit divorce bill](#), 17 November 2017

relatively smaller, and means the UK will make relatively smaller contributions to the EU Budget.

UK participation in programmes

The UK will continue to participate in EU programmes funded from the current Budget plan (the Multiannual Financial Framework 2014 – 2020)³⁷ until they close. The UK Government and UK beneficiaries will be required to respect all relevant EU legal provisions including co-financing.

EU programmes take two forms – funding is either provided to the UK Government to manage, or funding is allocated directly to beneficiaries by the Commission.

The UK Government-managed funds include the European Structural and Investment funds and direct payments to farmers. The OBR forecasts that the UK will receive around €7 billion in funding for these programmes in both 2019 and 2020.³⁸

The funding allocated directly by the Commission is largely through the Horizon 2020 – the EU's research and innovation programme. UK beneficiaries receive around €1.5 billion – €2 billion a year in direct funding from the Commission.³⁹

The second phase of negotiations may include some simplification of the UK's participation in EU programmes. For instance, the Joint Report says that the UK and EU could decide to simplify procedures so as to avoid unnecessary administrative burdens.

The Library briefing [Brexit: UK Funding from the EU](#) has more on EU funding programmes.

The currency of payments

The settlement will be drawn up and paid in euro. This means that the UK's actual contribution in pounds will be contingent on the future exchange rate.

Areas outside of the EU Budget

European Investment Bank

EU Member States are members of the European Investment Bank (EIB). As an EIB member the UK agrees to provide €39 billion of the EIB's capital – what is known as unpaid, or callable, capital. The UK also has €3.5 billion of paid-in capital with the EIB.

³⁷ The Library briefing [A guide to the EU budget](#) has more on the multiannual financial framework

³⁸ OBR. Economic and fiscal outlook – November 2017, [supplementary table 2.27](#)

³⁹ European Commission, [EU expenditure and revenue 2014-2020](#)

On withdrawal from the EU the UK will no longer be a member of the EIB. The UK's €3.5 billion of paid-in capital will be repaid to the UK in twelve annual instalments starting at the end of 2019.⁴⁰

The UK will provide a guarantee to the EIB equal to its callable capital – an amount the UK currently agrees to provide if required. This guarantee will decrease as EIB loans associated with it decrease.

European Central Bank

At January 2015 the UK had €0.06 billion (€56 million) of paid-in capital in the ECB.⁴¹ The paid-in capital will be returned to the Bank of England after the UK's withdrawal.

European Development Fund (EDF)

The EDF is the EU's main instrument for providing development aid overseas. The EDF is broken down over time into 'EDF funds'. The EDF is outside the EU Budget and the UK contributes to the fund.

The UK will remain part of the EDF until the close of the 11th EDF fund, which runs between 2014 and 2020. 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 practicalities of making payments will remain as they currently are, unless otherwise agreed in the second phase of negotiations.

The UK has a share of the EDF's Investment Facility. This funding will be returned to the UK as the investments end.

For further information on the EDF see the European Parliament Research Service's briefing [European Development Fund](#). For further information on the EDF see the European Parliament Research Service briefing [European Development Fund](#).

Facility for Refugees in Turkey and EU Trust funds

The UK will continue to honour the commitments it has made on the Facility for Refugees in Turkey and the European Union Emergency Trust Fund. The practicalities of the UK's participation in these schemes will continue on the current basis after withdrawal, unless changes are agreed in the second phase of negotiations.

The [Facility for Refugees in Turkey](#) was established as part of a wider framework to address the migration crisis which started in 2015. The Facility focuses on humanitarian assistance, education, migration management, health, infrastructure, and socio-economic support.

EU Trust Funds are development tools which pool resources from different donors in order to enable an EU response to an emergency or post-emergency situation. The European Parliament Research Service's briefing [EU Trust Funds for external action: First uses of a new tool](#) has more on the EU's trust funds.

⁴⁰ The first eleven payments will be €300 million and the final one will be €196 million.

⁴¹ ECB, [Capital subscription](#)

How much might the settlement cost?

The UK Government costs the settlement at around £35 billion- £39 billion.⁴² However, it is very difficult to put definitive figures to the settlement, not least because many of the commitments the UK has agreed to will be based on their value in 2020. Further complications are that many of the items are being paid over a number of years, so any estimate made now relies on assumptions about the future, such as how many outstanding commitments will be written off (or decommitted) in the future, and at what rate future payments are discounted – for EU pensions for instance – to come up with today's value. Payments arising from the settlement will be calculated and paid in euros, so the exchange rate will also influence the cost in pounds.

The FT has reported that the UK Government's estimate does not include contingent liabilities.⁴³ If included, these liabilities – which are dependent on the outcome of uncertain future events – add around €10 billion. The chance of all of these liabilities being realised is remote.

Box 5: Some items included in the EU's position paper didn't make it into the Joint Report

Costs related to the withdrawal process

The EU's position paper said that the UK should pay for the specific costs related to the withdrawal process. For instance, this would have included the costs related to moving EU agencies from the UK. The Joint Report says nothing about the UK meeting these. The only related reference is that "The Commission welcomes the UK Government's offer to discuss with Union Agencies located in London how they might facilitate their relocation, in particular as regards reducing the withdrawal costs".

Obligations of agencies financed outside of the general EU Budget

The position paper said that "For the agencies of the Council which are not financed by the General budget of the Union (European Defence Agency, European Union Institute for Security Studies, European Union Satellite Centre), the United Kingdom should assume its share of the financing of all obligations undertaken by these agencies before the withdrawal". There is no specific mention of this in the agreement. Likewise there is no mention of the following, which was included in the position paper "Until the end of the academic year 2020-2021, the United Kingdom should continue to contribute to the funding of the teachers it seconded to the European schools in line with the cost sharing agreement related to the secondment of British and Irish teachers".

What is to be agreed in phase two of negotiations?

The second phase of the negotiations will address the practical modalities for implementing the agreed methodology and the schedule of payments.

There may also be further negotiation on some of the issues mentioned above, such as simplifying the rebate or the UK's participation in EU programmes.

⁴² [HC Deb 11 Dec 2017:c25](#)

⁴³ FT, [€40bn or €60bn? Totting up the Brexit bill](#), 8 December 2017

2.4 Movement on Irish border question

At the moment, both the UK and Ireland are members of the EU single market and customs union. This allows goods to cross the Irish border with no customs checks. After Brexit, the UK will leave both the single market and customs union. The Prime Minister has made clear that this includes Northern Ireland.

The joint agreement contains a number of commitments by the UK including:

- A commitment to the avoidance of a hard border, including any physical infrastructure or related checks and controls (paragraph 43)
- A commitment to preserving the integrity of its internal market and Northern Ireland's place within it, as the United Kingdom leaves the European Union's Internal Market and customs Union (paragraph 45). This means no customs border between Northern Ireland and the rest of the UK.

While the agreement sets out the objectives in relation to the Irish border there is little detail about how they are to be achieved.

Commitment to the Good Friday Agreement

The Joint Report saw both the EU and UK affirm that the Good Friday Agreement "**must be protected in all its parts**, and that this extends to the practical application of the 1998 Agreement on the island of Ireland and to the totality of the relationships set out in the Agreement."

Such a comprehensive commitment to upholding the principles of the Agreement is not unexpected as it formed a key plank of both sides' approaches to the negotiations.

The Irish border issue has not been solved

The Report sets out a range of objectives for the Irish border. However, the means by which these objectives are to be achieved have not been spelt out. A leader in the Times said that the border issue had been "skilfully fudged, but certainly not resolved".⁴⁴ Katy Haywood, an academic expert on the Irish border, said:

The Irish question is far from resolved and there are laborious and detailed negotiations to come.

As such, the joint agreement wisely allows for a special strand of the phase two discussions between the EU and the UK to be dedicated to the "detailed arrangements" necessary to give effect to the ambitious commitments to Northern Ireland/Ireland contained here.⁴⁵

⁴⁴ Moving on [leading article], The Times, 9 December 2017

⁴⁵ [Brexit deal breaks deadlock – experts react](#), The Conversation, 8 December 2017

A broad definition of a 'hard border'

The Joint Report recalls the UK's commitment "to the avoidance of a hard border, including any physical infrastructure or related checks and controls." This is a very broad definition of a hard border, and seems irreconcilable with the UK's stated aim of leaving the Single Market and the Customs Union.

The agreement seeks to reconcile three objectives:

- Avoiding a hard border in Ireland
- Allowing the UK to diverge from EU regulations
- Avoiding regulatory divergence between Northern Ireland and the rest of the UK.

Many observers believe this is impossible. The EU's scepticism of this position is reiterated in the Commission's Communication to the European Council, in which it says that the UK:

Aims to achieve this protection and the avoidance of a hard border through the overall EU-United Kingdom relationship. This intention seems hard to reconcile with the United Kingdom's communicated decision to leave the internal market and the Customs Union.⁴⁶

The Exiting the EU Committee concluded in its report of 1 December that it could not at present see how leaving the customs union and the single market could be reconciled with there being no border or infrastructure. The use of technology to create a "light touch" border was "untested and to some extent speculative".⁴⁷

The "all circumstances" backstop

One of the most commented upon parts of the Report is the meaning and effect of the phrase "in all circumstances" in paragraph 46. The text states that "the commitments and principles outlined in this Joint Report [...] are made and must be upheld **in all circumstances**, irrespective of the nature of any future agreement between the European Union and United Kingdom."

This commitment, as with all commitments made in the Joint Report, has no legal force. However, the stipulation that these commitments must be upheld in all circumstances gives the parts of the report relating to Northern Ireland a particular primacy, and a 'unique' status.⁴⁸ This is further underlined by the commitment that discussions on the

⁴⁶ European Commission, '[Communication from the Commission to the European Council \(Article 50\)](#)', 8 December 2017

⁴⁷ Exiting the EU Committee, '[The progress of the UK's negotiations on EU withdrawal](#)', 01 December 2017, HC 372, 2017-19, para 10

⁴⁸ See Sylvia de Mars et al, '[Commentary on the Joint Report](#)', The Constitutional Conundrums: Northern Ireland, the EU and Human Rights Project

border during the second phase of the negotiations will form their own strand.

The comprehensiveness of the commitment in paragraph 46 is in contrast to the conditionality in paragraph 96, which says the Joint Report is “agreed [to] by the UK on the condition of an overall agreement under Article 50 on the UK’s withdrawal.” Because of this internal contradiction it is not clear which of these commitments has greater primacy. Paragraph 5 also adds that the joint commitments made in the Report will be reflected in the withdrawal agreement subject to “the caveat that nothing is agreed until everything is agreed”, which emphasises that the Report is part of a sustained negotiation that has not reached its conclusion.

Dominic De Saulles, an academic at Cardiff Law School, has suggested that the primacy does rest with “the definite arrangements” relating to Ireland in the Joint Report. He says that “the provisions on Ireland are intended to have permanent effect because specific language trumps the general language” used in paragraphs 5 and 96.⁴⁹ He also emphasises that the agreement is part of the Article 50 process and so it would be up to the Court of Justice of the EU (CJEU) to rule on what the agreement means.

The extent to which the negotiating parties can deviate from the text of the report will also be limited by the European Parliament, which must agree to the withdrawal agreement. The EP, having expressed concern over David Davis’ comments that the Joint Report was a “statement of intent”, passed a resolution supporting the Report but calling for the commitments made in it to be “fully translated” into the withdrawal agreement.⁵⁰

Whatever the legal force of this commitment to uphold the principles in the Joint Report in all circumstances, it carries significant political weight and underlines the importance of the future of Northern Ireland to both parties.

Three steps of guarantees to prevent a hard border

Katy Haywood, an expert on Irish border issues at Queen’s University Belfast, has argued that paragraph 49 sets out three separate options for the Irish border. The first, and the UK Government’s favoured option, is for the Irish border issue to be settled as part of the overall UK-EU future relationship:

The problem, of course, is that it is not possible to have a trade deal that manages to cover the full set of commitments that the UK has agreed to here.

⁴⁹ [‘European Court and not London will decide if Brexit deal binding’](#), Irish Times, 12 December 2017.

⁵⁰ European Parliament, [‘European Parliament resolution of 13 December 2017 on the state of play of negotiations with the United Kingdom’](#).

Even a deep and comprehensive free trade agreement does not allow for the incorporation of the *acquis communautaire*, or the accumulation of EU law, which - the report notes - is essential to the continuation of North/South cooperation. Neither does it avert the need for customs controls and checks.

Even if the UK was so “fully aligned” in its regulations as to be in the single market, there would be a need for a customs border between the UK and the EU. These controls would mean declarations of import/export (for compliance with standards and rules of origin, and tracking for VAT-exemption) and the payment of duties.

The border between Norway and Sweden is a good example of what this border looks like - and a smoothly run one at that. It entails approved and unapproved roads, efficiently-run and coordinated customs services, and physical infrastructure. Plenty of it.⁵¹

The second scenario sees the UK propose specific solutions to solve the Irish border issue. The agreement does not specify what these might be. The UK published a [position paper](#) in August. The solutions in this paper did not satisfy the EU. Michel Barnier said at the time: “creativity and flexibility can't be at the expense of the integrity of the single market and customs union”.⁵² Paragraph 45 states that the UK will respect the “rights and obligations” that come with Ireland’s membership of the EU and “in particular Ireland's place in the Internal Market and the Customs Union”.

The third scenario is where there is no agreed solution. Under these circumstances, the UK will “**maintain 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”. Katy Hayward argues that “these conditions have extraordinary broad implications”.⁵³

What does full alignment mean?

There has been significant focus on what the phrase “full alignment” means in the event of no agreed solution, the third scenario set out above.

[On 5 December](#), before the conclusion of the Joint Report, David Davis said that the UK was seeking a form of “regulatory alignment” with the EU, which would apply to the whole of the United Kingdom:

It is not harmonisation, being in the single market, or having exactly the same rules; it is this House exercising its democratic

⁵¹ Katy Hayward, [Brexit deal allows for three different types of Irish Border](#), Irish Times, 8 December 2017. This article was retweeted by Sabine Weyand, Michel Barnier’s deputy in the Brexit negotiations

⁵² [‘EU ‘worried’ by UK’s Irish border proposals’](#), BBC News online, 7 September 2017.

⁵³ Katy Hayward, [Brexit deal allows for three different types of Irish Border](#), Irish Times, 8 December 2017. This article was retweeted by Sabine Weyand, Michel Barnier’s deputy in the Brexit negotiations

right to choose our own laws in such a way as to maximise our ability to sell abroad.

He later clarified how this would work (c 901): “using things such as the mutual recognition and alignment of standards. That does not mean having the same standards; it means having ones that give similar results”.

But the Joint Report spoke of “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”.

Responding to questions on her statement on the Brexit negotiations, and use of the term “full alignment” in the Joint Report, the Prime Minister said on [11 December](#) (c30):

The right hon. Gentleman asked about alignment. What is necessary is that we have the same objectives. We may reach those objectives in different ways, but what we need to ensure—and this is not a theological argument; it is about the practical decisions that need to be made—is that the trade across the border between Northern Ireland and Ireland can continue, and that is what we will be looking at. The Taoiseach and I have been very clear in our discussions: we both believe that we should be working to ensure that that can be achieved through the overall agreement between the UK and the EU, and that is indeed what we should be aiming for.

The Commission has [said](#) that “implementation and oversight mechanisms” of the “full alignment” referred to in the Joint Report will be needed to maintain the integrity of the single market:

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

It has, however, been pointed out that the term “regulatory alignment” has other interpretations. For example, Emily Lydgate of the Trade Policy Observatory at Sussex University wrote in a [blog](#):

In the recently-concluded EU-Ukraine Association Agreement, ‘[regulatory alignment](#)’ means that Ukraine is expected to incorporate the EU acquis, its body of law and regulation, in covered areas. Determining whether it has fulfilled this obligation is down to the EU.

This is quite different from mutual recognition, which Davis then advocates. The Mutual Recognition Agreements the EU has concluded are limited in scope and application. They allow companies in a sub-set of sectors to certify that their products

meet EU standards at the point of production (*mutual recognition of conformity assessment*), thus obviating the need for checks to happen twice.

This is a far cry from an invisible border. It does nothing to prevent border checks resulting from tariff barriers and rules of origin checks. Davis notes that mutual recognition would only happen 'sometimes' such that border infrastructure would need to be in place for non-covered sectors.

Depending on how "full alignment" is interpreted, such a scenario could limit the ability for the UK to strike its own trade deals. US Commerce Secretary Wilbur Ross, for example, commented in November that the completion of a trade deal between the UK and the US will in part depend on the UK avoiding "unnecessary" divergences with US regulations, something the UK will struggle to do if it stays fully aligned with EU standards.⁵⁴

Since the Joint Report was agreed, David Jones (a former DExEU minister) also raised concerns that a full alignment situation could prevent the UK from signing free trade deals:

That could well relate to very important areas such as, for example, agriculture, which we would want to throw into the mix in negotiating a free trade agreement with a third country. And if this were to persist, then it could severely handicap our ability to enter into those free trade agreements.⁵⁵

However, the UK Government has since suggested a much narrower interpretation of the commitment to "full alignment." The Irish Times reported that a senior official at DEXEU said the commitment applies only to the six areas of North-South economic co-operation identified in the Good Friday Agreement. These are transport, agriculture, education, health, environment and tourism.

Referring to media reports at the end of November, that the 'mapping exercise' undertaken as part of the negotiations (and referred to in the Report) had identified 142 cross-border policy areas that could be affected by Brexit, the official clarified that these were "subsets of the original six".⁵⁶ The official was quoted as saying:

It's the six areas. The 142 are a deeper dive across those six areas. The ambition at the moment clearly is to get cross-border trading arrangements to maintain the status quo as much as we can [...] There are a very unique set of circumstances that apply to Ireland that don't apply to anywhere else in the UK. But in terms of

⁵⁴ ['Wilbur Ross outlines US terms for post-Brexit trade deal'](#), Financial Times, 6 November 2017.

⁵⁵ ['UK qualifies implications of 'full alignment' Brexit pledge'](#), The Irish Times, 8 December 2017.

⁵⁶ ['Hard Brexit would hit 142 Irish cross-border agreements'](#), The Guardian, 27 November 2017

customs union and single market membership, the UK as a whole will be leaving.⁵⁷

The Joint Report in paragraph 47 says the mapping exercise:

Shows that North-South cooperation relies to a significant extent on a common European Union legal and policy framework. Therefore, the United Kingdom's departure from the European Union gives rise to substantial challenges to the maintenance and development of North-South cooperation.

The results of the mapping exercise are not currently in the public domain.

The Irish Prime Minister Leo Varadkar, at the European Council meeting on 14 December, was asked by the Irish broadcaster, RTÉ, for his interpretation of "full alignment" in the Report:

In terms of maintaining full alignment, our view is that's very strong language. Maintain means, 'keep as it is' of course. Full means 'full', not 'partial', and alignment means 'keep in line'.

[...] What we're saying here is that in this backstop scenario the United Kingdom, and Northern Ireland in particular, would maintain full alignment with the rules and regulations of the internal market and the customs union as a backstop arrangement, and that gives us a very strong assurance that there won't be a hard border on the island of Ireland.⁵⁸

Does the Joint Report imply a soft Brexit?

Various commentators have suggested that the terms of the agreement mean a soft Brexit is more likely. For example, an article in the Financial Times said: "... the divorce settlement puts the onus on Britain to come up with a solution. If it does not, it will revert to full alignment with EU law. Unless Mrs May has a magical solution up her sleeve, the UK's exit might have just become a lot softer."⁵⁹ Similarly, the legal commentator, David Allen Green, said "it is beginning to look a lot like a soft Brexit."⁶⁰

However, the UK's preferred future trading relationship remains one based on a looser association with the EU. David Davis has said the UK envisages a trade deal based on the EU-Canada agreement, but with more comprehensive access for the service industries, what he called "Canada plus plus plus".⁶¹

⁵⁷ ['UK qualifies implications of 'full alignment' Brexit pledge'](#), The Irish Times, 8 December 2017.

⁵⁸ ['Irish PM blames Brexiteers for Irish border problems'](#), BBC News online, 14 December 2017

⁵⁹ ['Brexit breakthrough'](#), Financial Times [opinion today], 9 December 2017

⁶⁰ ['Brexit: what regulatory alignment means and does not mean'](#), David Allen Green blog, Financial Times, 8 December 2017

⁶¹ ['Brexit: David Davis wants 'Canada plus plus plus' trade deal'](#), BBC News online, 10 December 2017.

Michel Barnier said on the day the Joint Report was agreed that the UK's 'red lines' of being out of the single market and customs union, and not being subject to rulings by the European Court of Justice, mean only one type of future trade model is available: "If you take that - what are you left with? Just one thing: a free trade agreement on the Canadian model".⁶²

'Special status' – if consented to

Paragraph 50 reiterates that in the absence of agreed solutions - the 'third scenario' set out above – the UK will ensure that no regulatory barriers arise between Northern Ireland and the rest of the UK **"unless, consistent with the 1998 Agreement, the Northern Ireland Executive and Assembly agree that distinct arrangements are appropriate for Northern Ireland"**.

This scenario seems unlikely as the DUP have ruled out any special status for Northern Ireland, as have other Unionist parties.⁶³ Also, the phrase "consistent with the 1998 Agreement" is most likely a reference to the 'petition of concern' mechanism in the Northern Ireland Assembly. This mechanism means that if 30 or more Assembly Members raise a petition with the Speaker of the Assembly in relation to a vote, that vote must attract a higher voting threshold, which requires significant support from parties representing both communities.⁶⁴

The paragraph ends "in all circumstances, the United Kingdom will continue to ensure the same unfettered access for Northern Ireland's businesses to the whole of the United Kingdom internal market". This seems to rule out Northern Ireland remaining in the Single Market or the Customs Union.

This is consistent with the Prime Minister's 'Commitment to Northern Ireland' letter which she published on the same day as the Joint Report. This letter makes six commitments, of which the fourth is:

The whole of the United Kingdom, including Northern Ireland, will leave the EU customs union and the EU single market. Nothing in the agreement I have reached alters that fundamental fact.⁶⁵

Paragraph 50 does suggest there is limited latitude for Northern Ireland to enjoy some sort of special status that falls short of erecting significant barriers between it and the rest of the UK, but only if this can attract strong cross-party support in the Northern Ireland Assembly.

⁶² ['EU-Canada trade deal is only model that fits Britain's terms: EU's Barnier, Reuters'](#), 8 December 2017

⁶³ ['Poll suggests unionists would be content with Irish Sea border after Brexit'](#), The Irish News, 28 November 2017

⁶⁴ A vote on proposed legislation will only pass if supported by a weighted majority (60%) of members voting, including at least 40% of each of the nationalist and unionist designations present and voting.

⁶⁵ Prime Minister's Office, ['Commitments to Northern Ireland'](#), 8 December 2017

However, any special status for Northern Ireland is likely to be seized upon by the other nations of the UK, who have expressed their desire to remain more closely aligned to the EU post-Brexit.

No diminution of rights in Northern Ireland

Paragraph 53 states that “the United Kingdom commits to ensuring that no diminution of rights is caused by its departure from the European Union, including in the area of protection against forms of discrimination enshrined in EU law.”

The rights of EU citizens are covered in other parts of the Joint Report so it seems likely that this section is largely a guarantee of maintaining human rights in Northern Ireland.

If the EU Withdrawal Bill has the effect of incorporating all the provisions of EU law that cover human rights into UK law, then there should be no diminution of rights in Northern Ireland resulting from Brexit. However, there is some debate over whether and how the Withdrawal Bill does this, particularly in respect of the Charter of Fundamental Rights.

The Withdrawal Bill currently contains no explicit commitment reflecting paragraph 53.

The Charter of Fundamental Rights

The EU Charter of Fundamental Human Rights and Freedoms (the Charter), is part of the EU’s complex set of human rights obligations. The Charter’s 54 articles were intended to consolidate existing fundamental rights and principles relating to the EU.

The Government has specifically omitted the Charter from the ‘retained EU law’ that the EU Withdrawal Bill will incorporate into UK law. The Government asserts that no substantive rights will be lost as a result of not retaining the Charter, because:

- ‘The Charter did not create new rights but rather codified rights and principles which already existed in EU law’ (including case law of the CJEU);
- ‘by converting the EU acquis into UK law, those underlying rights and principles will also be converted into UK law’; and
- ‘EU law which is converted will continue to be interpreted in the light of those underlying rights and principles’.⁶⁶

However, the Government has not said exactly how or where each of the rights and principles set out in the Charter would be reflected in retained EU law or other domestic law in the UK. Those who support retaining the Charter argue that:

- individual rights and remedies would be lost if it was not retained

⁶⁶ EUW Bill [Explanatory Notes](#), paras 99-100

- the Charter could continue to be relevant in relation to retained EU law
- the Government's approach in this Bill leaves it unclear exactly what rights would continue to apply.⁶⁷

During the Withdrawal Bill's Committee Stage, several Members, including Dominic Grieve and Chris Leslie, argued that not enshrining the Charter into UK law would result in a loss of rights for British citizens. Chris Leslie tabled an amendment to the Bill requiring Ministers to produce a report reviewing the implications of removing the Charter from UK law (New Clause 16). Mr Leslie withdrew this amendment in return for a commitment by the Government that they will produce such a report. The [Government report](#) was published on 5 December 2017.

The Charter could play some continuing role in defining rights in Northern Ireland, as a House of Commons Library Briefing Paper on the Withdrawal Bill explains:

It is possible that the devolved legislatures might seek to incorporate Charter provisions into their law in future. For instance, the Scottish Parliament could pass a Scottish Bill of Rights as long as it did not modify the Human Rights Act itself or retained EU law.

The passage of a Bill of Rights for Northern Ireland is foreseen in the Good Friday Agreement but has not yet been achieved.

But any devolved Bill of Rights would be restricted to acts of the devolved executives and (possibly) parliament/assemblies and could not be invoked against UK legislation or executive action.⁶⁸

The “rights, opportunities and benefits” of EU citizenship.

Paragraph 52 contains a commitment that the people of Northern Ireland who are Irish citizens will:

Continue to enjoy rights as EU citizens, including where they reside in Northern Ireland. Both Parties therefore agree that the Withdrawal Agreement should respect and be without prejudice to the rights, opportunities and identity that come with European Union citizenship”

The provisions on citizenship rights in the Joint Report should largely cover this commitment. However, it is another broad-based guarantee and the text states further on that “in the next phase of negotiations, [the UK & EU] will examine arrangements required to give effect to the ongoing exercise of, and access to, their EU rights, opportunities and benefits”. This seems to imply that both sides need to fully map out

⁶⁷ EUW Bill [Explanatory Notes](#), paras 99-100

⁶⁸ [EU \(Withdrawal\) Bill: the Charter, general principles of EU law, and 'Francovich' damages](#), 8140, House of Commons Library, 17 November 2017

these rights, and further implications may become clearer in the second phase of negotiations.

One right that Irish citizens living in Northern Ireland would lose post-Brexit is the right to vote in European Parliament elections. Guy Verhofstadt, who represents the EP in the Brexit negotiations, has suggested that post-Brexit the Republic of Ireland be given more MEPs who could represent this community.⁶⁹ However, this cause has not been taken up by either the European Commission or the Irish Government so far. At present Irish law does not allow Irish citizens living abroad to vote in EP elections. In March 2017 the then Taoiseach Enda Kenny, announced his government supported extending the right to vote in Presidential elections to the Irish diaspora, including citizens living in Northern Ireland. The issue would be put to a referendum in 2018.⁷⁰

EU funding programmes post 2020

The Joint Report confirms that “the UK and EU will honour their commitments to the PEACE and INTERREG funding programmes under the current multi-annual financial framework”, a commitment that the UK had already made in its February 2017 White Paper.⁷¹ These programmes are cross-border initiatives, PEACE focuses on peace and reconciliation and has €229m in funding from the EU’s European Regional Development Fund (ERDF)⁷². The INTERREG Programme is focused on providing support for economic development in the border regions and receives €240m from the ERDF.⁷³

The Joint Report says that “possibilities for future support will be examined favourably”. The [Commission Communication](#) to the Council is clear that it supports future funding, saying:

The Commission intends to propose the continuation of these programmes, based on their existing management structures, in its proposal for the next Multi-annual Financial Framework, foreseen for May 2018.⁷⁴

With discussions already having begun on the next MFF, and the Commission foreseeing submitting its proposal in May 2018, the UK Government will have to decide before the end of the next phase of negotiations if it is willing to contribute to future funding programmes, and if so, to what extent.

⁶⁹ [‘Northern Ireland people ‘could elect Irish MEPs’](#), BBC News online, 12 July 2017

⁷⁰ [‘Dublin under fire for referendum on vote for Irish diaspora](#), Politico, 16 March 2017

⁷¹ HM Government, [The United Kingdom’s exit from and new partnership with the European Union](#), February 2017, para 1.13

⁷² The funding is provided over the period 2014–20. The programme receives another €41m in match-funding from the Irish Government and the Northern Ireland Executive

⁷³ This also covers the period 2014–20 and this programme receives another €43m in match-funding from the Irish Government and the Northern Ireland Executive

⁷⁴ European Commission, [‘Communication from the Commission to the European Council \(Article 50\)’](#), 8 December 2017

2.5 Other separation issues

The Joint Report and Commission Communication outline areas where there has been limited agreement or no discussion in the first phase. These will be followed up later.

Limited progress

- Euratom-related (nuclear specific) issues. The Government has introduced the Nuclear Safeguards Bill which would allow the Government to make regulations for, and implement international agreements in relation to, nuclear safeguarding. This is required once the UK leaves Euratom.
- Ensuring continuity in the availability of goods placed on the market under Union law before withdrawal. See [Position Paper](#), 12 July 2017.
- Judicial cooperation in civil and commercial matters. See [Position Paper](#), 12 July 2017.
- Police and judicial cooperation in criminal matters. See [Position Paper](#), 12 July 2017.
- Ongoing Union judicial and administrative procedures. See [Position Paper](#), 12 July 2017
- Issues relating to the functioning of the Union institutions, agencies and bodies. See [Position Paper](#), 12 July 2017
- General governance of the Withdrawal Agreement - aspects not related to citizens' rights. See [Position Paper](#), 12 July 2017. These discussions will cover the cross-cutting issue of whether the CJEU or another body will adjudicate to uphold the provisions of the withdrawal agreement. This was discussed in the third round of negotiations on 31 August 2017.

No discussion yet

- Intellectual property rights (including geographical indications). See [Position Paper](#), 20 September 2017
- Ongoing public procurement procedures. See [Position Paper](#), 20 September 2017
- Customs-related matters needed for an orderly withdrawal. See [Position Paper](#), 20 September 2017
- Use of data and protection of information obtained or processed before the withdrawal date. See [Position Paper](#), 20 September 2017

3. New EU negotiating guidelines on transition

The European Council President Donald Tusk proposed [draft guidelines](#) for phase 2 of the negotiations. These insist that “negotiations in the second phase can only progress as long as all commitments undertaken during the first phase are respected in full and translated faithfully into legal terms as quickly as possible”.

The main points are:

- Work will continue on “all withdrawal issues” under the European Council guidelines of 29 April 2017, “to consolidate the results obtained, and to start drafting the relevant parts of the Withdrawal Agreement”.
- Michel Barnier may now negotiate a transition period covering the whole of the EU acquis, while the UK, as a third country, will no longer participate in or nominate or elect members of the EU institutions;
- The EU considers that the UK will “continue to participate in the Customs Union and the Single Market (with all four freedoms) during the transition”; “all existing Union regulatory, budgetary, supervisory, judiciary and enforcement instruments and structures will also apply, including the competence of the Court of Justice of the European Union”, and the UK “will have to continue to comply with EU trade policy, to apply EU customs tariff and collect EU customs duties, and to ensure all EU checks are being performed on the border vis-à-vis other third countries.”
- Agreement on a future relationship can only be finalised and concluded once UK has left the EU, but the EU will be “ready to engage in preliminary and preparatory discussions with the aim of identifying an overall understanding of the framework for the future relationship”. This suggests trade talks will be in a phase three, and will aim for a “political declaration accompanying the Withdrawal Agreement”.
- The EU takes note of the UK’s intention to leave the EU’s customs union and single market after the end of the transition period. There is a pointed statement that the Council in crafting a deal with the UK will take steps to safeguard the market and trade relations with other countries.

The [guidelines](#) were adopted by the European Council on 15 December with one amendment – that the “transitional arrangements, which will be part of the Withdrawal Agreement, must be in the interest of the Union, clearly defined and **precisely** limited in time”.

More details of the EU's stance on transition are expected in negotiating directives from the Council in January 2018.

The framework for the future relationship will feature in "additional guidelines" to be adopted by the European Council in March 2018". The European Council calls on the UK to "provide further clarity on its position on the framework for the future relationship". Meanwhile, the EU will continue "internal preparatory discussions, including on the scope of the framework for the future relationship".

The Prime Minister outlined the UK's objectives for transition in her Florence Speech on 22 September 2017:

- "people, businesses and public services should only have to plan for one set of changes in the relationship between the UK and the EU";
- "during the implementation period access to one another's markets should continue on current terms";
- there should be a "strictly time-limited period" under "the existing structure of EU rules and regulations"; and
- "how long the period is should be determined simply by how long it will take to prepare and implement the new processes and new systems that will underpin that future partnership".

The Treasury Committee has highlighted concerns that a 'standstill' transitional arrangement might exceed the EU's competence under Article 50, such that it could not be negotiated as part of the Withdrawal Agreement.⁷⁵ It also set out two possible methods for incorporating a standstill transition in the agreement. Implementing a standstill transition in UK law could also give rise to complexities. Another issue is what would happen with EU external agreements on trade and other issues in a standstill transition – as soon as the UK leaves the EU, in the absence of any negotiation involving the third country, these treaties will probably no longer apply to the UK.⁷⁶ It is not clear how far the UK could go in negotiating future trade deals during the transition.⁷⁷

The first Cabinet discussions about what the UK's final relationship with Europe after Brexit took place on 18 and 19 December.

⁷⁵ Treasury Select Committee, [Transitional arrangements for exiting the European Union](#), 14 December 2017, paras 124-7

⁷⁶ Treasury Select Committee, [Transitional arrangements for exiting the European Union](#), 14 December 2017, ch 4

⁷⁷ See for example '[EU internal dispute threatens UK plans to stay in bloc's trade agreements post-Brexit](#)', MLex, 14 December 2017

4. Other developments

4.1 Brexit in Parliament

Commons debate on a second referendum

On 11 December the Commons debated a motion moved by Welsh Labour MP, Susan Elan Jones, relating to a referendum on the withdrawal agreement. The debate was in response to e-petitions 200004, 187570, 193282 and 200311, which had attracted more than 130,000 signatures since September.

The proposed referendum would offer three options:

- To revoke Article 50, thereby keeping Britain in the EU
- To reject the UK-EU deal and leave the EU
- To accept the UK-EU deal and leave the EU

The Brexit minister Robin Walker concluded that there would be no second referendum and Labour's Paul Blomfield also ruled one out "I want to make it clear at the outset that we are not calling for a further referendum". Peter Grant (SNP) did not rule out another referendum at this stage but said people had to "live by the results of their decisions". Liberal Democrat's Tom Brake and other Lib Dem MPs, several Labour members and Caroline Lucas of the Green Party supported a referendum on the final Brexit deal.

[Amendment 120](#) to the European Union (Withdrawal) Bill calls for a referendum on the question "Do you support the Government's proposed new agreement between the United Kingdom and Gibraltar and the European Union or Should the United Kingdom remain a member of the European Union?" It could be debated on 20 December.

New Brexit sifting committee

The Government has accepted amendments to the EUW Bill tabled by Charles Walker, Chair of the Procedure Committee, to establish a sifting committee to examine statutory instruments under the Bill. The relevant amendments were made to the Bill on 13 December 2017 without division.

The amendments mean that where the Government proposes the negative procedure for an instrument, the House of Commons will be able to recommend that it should instead be debated and voted on as an affirmative instrument.

The Procedure Committee had recommended that a sifting process should be added to the Bill in its [report on the Bill](#). The Leader of the House of Commons, Andrea Leadsom, has tabled draft temporary standing order changes in the House's [Remaining Orders and Notices](#) which would provide for a European Statutory Instruments Committee.

A 'meaningful vote' on the withdrawal agreement

Whether Parliament gets a 'meaningful vote' on the terms on which the UK leaves the EU has been debated since late 2016. The Government lost a vote on this on 13 December 2017 despite issuing a written statement earlier that day.

David Davis statement on parliamentary votes

In a [Written Statement](#) on 13 December David Davis set out the Government's view of the timing and procedure for various parliamentary procedures linked to the withdrawal agreement:

- the promised vote to approve the final deal before it is signed;
- the opportunity for Parliament to delay ratification of the signed agreement; and
- the implementing legislation under clause 9 of the EU (Withdrawal) Bill and/or the proposed Withdrawal Agreement and Implementation Bill.

The statement did not announce any new procedures, but did set out a commitment not to implement any of the withdrawal agreement until Parliament had voted to approve the agreement:

How will the Withdrawal Agreement be approved and brought into force?

The Withdrawal Agreement will need to be signed by both parties and concluded by the EU and ratified by the UK before it can enter into force. The UK approval and EU approval processes can operate in parallel.

The EU's Chief Negotiator, Michel Barnier, has said that he wants to have finalised the Withdrawal Agreement by October 2018. In Europe, the agreement will then require the consent of the European Parliament and final sign off by the Council acting by a qualified majority. It will not require separate approval or ratification by the individual Member States.

In the UK, the Government has committed to hold a vote on the final deal in Parliament as soon as possible after the negotiations have concluded. This vote will take the form of a resolution in both Houses of Parliament and will cover both the Withdrawal Agreement and the terms for our future relationship. The Government will not implement any parts of the Withdrawal Agreement - for example by using Clause 9 of the European Union (Withdrawal) bill - until after this vote has taken place.

In addition to this vote, the Constitutional Reform and Governance Act 2010 (CRAG) normally requires the Government to place a copy of any treaty subject to ratification before both Houses of Parliament for a period of at least 21 sitting days, after which the treaty may be ratified unless there is a resolution against this. If the House of Commons resolves against ratification the Government can lay a statement explaining why it considers the treaty should still be ratified and there is then a further 21

sitting days during which the House of Commons may decide whether to resolve again against ratification. The Government is only able to ratify the agreement if the House of Commons does not resolve against the agreement.

If Parliament supports the resolution to proceed with the Withdrawal Agreement and the terms for our future relationship, the Government will bring forward a Withdrawal Agreement & Implementation Bill to give the Withdrawal Agreement domestic legal effect. The Bill will implement the terms of the Withdrawal Agreement in UK law as well as providing a further opportunity for parliamentary scrutiny. This legislation will be introduced before the UK exits the EU and the substantive provisions will only take effect from the moment of exit. Similarly, we expect any steps taken through secondary legislation to implement any part of the Withdrawal Agreement will only be operational from the moment of exit, though preparatory provisions may be necessary in certain cases.

The statement then went on to explain that the agreement on the UK's future relationship with the EU would come later and follow different procedures:

How will the agreement governing the UK's future relationship with the EU be approved and brought into force?

As described above, the agreement governing our future relationship with the EU can only be legally concluded once the UK has left the EU. This may take the form of a single agreement or a number of agreements covering different aspects of the relationship.

Whatever their final form, agreements on the future relationship are likely to require the consent of the European Parliament and conclusion by the Council. If both the EU and Member States are exercising their competences in an agreement, Member States will also need to ratify it.

In the UK, the Government will introduce further legislation where it is needed to implement the terms of the future relationship into UK law, providing yet another opportunity for proper parliamentary scrutiny.

The CRAG process is also likely to apply to agreements on our future relationship, depending on the final form they take.

But Dominic Grieve told *Politico* on 13 December that the statement did not address his concerns, or explain why his amendment 7 to the EU (Withdrawal) Bill – which is often described as a 'meaningful vote' amendment – could not be accepted.

EU (Withdrawal) Bill vote

On 13 December the Government suffered its first defeat on the EU (Withdrawal) Bill when the Commons [voted](#) by 309 to 304 to support Dominic Grieve's [amendment 7](#).

The amendment means that clause 9 of the Bill⁷⁸ cannot be used to implement the withdrawal agreement without parliamentary approval - via statute - of the agreement:

Clause 9, page 6, line 45, at end insert ", subject to the prior enactment of a statute by Parliament approving the final terms of withdrawal of the United Kingdom from the European Union".

Twelve Conservative MPs backed the amendment and two Labour MPs voted against it.

Justice Minister Dominic Raab is reported to have said that the vote would not "frustrate the Brexit process" or stop the UK leaving the EU in March 2019. It does not allow for amendments to the deal itself, or say what would happen if Parliament votes no to the implementing legislation.

For more information and commentary on clause 9, see Commons Briefing Paper 8170, [EU \(Withdrawal\) Bill: clauses 9, 8 and 17, EU \(Withdrawal\) Bill: clauses 9, 8 and 17](#), 11 December 2017.

Exit day

The Government has tabled amendments to the EU (Withdrawal) Bill to fix 'exit day' for the purposes of the Bill as 11pm on 29 March 2019. This would determine:

- when the European Communities Act 1972 (which acts as a "conduit pipe" for EU law to flow into the UK legal system) is repealed
- when the 'snapshot' of EU law is taken that will form 'retained EU law' in the UK under the Bill and which will continue to have supremacy over inconsistent UK legislation
- when wide-ranging powers in the Bill for the Government to make secondary legislation will expire

The Bill currently allows the Government to decide 'exit day' for these purposes, and to set different days for different purposes.

It is important to note that whatever the Bill says about 'exit day' does not determine the date when the UK actually leaves the EU. This is instead set out in Article 50 of the Treaty on European Union.

For further information, see Commons Library Briefing Paper 8184, [The European Union \(Withdrawal\) Bill: exit day](#), 18 December 2018.

Recent Commons and Lords Committee reports

Committees continue to publish a large number of reports and other documents on Brexit. For lists of all parliamentary reports on Brexit

⁷⁸ Clause 9 states: "A Minister of the Crown may by regulations make such provision as the Minister considers appropriate for the purposes of implementing the withdrawal agreement if the Minister considers that such provision should be in force on or before exit day".

issues, see Commons Briefing Paper 7912, [Brexit: a reading list of post-EU Referendum publications by Parliament and the Devolved Assemblies](#), updated 13 December 2017.

Below is a selection from recent weeks:

[Transitional arrangements for exiting the European Union](#), Commons Treasury Committee, 14 December 2017

[Leaving the EU: implications for the civil nuclear sector](#), Commons Business, Energy and Industrial Strategy Committee, 13 December 2017, HC 378 2017-19

[Brexit and the UK border](#), Commons Public Accounts Committee, 8 December 2017, HC 558 2017-19

[Brexit: deal or no deal](#), Lords European Union Committee, 7 December 2017

[Brexit: deal or no deal](#), Lords European Union Committee, 7 December 2017, HL 46 2017-19

[Data Protection Bill \[HL\]: Government Response to Lords Delegated Powers and Regulatory Reform Committee](#), 6 December 2017, HL 48 2017-19

[The progress of the UK's negotiations on EU withdrawal](#), Commons Exiting the EU Committee, 1 December 2017

[The progress of the UK's negotiations on EU withdrawal](#), Commons Exiting the EU Committee, 1 December 2017, HC 372 2017-19

[Devolution and Exiting the EU and Clause 11 of the European Union \(Withdrawal\) Bill: Issues for Consideration](#), Commons Public Administration and Constitutional Affairs Committee, 29 November 2017, HC 484 2017-19

[European Union \(Withdrawal\) Bill: Implications for devolution](#), Commons Scottish Affairs Committee, 19 November 2017, HC 375 2017-19

[European Union \(Withdrawal\) Bill](#), Commons Exiting the EU Committee, 17 November 2017, HC 373 2017-19

[Sanctions and Anti-Money Laundering Bill \[HL\]](#), Lords Select Committee on the Constitution, 17 November 2017, HL 39 2017-19

[European Union \(Approvals\) Bill; Finance Bill; Northern Ireland Budget Bill; Sanctions and Anti-Money Laundering Bill \[HL\]](#), Lords Delegated Powers and Regulatory Reform Committee, 17 November 2017, HL 38 2017-19

[Home Office delivery of Brexit: customs operations](#), 16 November 2017, HC 540 2017-19, Commons Home Affairs Committee

[Brexit and the future of Customs](#), Commons Public Accounts Committee, 14 November 2017, HC 401 2017-19

[Leaving the EU: negotiation priorities for energy and climate change policy: Government response to the Committee's Fourth Report of Session 2016–17](#), Commons Business, Energy and Industrial Strategy Committee, 6 November 2017, HC 550 2017-19

[Scrutiny of delegated legislation under the European Union \(Withdrawal\) Bill: interim report](#), Commons Procedure Committee, 6 November 2017, HC 386 2017-19

4.2 UK remains outside EU defence initiative

The UK Government has said it intends to continue to contribute to European security, prompting suggestions that it might use this as a lever in the Brexit negotiations.

On 13 November 2017, 23 EU Member States submitted a Joint Notification to the Council of Ministers setting out their intention to utilise the Permanent Structured Cooperation (PESCO) mechanism to further European Security and Defence (CSDP)⁷⁹. On 11 December 2017 the Council adopted a decision establishing PESCO. PESCO participants also adopted a declaration which identified an initial list of 17 projects in areas such as training, capability development and operational readiness in the field of defence. These initial capability projects are expected to be formally adopted by the Council in early 2018.

The UK did not sign the Joint Notification and will therefore remain outside PESCO. The UK will therefore have no decision-making rights over its governance or veto over its future strategic direction. The PESCO proposal is discussed in Commons Briefing Paper 8149, [EU Defence: the realisation of Permanent Structured Cooperation \(PESCO\)](#), 12 December 2017.

Speaking about the proposed EU Defence and Security Union, Michel Barnier told the Berlin Security Conference that with Brexit the UK would “become a third country when it comes to defence and security issues”. He concluded:

- The UK defence minister will no longer take part in meetings of EU Defence Ministers; there will be no UK ambassador sitting on the Political and Security Committee.
- The UK can no longer be a framework nation: it will not be able to take command of EU-led operations or lead EU battlegroups.
- The UK will no longer be a member of the European Defence Agency or Europol.

⁷⁹ Ireland and Portugal submitted notifications on the 7 December meaning 25 Member States have now announced their intention to participate in PESCO.

- The UK will not be able to benefit from the European Defence Fund the same way Member States will.
- The UK will no longer be involved in decision-making, nor in planning our defence and security instruments.⁸⁰

However, he also pointed to the UK's continuing role in other international security organisations and operations, saying there would be "no security vacuum in Europe" because:

- UK withdrawal would not affect bilateral cooperation between Member States and the UK, particularly at operational level.
- The UK would continue to play a part in NATO's Enhanced Forward Presence in Estonia and Poland.
- London's withdrawal would not affect the strategic partnership between the EU and NATO.
- Theresa May had assured the Member States that the UK is committed unconditionally to maintaining European security.

4.3 Emissions Trading Scheme: first Brexit-related regulatory change agreed

Emissions Trading Scheme

On 30 November the EU Climate Change Committee (Member State representatives including from the UK) agreed an amendment to the EU Emissions Trading Scheme (ETS) Registry Regulation to implement safeguard measures in a [Commission regulation](#) to protect the environmental integrity of the EU ETS in the event of a hard Brexit on 29 March 2019. The ETS website [reported](#), 30 November:

The measures provide for marking and restricting the use of allowances issued by the United Kingdom as of 1 January 2018, unless Union law would not cease to apply in the United Kingdom by 30 April 2019 or it is sufficiently ensured that the surrender of allowances takes place in a legally enforceable manner by no later than 15 March 2019.

The United Kingdom informed the Committee of its intention to adopt a law by the end of 2017 by which the compliance deadline for 2018 emissions would be advanced to before the date of the United Kingdom's withdrawal from the EU and in accordance with the amendment to the EU ETS Registry Regulation. Should that be confirmed allowances issued by the United Kingdom for 2018 would not be marked and would be accepted for surrender.

New UK environment body

On 11 November the Environment Secretary Michael Gove announced that there would be a new independent UK environment watchdog to protect UK wildlife, land, water and air after Brexit. The body would

⁸⁰ Michel Barnier, [speech](#) at the Berlin Security Conference, 29 November 2017.

“give the environment a voice”, “hold the powerful to account” and would form the cornerstone of a “green Brexit”.⁸¹ Mr Gove told the [Andrew Marr Show](#) that environment and animal welfare standards would not be lowered if the UK agreed a trade deal with the US.

For information on the UK's position on the environment after Brexit, see Commons Library Briefing Paper 8132, [Brexit and the environment](#), 13 November 2017.

⁸¹ [Telegraph, 11 November 2017](#)

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