**Draft EU Withdrawal Agreement**

**COSLA Assessment**

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| On Tuesday 13 November 2018 the UK and EU27 negotiators agreed the draft of a Withdrawal Agreement (Treaty) between the European Union and the United Kingdom. It is based on the version produced last February so most of the key elements are already known, indeed 80% of the text had already been agreed by both sides before the summer. The current draft translates, in specific legal terms, the broad political agreement (the UK EU Joint Report) agreed last December. An eight-page outline of a political declaration for the future UK-EU27 relationship post Transition is included in the draft to deal with issues beyond separation itself.The draft deals only with the withdrawal from EU membership, four months from now, and the Transition/Implementation period until end 2020. It gives an indication on how open the EU might be to accept “bespoke” provisions to govern the relationship between the EU and the UK on certain sectors (services, aviation, transport, security) or areas (Gibraltar and most sensitively Northern Ireland). It translates into legal terms the negotiation texts on citizen rights agreed last Autumn between the UK and the EU.The draft contains a framework for the future governance arrangements between the UK and the EU and how the UK EU Budget contributions and EU funds, to be spent in the UK between 2019 and 2023, will be dealt with. It also reiterates that the UK will only be able to send observers (Ministers, MEPs, CoR members) to EU meetings in exceptional circumstances, and on an *ad hoc* basis where there are UK interests.**There are several challenging areas:** * The possibility of an indefinite transition period including continued UK contributions to the EU budget and a continuing role of the European Court of Justice (ECJ) in certain areas.
* Limitations on the participation of UK officials in EU decisions, while UK ministers and MEPs will no longer be part of the EU from Brexit day, is likely to raise concerns. As is the introduction of the Permanent Court of Arbitration to settle disputes.
* Creation of a UK-EU customs area to avoid the challenges associated with the Northern Ireland/Republic of Ireland Border. This would mean that the UK could remain indefinitely in a customs area for goods (not services). The continuation of several all-Ireland arrangements on a range of issues (electricity, phytosanitary controls) is likely to be received with mixed views.
* The draft Declaration may be considered too short and lacking in specificity. Unless it is developed between now and the 14 December Summit, many sectors (aviation, financial services, participation in EU agencies) might feel that it does not provide sufficient reassurances for the post Transition period.
* Uncertainty over whether EU27 citizens entering the UK post Brexit will have the same rights as those already residing in the UK prior to the date of Withdrawal. A likely trade off might be that UK citizens residing in one Member State will have their rights extended to all EU27 states in exchange for a simple declaratory procedure with the Home Office to deal with settled status.

**The draft Withdrawal Agreement (and the draft Declaration) does not include:*** Detail on the issue of distribution of EU returned powers / Common Frameworks and joint UK-wide bodies.
* Even if agreed, the EU deal will not make the EU Withdrawal Act ‘go away’. The UK Supreme Court is about to issue a very consequential ruling on this Act and on the Scottish Legal Continuity Act which will impact the existing constitutional settlement of the UK.
* Replacement of EU funds - the Withdrawal Agreement gives a legally binding guarantee that current EU funds will continue as present until their natural end in 2020.
* Certainty over how the UK will formulate negotiation positions for the EU-UK relationship and other trade deals.
* Clarity on continued cooperation (COSLA is supportive of continuing political dialogue at the EU level through a CoR UK Joint Committee).
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**Citizens**

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| **Key Elements*** Broadly agreed before the December Summit the draft covers pensions, social security, residence status, employment, self-employment, professional qualifications and family reunification. It translates separate documents on each of these areas and the EU-UK Joint Technical note tabled last December.
* Free movement and ECJ enforcement does not change during the Transition period. The draft includes reference to more people (spouses, civil and unmarried partners, dependent children and grandchildren, and dependent parents and grandparents, trans frontier workers) resided in either the UK or the EU27 (“the host state”) by 31 December 2020 and extends their existing rights beyond that date.
* Mirroring the UK migration proposals, both UK and EU27 citizens that are not yet resided continuously and lawfully for five years in their host state by the end of the implementation period will also be able to stay until they have reached the five-year threshold.
* Confirms that all the rights for EU and UK nationals covered by this Agreement would be lifelong.
* For UK nationals in EU27, their rights are restricted to the “host state”. In short, freedom of movement across the EU27 is not recognised, though the UK has indicated that it will press for this to be agreed as part of the future relationship talks.
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**Governance**

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| **Key Elements*** A Joint Committee made up of UK and EU officials will be created. This is the same structure that applies to the Canada-EU Treaty and others. It will meet at least once a year; probably more often. There will be several specialised (sub) committees (citizen rights, other issues, Ireland, Cyprus RAF bases, financial issues). This might indicate EU priorities moving forward.
* The Joint Committee will be the first instance for **dispute settlement.** It is most likely that this joint body will carry on for the post Brexit Treaty as well.
* The European Court of Justice continues to retain the role of last arbiter on matters pertaining to EU law. This is necessary otherwise the ECJ can veto the Withdrawal Agreement.
* This section also covers the sanctions, fines, compliance and remedial actions arising from such disputes. The provisions are reciprocal. This refers to both ECJ rulings or the arbitration under the Permanent Court of Arbitration system.
* A new **Independent Authority for citizen rights** is proposed “to monitor the implementation and application of Part Two. The Authority shall have the power to receive and investigate complaints from Union citizens and their family members, and to conduct inquiries on its own initiative, concerning alleged breaches by administrative authorities of the United Kingdom of their obligations under Part Two.” It shall also report to the Commission which can still issue infringement procedures to the ECJ.
* For State Aid, an independent authority must be set up in the UK similar to the European Commission. It is not clear whether the UK Government choice of the Competition & Markets Authority (CMA) would be acceptable to the EU side. There are concerns about having a UK body replacing the Commission without the input that the Commission currently allows to devolved and local authorities to help formulate state aid policy and guidelines.
* On Fisheries Issues the UK “shall be consulted by the European Commission” on UK Fish Quotas DURING the transition period. The UK should be involved in any fisheries-related international talks during this period. This only covers the Transition period (unless the Transition period itself is extended), the status of UK fisheries will be one of the issues for negotiation for the post-Transition UK-EU Free Trade/Partnership Agreement – however an outline of that should be included in the non-binding declaration that will be agreed at the 14 December EU summit.
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**UK Representation**

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| **Key Elements*** From Brexit day, the UK will not be a Member State, so it will not have a seat in the Council, European Council, delegations of MEPs, Committee of the Regions (CoR) and European Economic Social Committee.
* UK official access to preparatory bodies will be a little less restricted than previously proposed.
* During the transition period, representatives or experts of the United Kingdom, or experts designated by the United Kingdom, may, exceptionally attend meetings or parts of meetings of the committees such as those dealing with implementation of Commission decisions. This only concerns meetings and agenda items where the UK has a direct interest (which will be a matter of judgement).
* No MEPs or CoR Members will continue. It is possible that a new Interparliamentary body made up of MPs and MEPs (ideally also Welsh Assembly Members, Members of the Northern Ireland Legislative Assembly and MSPs) would be set up. The CoR, COSLA and our counterparts across the UK are requesting that there is a Joint UK-CoR Commission to oversee the local and devolved impact of the Transition Period.
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**Jurisdiction & European Court of Justice**

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| **Key Elements*** The EU wants all ongoing cases brought to the ECJ not only before withdrawal but also during the Transition period to be adjudicated by the ECJ.
* Any infringement by the UK of the Treaty can be brought by the European Commission to the ECJ. ECJ rulings on the issues covered in this Treaty would be binding in the UK even after the UK completely leaves the EU in 2020.
* UK courts can continue to make references for preliminary rulings to the ECJ on matters pertaining the Transition period for up to 8 years after the UK departure date.
* EU decisions concerning the UK during the transition period would continue to be directly enforceable in the UK for matters that occurred before the end of the Transition Period.
* This will likely be further negotiated by the UK as it would imply that the Commission (and the ECJ) have jurisdiction over the UK well before the UK withdraws on anything that can be connected to the time when the UK was a member or during the Transition period. However, this also means that current State Aid, funding, guidance, audit and reporting decisions remain in force for the time being.
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**Transition**

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| **Key Elements*** The Transition period is anticipated to end on 31 December 2020 (also the date of the end of the existing EU budget 2014-2020) although the Transition could be extended.
* Should it be extended, the period between 1 January 2021 and its end, the United Kingdom shall contribute to the Union budget. This covers not only outstanding liabilities from EU membership and the 2014-2020 EU Budget but also any future contribution that the UK may make if it chooses to opt into the 2021-2027 EU funding programmes.
* The Protocol on Northern Ireland (see below) foresees that the EU and UK “shall use their best endeavours to conclude, by 31 December 2020, an agreement which supersedes this Protocol in whole or in part” on the matters pertaining to Northern Ireland.
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**Ireland / Northern Ireland Protocol**

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| **Key Elements*** A UK-EU “Single Customs Territory” will be created for the free movement of goods not just for Northern Ireland (NI) and the EU but the whole of the UK and the EU, until the future relationship becomes applicable. Unless a solution is found, and regardless of what happens with the rest of provisions of Withdrawal and the Transition Period, the UK and the EU27 will form a customs union similar to Turkey and the EU.
* For Northern Ireland specific matters, the Protocol sets out the continuity of EU laws in Northern Ireland on various aspects of Technical regulations.
* This will be overseen by the overall Joint Committee, the NI specific Specialised Committee and a Joint Consultative Working Group. The Northern Ireland institutions are no longer mentioned (as equally for the Gibraltar Protocol) but this does not prevent the UK Government including NI representatives in its negotiation teams.
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**EU Funding**

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| **Key Elements*** The United Kingdom shall contribute to, and participate in, the implementation of the Union budgets and their programmes as if it had remained a member state. After the end of Transition, the UK will continue to honour any UK commitments for the EU 2014-2020 budget period. The scope of these provisions includes all EU funding programmes.
* The United Kingdom shall only be eligible for financial operations of EU funds provided that those financial operations were decided by the entities and bodies before the date of entry into force of the Withdrawal Agreement, even if the signature of those financial operations took place after that date.
* This means that there is legal certainty that all EU funding activities started before Brexit day will continue to be managed, audited, etc as at present, even if their effect runs after Brexit day.
* Projects before and including the EU Budget period 2014-2020 that are committed after the end of Transition period on 31 December 2020 shall continue to apply as if the UK had left the EU. UK experts (including Councils) can continue attending specialist bodies in charge of advising on the management of the funds.
* The UK would continue making the payments to the EU budgets on the amounts it had already agreed till 2020 and related extra budgetary funding commitments (external aid, for instance). This does not cover opting into EU funds from the post 2020 Budget.
* The draft foresees the continuation of existing European Investment Bank (EIB) loans to UK authorities (running to several billions) but makes clear that after Withdrawal “neither the United Kingdom nor projects located in the United Kingdom shall be eligible for new financial operations from the EIB group that are reserved for Member States”. This means that the UK will be eligible for EIB loans that are available to non-EU countries.
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**Other Issues**

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| **Key Elements****Other separation issues**The draft seeks to ensure that Withdrawal results in no break in free movement of goods and services, allowing the EU and UK two years to negotiate the post Brexit Treaty.**Ongoing Police and Judicial Cooperation**A range of existing EU legislation on these issues continue to be in force at least during the Transition period. However, in successive speeches the Prime Minister made clear that she would be prepared for the post Brexit treaty to continue covering these issues (including being associated to the agencies dealing with these issues such as EUROPOL). **Other issues**It is likely that Data protection and management issues will be carried over in the post Brexit Treaty due to the security and commercial implications.Procurement matters will most likely be dealt with in a similar way to the Canada-EU deal in the post Brexit EU-UK Free Trade and Partnership Treaty.The UK will leave EURATOM and the UK will create their own agency to deal with management of radioactive materials including fissile material shipments.**Protocol on Gibraltar**This will be similar in structure to that of Northern Ireland, with the difference that there will be a bilateral UK-Spanish body to deal with a range of issues of common interest.  |

**Draft Joint Declaration**

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| The draft Political Declaration is a list of bullet points rather than the politically binding and detailed declaration that theoretically needs to be agreed by the December 14 EU Summit. It lists several issues that will form the Economic and Political Partnership to be developed.It will include the terms for the United Kingdom’s participation in EU programmes (2021-2027), subject to the conditions set out in the corresponding Union instruments, such as in science and innovation, culture and education, development, defence capabilities, civil protection and space.Some issues to be included are going to be a continuation of the provisions of the Withdrawal Agreement (data, trade in goods). Other key issues are still to be negotiated such as Open Skies (Air Services Agreement) or energy links. The agreement should also cover services or procurement, just as is the case in other trade deals such as the Canada-EU Comprehensive Economic Trade Agreement (CETA).No mention is made of the UK participating in EU Agencies (pharmaceutical authorisations for instance, where the UK is the European leader) other than possible cooperation on police and security matters. |

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| **Conclusion****COSLA has been actively influencing in London, Brussels and Edinburgh on the ongoing negotiations, with the input at officer and political level of our member Councils and in partnership with our peers from the rest of the UK and indeed likeminded counterparts from the rest of the EU. We will continue to do so to ensure the best deal possible for our communities and a continued relationship, albeit in different terms, with our colleagues in the continuing EU.****This is an ‘on the day’ assessment of a lengthy technical document and further specific analysis, as it affects Local Government, will be undertaken over coming months and reported appropriately through COSLA’s governance structures.****November 2018.** |