
The Brexit negotiations: Issues for the first phase



IN-DEPTH ANALYSIS

This paper presents the three key EU priorities for the negotiations on the arrangements for the UK's withdrawal from the EU. It analyses the EU's negotiating positions as regards citizens' rights, setting out the current legal situation under EU law. The negotiating guidelines and mandate state that this should be secured for those EU citizens who are directly affected by UK withdrawal as a result of having made use of their right of free movement. It also presents the EU's negotiating position on how to disentangle UK rights and obligations from those of the other EU Member States, including on the method to calculate the related financial settlement. Finally, it explains the significance of the Good Friday Agreement and the EU's contribution to the Northern Ireland peace process.

PE 607.267

ISBN 978-92-846-1200-0

doi:10.2861/004364

QA-02-17-758-EN-N

Original manuscript, in English, completed in June 2017.

The authors acknowledge the contribution of Christiaan van Lierop to this publication.

Disclaimer and Copyright

This document is prepared for, and addressed to, the Members and staff of the European Parliament as background material to assist them in their parliamentary work. The content of the document is the sole responsibility of its author(s) and any opinions expressed herein should not be taken to represent an official position of the Parliament.

Reproduction and translation for non-commercial purposes are authorised, provided the source is acknowledged and the European Parliament is given prior notice and sent a copy.

© European Union, 2017.

Photo credit: © European Union, 2017

Source: European Commission, Audiovisual Service / Mauro Bottaro.

epprs@ep.europa.eu

<http://www.epprs.ep.parl.union.eu> (intranet)

<http://www.europarl.europa.eu/thinktank> (internet)

<http://epthinktank.eu> (blog)

EXECUTIVE SUMMARY

Negotiations on the arrangements for the United Kingdom's withdrawal from the European Union started on 19 June 2017. The European Commission is negotiating on behalf of the EU, on the basis of the European Council's guidelines and the subsequent mandate from the Council. The European Parliament, for its part, has also laid down key principles and conditions for its approval of a possible UK withdrawal agreement. Three key priorities are set to dominate the first phase of the negotiations (with the future relationship between the EU and the UK left to a second phase). These are: citizens' rights, settlement of the UK's financial obligations, and ensuring the Northern Ireland peace process is not jeopardised.

The EU position on citizens' rights is set out in the Council negotiating directives, accompanied by a Commission working paper listing the essential principles to be safeguarded through the negotiations. These documents aim at securing, post-Brexit, the same level of protection that EU-27 citizens in the UK, and UK citizens in the EU-27, enjoy under EU law prior to the withdrawal date. This includes rights the enjoyment of which will 'intervene at a later date' (for example, rights related to old-age pensions) and rights which are 'in the process of being obtained' (such as the right to permanent residence). Such rights should be protected 'for life', including the right of current and future family members to join (Union) citizens 'at any point in time' before and after the withdrawal. The two documents also call for simple administrative procedures to obtain national residence documents, and for the jurisdiction of the Court of Justice to continue for the above matters.

Furthermore, the negotiation documents highlight the equal treatment principle as a condition for the effective exercise of all Union citizenship rights. They stipulate that EU-27 citizens in the UK should be treated equally to UK citizens, and that equal treatment among EU-27 citizens be guaranteed in all matters covered by the withdrawal agreement. Under this principle, EU citizens are granted access to employment on an equal basis with host-country citizens, with no priority for the latter, and without the possibility of the host state introducing quotas for the employment of EU citizens. Moreover, EU social security coordination ensures that EU citizens working in another Member State suffer no disadvantage. To this end, periods spent – and contributions paid – in different Member States are aggregated, pensions can be exported to another Member State, and access equal to that of nationals is granted to social security benefits such as sickness, unemployment, maternity and old-age benefits.

A second challenge in the first phase of the negotiations concerns the financial implications of obligations undertaken by the UK during its EU membership. The EU has presented its negotiating position on how to disentangle UK rights and obligations from those of the other EU Member States, including the method to calculate the related financial settlement. The UK government has not yet detailed its position on the matter. While there are no official figures on the possible amount of the financial settlement, analysts have produced a range of estimates, which differ significantly depending on the assumptions and data used. A number argue that, while the financial settlement is not the most significant economic issue in the UK withdrawal, it has the potential to represent a major difficulty in the negotiations due to its sensitivity.

The negotiation guidelines and mandate also address the possibility of a post-Brexit hard border between Ireland and Northern Ireland, stating that nothing in the UK withdrawal agreement should undermine the objectives and commitments in the Good Friday Agreement.

TABLE OF CONTENTS

1. Phased approach and priorities for the Brexit negotiations	3
2. Citizens' rights: free movement and residence	4
2.1. The nature of EU citizenship and implications of Brexit	5
2.2. EU negotiating directives and 'essential principles on citizens' rights'	8
2.3. Rights of free movement and residence	9
2.3.1. Conditions for residence (3 months to 5 years)	10
2.3.2. Permanent residence	12
2.3.3. Protection against expulsion	12
2.3.4. Application of the Citizenship Directive and the issue of administrative formalities	13
2.4. Equal treatment	16
2.5. Social security benefits	17
2.5.1. General principles of EU social security coordination	17
2.5.2. Workers	18
2.5.3. Jobseekers	20
2.5.4. Economically inactive citizens and social assistance	20
2.5.5. Pensioners	21
2.5.6. Students	22
2.5.7. Health care	22
3. Settlement of financial obligations	24
3.1. Financial implications of obligations undertaken during EU membership	24
3.2. EU negotiating position on the financial settlement	25
3.2.1. European Council and Council of the European Union	25
3.2.2. European Commission: essential principles on financial settlement	25
3.2.3. European Parliament	27
3.3. UK position on a financial settlement	28
3.4. Some estimates by analysts and observers	29
4. The Good Friday Agreement regarding Northern Ireland	30
4.1. EU funding towards the peace process	31
4.2. EU position on Brexit regarding the Northern Ireland peace process	32
4.3. Issues to resolve	33
5. Main references	34

1. Phased approach and priorities for the Brexit negotiations

The two-year period for the UK and the EU to reach an agreement on the arrangements for the UK's withdrawal started on 29 March 2017, when the UK government triggered the Article 50 'exit clause' of the EU Treaties. However, if the two sides cannot reach a withdrawal agreement, the EU Treaties will automatically cease to apply to the UK from 30 March 2019, unless the European Council were to decide unanimously, and in agreement with the UK, to prolong the two-year period (Article 50(3) TEU). Once the withdrawal takes effect – either at the end of the two-year period or on the date of entry into force of the withdrawal agreement – the UK will become a third state vis-à-vis the EU. However, until then, the UK remains a Member State of the EU, with all the rights and obligations thereof.¹

The 27 remaining Heads of State or Government adopted political guidelines for the negotiations with the UK at a Special European Council meeting on 29 April.² Given the complexity of the legal issues to be settled, the guidelines set out a phased approach to the negotiations. In the first phase, the aim will be to provide legal certainty and to minimise disruption for citizens, businesses and international partners, as well as to disentangle the UK from its commitments as a Member State. In a second phase – if the European Council decides 'sufficient progress' has been achieved on the withdrawal deal – preliminary discussions will take place on the framework for the future EU-UK relationship, as well as on possible transitional arrangements. However, any agreement on that future relationship would be finalised and concluded only once the UK had actually left the EU.

On 22 May 2017, the Council formally appointed the European Commission as the EU's negotiator for Brexit issues, and agreed its negotiation mandate,³ setting out in greater detail the framework for the first phase. **Three main priorities** have been identified on the EU side, and these were already set out by the European Parliament in its resolution of 5 April 2017,⁴ shortly after Article 50 was triggered. In that resolution, the Parliament demanded that the first phase of negotiations on the withdrawal agreement should, above all, secure:

- **Citizens' rights:** Fair treatment of EU-27 citizens living or having lived in the UK, and of UK citizens living or having lived in the EU-27. The Parliament demands that their legal status and rights be subject to the principle of reciprocity, equity, symmetry and non-discrimination, while protecting the integrity of EU law, including the EU Charter of Fundamental Rights;
- **Financial settlement:** A single financial settlement with the United Kingdom on the basis of the European Union's annual accounts as audited by the European Court of Auditors, that includes all its legal liabilities arising from outstanding commitments and that makes provision for off-balance sheet items, contingent

¹ For more information on the procedural aspects, please see E.-M. Poptcheva, [Article 50 TEU: Withdrawal of a Member State from the EU](#), EPRS, February 2016. See also J. Carmona, C. Cirlig and G. Sgueo, [UK withdrawal from the European Union. Legal and procedural issues](#), EPRS, March 2017.

² [European Council \(Article 50\) guidelines for Brexit negotiations](#), 29 April 2017.

³ [Council Decision](#) authorising opening of negotiations with the UK and directives for the negotiation of an agreement with the United Kingdom of Great Britain and Northern Ireland setting out the arrangements for its withdrawal from the European Union, 22 May 2017.

⁴ European Parliament [resolution](#) of 5 April 2017 on negotiations with the United Kingdom following its notification that it intends to withdraw from the European Union (2017/2593(RSP)).

liabilities and other financial costs arising directly as a result of the UK's withdrawal;

- **Good Friday Agreement:** The Parliament urges that all means and measures consistent with EU law and the 1998 Good Friday Agreement be used to mitigate the effects of the UK's withdrawal on the border between Ireland and Northern Ireland, and insists on the absolute need to ensure continuity and stability of the Northern Ireland peace process and to do everything possible to avoid a 'hard' border between Ireland and Northern Ireland.

These key demands of Parliament match those in the guidelines adopted by the European Council some four weeks later. In addition to the three priorities above, a number of further issues arising from the withdrawal, such as in the areas of judicial cooperation, law enforcement and security, the situation of goods placed on the market before the withdrawal date, the relocation of the EU agencies based in the UK, and pending cases before the Court of Justice of the EU, are all to be addressed during the first phase of the negotiations.

Transparency of the negotiations

The European Council guidelines make a commitment to transparency in the Brexit negotiations. The European Ombudsman has warned of the concerns of EU citizens and businesses about the potentially far-reaching implications of the outcome of the negotiations.⁵ The Commission has stated⁶ in this context that negotiating documents which are shared with EU Member States, the European Council, the European Parliament, the Council, national parliaments, and the United Kingdom, will be released to the public – in particular agendas for negotiating rounds, EU position papers, non-papers and EU text proposals.

2. Citizens' rights: free movement and residence

The EU Treaties and secondary legislation allow EU citizens to travel to, live, work, study and retire in another Member State, and to enjoy equal treatment while doing so. The EU *acquis* regarding coordination of social security ensures that those moving across borders do not suffer disadvantages (e.g. loss of pension rights) as a result of making use of their treaty rights. Provisions regarding recognition of professional qualifications reduce obstacles to free movement stemming from different national requirements regarding access to certain professions.

Millions of EU citizens on both sides of the English Channel have availed themselves of these and other rights to make choices for life, and their uncertainties in the face of Brexit have been well documented.⁷ While the reported numbers of EU-27 citizens in the UK and UK nationals in the EU-27 vary significantly, it is generally estimated that around 1.2 million UK nationals live in another EU country, and more than 3 million EU

⁵ [Letter](#) from the Ombudsman to President Juncker concerning information for the public on the upcoming negotiations aimed at reaching agreement on the UK's withdrawal from the EU, 28 February 2017.

⁶ The European Commission's approach to [transparency](#) in the Article 50 negotiations with the United Kingdom.

⁷ For example, [Brexit: acquired rights](#), House of Lords. European Union Committee, 10th report; [Position paper](#) of 'the3million' group on guaranteeing citizens' post Brexit. 'The3million' is a non-profit network which campaigns to protect the rights of EU citizens in the UK and British citizens in Europe after Brexit.

citizens live in the UK.⁸ Given the potentially serious consequences of UK withdrawal for both categories, both sides at the negotiating table (EU-27 and UK) have embraced protecting citizens' rights as an early priority in the negotiations. In advance of the European Council adopting its guidelines for the negotiations, the European Parliament resolution of 5 April 2017 called for citizens' rights to be given full priority in negotiations, and for the protection of their rights according to principles of reciprocity, fairness and non-discrimination.⁹ The European Council guidelines for the Brexit negotiations, which were adopted on 29 April 2017, state:

*The right for every EU citizen, and of his or her family members, to live, to work or to study in any EU Member State is a fundamental aspect of the European Union. Along with other rights provided under EU law, it has shaped the lives and choices of millions of people. Agreeing reciprocal guarantees to **safeguard the status and rights** derived from EU law at the date of withdrawal of EU and UK citizens, and their families, affected by the United Kingdom's withdrawal from the Union will be the **first priority** for the negotiations. Such guarantees must be effective, enforceable, non-discriminatory and comprehensive, including the right to acquire permanent residence after a continuous period of five years of legal residence. Citizens should be able to exercise their rights through smooth and simple administrative procedures.*

While aiming at certainty for citizens, the guidelines also set out the principle that 'nothing is agreed until everything is agreed'. Article 50 TEU negotiations are to be conducted as a single package and 'individual items cannot be settled separately'.¹⁰ It is in this context that various stakeholders have called, on several occasions, for negotiations on citizens' rights to be decoupled from the other issues to be tackled during withdrawal negotiations, with a view to ensuring an early guarantee of such rights.¹¹ While the guidelines do not provide for any such decoupling, the need to address citizens' rights as a top priority is broadly recognised.

2.1. The nature of EU citizenship and implications of Brexit

According to the EU Treaties, 'every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship'.¹² As is clear from the wording, Union citizenship has a '**derivative character**': it is dependent on national citizenship and is lost if a person is no longer a citizen of a Member State.¹³ Accordingly, it is generally agreed that, as of the day of withdrawal (i.e. on the day on which the withdrawal agreement takes effect), British citizens will become 'third-country nationals' for the purposes of EU law – unless they have dual nationality or acquire such a nationality. As one author has noted, 'for the first time we are witnessing an automatic and collective lapse of status

⁸ [EP news](#), 9 May 2017. Some have criticised these figures for their inaccuracy insofar as they rely on the UN data, which refers to persons by their country or origin and not nationality, for example, P. Mindus, [European Citizenship after Brexit. Freedom of Movement and Rights of Residence](#), 2017, Palgrave Studies in European Union Politics, p. 31.

⁹ European Parliament resolution of [5 April 2017](#) on negotiations with the United Kingdom following its notification that it intends to withdraw from the European Union (2017/2593(RSP)).

¹⁰ [European Council \(Article 50\) guidelines for Brexit negotiations](#), 29 April 2017, para. 2.

¹¹ Here referring to the [position paper](#) on guaranteeing citizens' rights of 'the3million' group.

¹² Articles 9 TEU and 20 TFEU.

¹³ Some contest this proposition, e.g., Rieder, C.M., '[The withdrawal clause of the Lisbon Treaty in the light of EU citizenship](#)', in: *Fordham International law Journal*, 37(1), 2013, p. 172.

for Union citizens of exclusively British nationality.¹⁴ However, it is important to note that third-country nationals may also, in principle, be granted far-reaching free movement and equal treatment rights, despite not having the status of EU citizens. Upon Brexit, the rights of those *already* in the UK or EU-27 on the date of withdrawal will depend on the content of the withdrawal agreement. In the absence of such an agreement, British citizens would be subject to the EU *acquis* applicable to third-country nationals, in combination with the national immigration provisions of the Member State concerned or the UK, respectively. This may imply stricter conditions for residence, including income requirements or integration conditions, EU-preference rules in accessing employment, and (much) less favourable equal treatment provisions (for example, through higher tuition fees).

In contrast to UK nationals, the status of **EU-27 nationals** as Union citizens *as such* will remain unaffected. Yet, while they will retain full rights in the (remaining) EU, upon 'Brexit' those resident in the UK will find themselves in a non-EU country, to which EU Treaties no longer apply. Their rights in the UK will depend on the provisions of the withdrawal agreement or – in the absence of such an agreement – UK (immigration) laws. The latter are generally far less generous than EU free movement provisions.¹⁵

Both categories of citizens may, in principle, seek to **acquire the nationality** of their host country in line with the conditions set out in its national law. The conditions for acquisition of nationality are essentially regulated by Member States alone – albeit within the limits of European and international law.¹⁶ Some press reports, quoting data from national authorities, have suggested that more than 2 800 Britons applied for the nationality of other Member States during the first eight months of 2016, suggesting that there were 2.5 times more nationality applications than in 2015.¹⁷ The German Statistical Office reported on 13 June 2017 that, in 2016, 2 865 Britons were naturalised in Germany, which corresponds to a 361 % increase compared to 2015, and represents the 'highest number ever recorded for British citizens'.¹⁸ However, many will be discouraged from seeking a new nationality since this may imply the duty to renounce their original nationality, as a significant number of Member States (about one third) do not allow dual nationality.¹⁹ In this context, 'the 3 million' group advocates allowing dual nationality and is campaigning to this end.²⁰

In this context, it is interesting to note that the European Commission has recently registered two European Citizens' Initiatives concerned with the consequences of

¹⁴ Mindus, P. (2017), [European Citizenship after Brexit: Freedom of Movement and Rights of Residence](#), Palgrave Studies in European Union Politics, p. 35.

¹⁵ For example, Gordon, R. and Moffatt, A., [Brexit: The immediate legal consequences](#), Report of the Constitution Society & UK Constitutional Law Association, 2016, p. 56.

¹⁶ For example, in the much-cited *Rottmann* case (C-135/08, *Rottmann v Freistaat Bayern*), the Court of Justice confirmed that while the Member States retain the power to lay down the conditions for the acquisition and loss of nationality, the exercise of this power can be reviewed by the Court of Justice 'in so far as it affects the rights conferred and protected by the legal order of the Union' (para 48). It further stated that Member States retain the power to withdraw naturalisation (even if such withdrawal leads to loss of Union citizenship), yet such decision must observe the principle of proportionality (para 59).

¹⁷ The Guardian, [Huge increase in Britons seeking citizenship in EU states as Brexit looms](#), 19 October 2016.

¹⁸ Statistisches Bundesamt, [Pressemitteilung vom 13. Juni 2017](#) - 95/17.

¹⁹ Dumbrava, C., [Comparative report: citizenship in Central and Eastern Europe](#), April 2017, p. 18.

²⁰ For example, it has launched a petition to change the law of the Netherlands, ['The3million' group](#).

Brexit, one of which aims at **decoupling** Union citizenship from the nationality of a Member State. In its decision to register the initiative, the European Commission suggested that, while the link between EU citizenship and nationality of a Member State is established in the EU Treaties, and no legal act of the institutions (i.e. secondary EU law) may abolish that link, the Union may nevertheless adopt legal acts aimed at granting to third-country nationals (free movement) rights similar to those enjoyed by Union citizens.²¹ A good example of this is Directive 2003/109/EC concerning third-country nationals who are long-term residents, which grants such residents far-reaching equal treatment rights (while at the same time leaving it to Member States' discretion to limit their access to certain social benefits to 'core benefits' only).²²

Moreover, while the legal situation as of the date of 'Brexit' remains uncertain, it should be recalled that until the UK has formally withdrawn, it remains a **full Member State** of the EU subject to the rights and obligations stemming from EU Treaties. Accordingly, until withdrawal takes effect, both Union citizens resident in the UK and UK nationals in the EU-27 continue to enjoy the full range of rights granted to them by EU law. Nonetheless, given the uncertainty surrounding their future status (and even the possibility of a no-agreement scenario), 'the3million' group has reported evidence suggesting that, in practice, EU citizens already face discrimination and numerous practical problems when dealing with, inter alia, landlords, banks and (potential) employers.²³

Given the unprecedented situation of withdrawal of a Member State, the uncertainties – even anxieties – faced by Union citizens concern their right to stay, work, study, to live with their families, and to access healthcare and social benefits. These uncertainties are summarised in the following passage, referring to real-life situations:

Consider, for example, Charlotte, the 15-year-old daughter of French citizens living in London: Will she have a claim to equal treatment in respect of university fees as she will turn 18 after Brexit date? And will a degree taken in the UK even be recognised in EU-27? Or take Belgian Olivier, a self-employed psychologist in Bristol, who gets married to his girlfriend from Singapore: Will he be able to bring his spouse to the UK or will he need to prove, in accordance with the more restrictive British policy, that he earns £18 600 pa, which he, as almost half of the UK population, does not? [...] This [right to reside] also puzzles Leila from Luxembourg who did have a job, but that she was forced to leave while pregnant. As primary carer of her two-year-old son David, she has not yet found employment. Will she be able to stay?²⁴

Similar questions have been worrying UK nationals in the (remaining) EU:

Consider, for example, [...] Christopher who works as an assistant on a project at a local university: does he now fall within the remit of the European Directive on third country national researchers? What happens to Margaret, who is one of the 106 610 claiming UK pension in Spain? She sold her house in Cambridgeshire and retired on the Costa Brava. Will the European rules that guarantee the upgrading of her British pension no longer apply? [...] Abigail, who is a part-time tourist guide in Stockholm, is anxious about her

²¹ Commission [decision](#) on the proposed Citizens' Initiative of 22 March 2017, paras 3 and 4.

²² Council Directive [2003/109/EC](#) of 25 November 2003 concerning the status of third-country nationals who are long-term residents.

²³ [Position paper](#) of 'the3million' group, p. 5.

²⁴ P. Mindus [European Citizenship after Brexit. Freedom of Movement and Rights of Residence](#), 2017, Palgrave Studies in European Union Politics, p. 32-33.

*studies in biology: Would they let her continue working? Will she now need to pay the 15 000-euro tuition fees for non-EU nationals?*²⁵

It is, inter alia, such questions which the first phase of withdrawal negotiations, and the related EU 'Article 50 documents', now seek to address.

2.2. EU negotiating directives and 'essential principles on citizens' rights'

The Council negotiating directives of 22 May 2017 for the Article 50 negotiations, which flesh out the European Council guidelines, state that:

*The [withdrawal] agreement should **safeguard** the status and rights derived from Union law at the withdrawal date, including those the enjoyment of which will intervene **at a later date** (e.g. rights related to old age pensions) as well as rights which are **in the process of being obtained**, including the possibility to acquire them under current conditions after the withdrawal date (e.g. the right of permanent residence after a continuous period of five years of legal residence which started before the withdrawal date). This should cover both EU-27 citizens residing (or having resided) and/or working (or having worked) in the United Kingdom and United Kingdom citizens residing (or having resided) and/or working (or having worked) in one of the Member States of the EU-27. Guarantees to that effect in the Agreement should be **reciprocal** and should be based on the principle of equal treatment amongst EU-27 citizens and equal treatment of EU-27 citizens as compared to United Kingdom citizens. Those rights should be protected as directly enforceable vested rights for the **life time** of those concerned.*²⁶

The Commission's working paper on 'Essential Principles on Citizens' Rights' gives further detail to the principles envisaged. The directives and the paper are far-reaching and significant in many respects. Essentially, they aim to ensure that citizens – both UK and EU-27 – who moved to work, study or retire in another Member State and have thereby availed themselves of their Treaty rights before the withdrawal date, should not suffer disadvantages from the UK's decision to leave the EU but, in most respects, continue to enjoy rights they now have.

The principles express the aim to ensure, at the date of withdrawal, the '**same level of protection**' as set out in Union law, **as interpreted by the Court of Justice** of the EU. This should include interpretations of the Court given in cases 'pending at the date of withdrawal'. More specifically, the directives seek to protect, inter alia, entry and residence rights of those UK and EU-27 citizens 'who have resided in the UK or EU-27 before the withdrawal date.' Moreover, their family members should be able to join them 'at any point in time before or after the withdrawal date';²⁷ this is to cover *current and future* family members irrespective of their nationality.²⁸ According to 'essential principles', the rights of Union citizens and the derived rights of their family members 'should be protected for life, provided the conditions of Union law are met'. Consequently, for example, the Singaporean wife of an EU worker who remains resident in the UK post-Brexit would be able to join her husband and live in the UK, as would their children. The same applies to UK citizens in the EU seeking family

²⁵ Ibid., p. 37.

²⁶ [Negotiating directives](#) for Article 50 negotiations of 22 May 2017, para. 20. Emphasis added.

²⁷ Negotiating directives, para 21(a).

²⁸ One difference between the current provisions and the situation envisaged in the negotiating directives concerns the absence of the category of other 'beneficiaries' of the Directive, such as dependent members of the 'broader family' or 'durable partners', whose entry and residence is to be merely 'facilitated' by Member States. The concept of 'facilitation' has been elaborated on by the Court of Justice in case [C-83/11, Rahman](#).

reunification with their non-EU family members. Equally, according to the essential principles paper, EU-27 and UK citizens should be able to 'continue to change status and to accumulate periods leading to rights pursuant to Union law *during the period of protection of the withdrawal agreement*.' It specifies that:

A student can still become an 'EU worker' after end of studies without having to comply with immigration law for third-country nationals, an inactive citizen can become a worker and still be covered by EU rules, and a person who resided legally in the UK for less than five years by the date of the entry into force of the Withdrawal Agreement can continue to accumulate the necessary five years residence giving access to permanent residence rights.

According to the principles, the withdrawal agreement should safeguard not only entry and residence rights but also rights to equal treatment, established in EU Treaties and applicable secondary law (Directive 2004/38, Regulation 492/2011 regarding workers and job-seekers). Equally, the principles of social security coordination, which include aggregation, export of benefits and equal treatment, should also be maintained. Finally, the agreement should further ensure the protection of recognised professional qualifications 'obtained in any of the EU-28 Member States' before the withdrawal date. These issues, as well as their interpretation by the Court of Justice – to which the principles refer – are addressed in turn below.

Monitoring and enforcement of the withdrawal agreement

The Council negotiating directives envisage **maintaining the jurisdiction of the Court of Justice** as well as the supervisory role of the Commission. This would imply a continued right of citizens covered by the withdrawal agreement to resort to the same legal remedies as they can now, including the possibility for national courts to request a preliminary ruling from the Court of Justice of the EU (Article 267 TFEU). Maintaining jurisdiction of the Court of Justice is expected to become one of the stumbling blocks in the negotiations, given that the UK government, prior to those negotiations starting, explicitly and repeatedly expressed the aim to 'take control of our own laws' and to end the jurisdiction of the EU Court.²⁹

2.3. Rights of free movement and residence

Most aspects of free movement and residence are governed by Directive 2004/38 (also called the Citizenship Directive),³⁰ the protections of which the negotiating directives essentially seek to maintain.

Every EU citizen has the right to enter the territory of another Member State with a valid identity card or passport, without any visa requirements or equivalent formalities (Article 5(1)). He or she may further reside in another Member State for **up to three months** without any conditions other than the requirement to hold a valid identity card or passport.³¹ The directive also sets out categories of persons who enjoy the right of residence for **longer than three months**, which follow below.

²⁹ Department for Exiting the European Union, [The United Kingdom's exit from and new partnership with the European Union](#), White Paper of 7 February 2017, section 2.

³⁰ Directive [2004/38/EC](#) of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

³¹ This applies only as long as such persons do not 'become an unreasonable burden on the social assistance system of the host Member State', Article 14(1) of Directive 2004/38.

2.3.1. Conditions for residence (3 months to 5 years)

Workers and self-employed persons

Workers and the self-employed do not need to satisfy any further conditions to reside (besides being a worker or self-employed). The term '**worker**' is an EU law concept interpreted by the Court of Justice, which is understood to cover every person pursuing effective and genuine employment activities, to the exclusion of activities which are purely marginal and ancillary. Such activities need to be performed under the direction of another person and for remuneration, which can be remuneration in kind. The (short) duration of a contract, low level of such remuneration or the fact that a person works only a 'small number of hours per week' does *not* prevent a person from being considered a worker for the purposes of EU law (see also discussion below).³²

Economically inactive persons with sufficient resources

The right of EU citizens who are not economically active to reside in another Member State is subject to the condition that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State, and have 'comprehensive sickness insurance cover'.³³

According to Directive 2004/38, under certain conditions unemployed persons and jobseekers are not considered economically inactive persons.

Member States may not lay down a fixed amount which they regard as '**sufficient resources**', but need to take account of the circumstances in each individual case. In any case, the amount deemed to be necessary for self-sufficiency may not exceed the threshold under which nationals become eligible for social assistance, or the threshold for the payment of a social security pension (Article 8(4)). Union citizens retain their residence right as long as they do not become an unreasonable burden on the social assistance system of the host Member State. National authorities can, when necessary, undertake checks as to the existence of the resources and their lawfulness, amount and availability. Self-sufficiency does not need to be acquired on the territory of the Member State of residence.³⁴ Resources which a third person makes available to the EU migrant concerned must also be accepted. In contrast, lack of sufficient resources may not be overcome through recourse to social assistance benefits in the host Member State unless the Member State's legislation so provides.³⁵

Comprehensive sickness insurance cover does not necessarily have to derive from the host Member State: it may be contracted in another Member State if cover is granted in the host Member State too, even if emergency treatment given in the host Member State is not.³⁶

Differences between Member States arise from the fact that whilst some Member States have a national health service (e.g. Denmark, Finland, Ireland, Italy, Sweden and the UK), others have a health insurance scheme (e.g. Belgium, Germany, Luxembourg,

³² Cases C-53/81, *Levin*, para. 17; C-268/99, *Jany v Staatssecretaris van Justitie*, C-139/85 *Kempf and C-46/12, L.N. v Styrelsen for Videregående Uddannelser og Uddannelsesstøtte*, paras 39-43.

³³ Article 7(1)(b) of Directive 2004/38.

³⁴ CJEU judgment of 17 September 2002, C-413/99 *Baumbast* para 88.

³⁵ CJEU judgment of 11 November 2014, C-333/13 *Dano*, para. 77-79.

³⁶ *Baumbast* case, op. cit., paras 89 and 93.

the Netherlands and Romania).³⁷ In Member States with health services, such as the NHS in the UK, the entitlement to healthcare is based solely on residence. In this context, the UK refuses to accept access to the NHS as comprehensive sickness insurance cover. In 2012 the Commission had started an infringement procedure against the UK on this issue. While the infringement proceedings appear to be ongoing,³⁸ the issue remains as the application forms for permanent residence currently in use in the UK explicitly state that access to the NHS is not accepted as the required insurance cover.³⁹ According to Professor Gareth Davies, the result is to invalidate years of 'fairly blameless' residence of non-economically active residents in the UK, and effectively confining the 'permanent residents' group to those who can afford private medical insurance – an estimated one tenth of the population. According to Davies, this is, therefore, one of the issues to be addressed during withdrawal negotiations. After all, an agreement aimed at safeguarding most of the current rights under current conditions would benefit few if these conditions are restrictively interpreted and applied.⁴⁰

Students

Students enrolled in an accredited establishment for the purpose of studies (including vocational training), have a right of residence provided they have comprehensive insurance cover (see above) in the host Member State and declare – in a declaration, or equivalent means they may choose – that they have sufficient resources not to become a burden on the social assistance system of the host state (Article 7(1)(c)). Member States *may not* require students to refer to any specific amount of resources in such a declaration.

Jobseekers and the involuntarily unemployed

As recognised in the Court's early case law, freedom of movement would be rendered practically irrelevant if only citizens who already had a job offer could move to another Member State.⁴¹ EU law thus allows jobseekers the right of residence during the periods in which they seek work.⁴² Jobseekers may stay for a period *longer* than three months, as long as they can 'provide evidence that they are continuing to seek employment and that they have a genuine chance of being engaged' (Article 14(4)(b)). Member States may, however, expel a jobseeker if there prove to be no such prospects after a reasonable period of time.

Under certain conditions established by Directive 2004/38, the unemployed and jobseekers are not considered to be economically inactive, so that the sufficient resources and sickness insurance requirements are not applied to them. Pursuant to Article 7(2) of Directive 2004/38, EU citizens **maintain their status of worker**, *inter alia*

³⁷ ICF GHK / Milieu, [A fact-finding analysis on the impact on the Member States' social security systems of the entitlements of non-active intra-EU migrants to special non-contributory cash benefits and healthcare granted on the basis of residence](#), for the European Commission, DG Employment, Social Affairs and Inclusion, 14 October 2013.

³⁸ See Commission [press release](#) on issuing a reasoned opinion of 26 April 2012 and [answer given by Vera Jourová on behalf of the Commission](#) on 22 November 2016.

³⁹ UK Visas & Immigration, [Guidance notes](#), pp. 5 and 6.

⁴⁰ G. Davies, [The UK and sickness insurance for mobile citizens: an inequitable mess for Brexit negotiators to address](#), European Law Blog, March 17, 2017.

⁴¹ CJEU judgment of 26 February 1991, C-292/89 *Antonissen*.

⁴² CJEU judgment of 23 March 2004, C-138/02 *Collins*, para 18; CJEU judgment of 15 September 2005, C-258/04 *Ioannidis*, para 38.

when an individual is in duly recorded involuntary unemployment after having been employed for over a year, and has registered as a jobseeker with the employment office. Those losing their job involuntarily before having completed a period of employment of one year nonetheless retain their worker status for a minimum period of six months (Article 7(3)). The same applies to a person who was employed on a fixed-term contract of less than one year. Accordingly, the self-sufficiency and sickness insurance requirements do not apply either to unemployed EU citizens who were employed in the host Member State for at least one year before losing their job, or (for six months) to those who were employed for under one year.

Family members

EU citizens have the right to be accompanied by their **family members**, who may themselves be EU or non-EU citizens. Family members include a spouse, registered partner,⁴³ children under 21 or dependent children, and dependent parents or grandparents (and those of the spouse). In other words, according to Directive 2004/38, the Portuguese wife of a German citizen in the UK will be able to join her husband to reside in the UK – as will the Australian partner of a citizen of France, with no further conditions attached.

2.3.2. Permanent residence

Union citizens who have been legally and continuously residing for five years in a Member State acquire the right of **permanent residence**.⁴⁴ Continuity of residence is not affected by temporary absences of up to six months or, in certain cases, longer absences.⁴⁵ In this context, '**legal residence**' is defined as residence in compliance with the conditions of the Directive, in particular those set out in Article 7, discussed above.⁴⁶ This status implies a right of residence no longer subject to the above conditions (e.g. sufficient resources), and 'full' equal treatment, including access to all relevant benefits granted to nationals. The same applies for family members who have legally resided with the Union citizen. Once acquired, the right of permanent residence is lost in the case of an absence longer than two consecutive years (Article 16(4)).

2.3.3. Protection against expulsion

Member States may **restrict** freedom of movement and residence on grounds of public policy, public security or public health (Article 27(1), Directive 2004/38). Such restrictions may entail expulsion measures. Any such measure needs to comply with the principle of **proportionality** and must be based exclusively on the personal conduct of the individual concerned. Such conduct must represent a 'genuine, present and sufficiently serious threat affecting one of the fundamental interests of society' (Article 27(2)). Before taking an expulsion measure, Member States must take into account the personal situation of the individual concerned, including the length of their residence in

⁴³ Subject to the condition that the host Member State treats registered partnerships as equivalent to marriage, Article 2(2)(b) of Directive 2004/38.

⁴⁴ In certain cases, permanent residence can be acquired *earlier* than after five years. This applies in cases of, for example, workers or self-employed who stop working after having reached retirement age or due to permanent incapacity to work (e.g. by reason of an accident at work), Article 17 of Directive 2004/38.

⁴⁵ If due to, for example, compulsory military service, pregnancy and childbirth, serious illness, study or vocational training or posting in another Member State, Article 16(3), Directive 2004/38.

⁴⁶ Joined cases [C-424/10 and 425/10](#), *Ziolkowski & Szeja*, para 46. The Court has also held that periods of imprisonment will not count towards establishing permanent residence, Case [C-378/12](#), *Onuekwere v Secretary of State for the Home Department*.

the host Member State, age, health, family situation and social integration into the host Member State. This excludes automatic expulsions. In general, the longer a person has resided in the territory of a Member State, the stronger the safeguards against expulsion (Article 28).

Implications of Brexit

In a no-agreement scenario, UK citizens in the EU-27 would be subject to the EU *acquis* regarding third-country nationals, in combination with national immigration provisions depending on the state of residence. Generally, this implies stricter residence conditions and less far-reaching equal treatment provisions. For example, the family reunification regime for non-EU nationals (Directive 2003/86) allows Member States to require the family to provide evidence of stable and regular resources or impose integration requirements (language or integration courses) to establish residence. Workers may be exposed to EU-preference rules or minimum salary requirements (e.g. Blue Card applicants). Similar conditions and stricter requirements would equally apply to EU-27 citizens who – in the absence of a withdrawal agreement – would be subject to UK immigration provisions (including, inter alia, a points-based system for economic migration or financial requirements for family reunion). However, both categories seeking family reunification may possibly benefit from the additional protection of the European Convention of Human Rights (ECHR), which guarantees, inter alia, respect for private and family life.

2.3.4. Application of the Citizenship Directive and the issue of administrative formalities

The negotiating directives stipulate that 'citizens should be able to exercise their rights through smooth and simple administrative procedures.' They further specify that:

*any document to be issued in relation to the residence rights (for example, registration certificates, residence cards or certifying documents) should have a **declaratory nature** and be issued under a simple and swift procedure either free of charge or for a charge not exceeding that imposed on nationals for the issuing of similar documents.*⁴⁷

The declaratory nature of residence documents implies that, as the corresponding Commission working paper specifies:

EU27 citizens or UK nationals who resided legally respectively in the UK or EU-27 at the date of entry into force of the Withdrawal Agreement should be considered legally resident even if they do not hold a residence document evidencing that right.

This position echoes the current provisions of the Citizens' Directive, which make clear that national residence documents **do not confer rights but attest** them. According to Article 25 of the directive, the possession of national residence documents 'may under no circumstances be made a precondition for the exercise of a right or the completion of an administrative formality, as entitlement to rights may be attested by any other means of proof'.⁴⁸ According to this logic, 'EU citizens ... who have fulfilled the underlying conditions for acquisition of the right but never bothered to seek evidence of the right from the authorities are equally entitled to rely on the right as compared to those who have sought evidence from the authorities of the host State'.⁴⁹ The negotiating directives not only seek confirmation of this principle post-Brexit, but also

⁴⁷ Negotiating directives, paras. 20 (last sentence) and 21(b)(i).

⁴⁸ This position was also expressed numerous times by the Court. For example, in case [C-215/03, Oulane](#), the court held that 'issuance of a residence permit to a national of a Member State is to be regarded not as a measure giving rise to rights but as a measure by a Member State serving to prove the individual position of a national of another Member State' (para 18).

⁴⁹ Guild, S. Peers and J. Tomkin *The EU Citizenship Directive. A Commentary*, Oxford University Press, 2014, pp. 214-215.

aim to address the concerns of citizens (in particular those resident in the UK), who in the aftermath of the UK referendum reportedly faced difficulties in obtaining residence documents confirming their status.

Under the current rules, Member States may require Union citizens resident in their territory for longer than three months to **register** with the relevant authorities. Where they do so, national authorities must issue a 'registration certificate' immediately.⁵⁰ Practice has shown that the vast majority of Member States do require Union citizens to register, except a handful of Member States, which include the UK.⁵¹ Registration may entail providing proof that the directive's conditions for residence (e.g. being a worker or a student with comprehensive sickness insurance) are fulfilled. In this context, besides a valid identity card or passport, Member States may require the following documents:

Workers or self-employed	Confirmation of engagement of employer or proof of self-employment.
Students	Proof of enrolment in an accredited establishment; Comprehensive sickness insurance; Declaration (or equivalent means) of sufficient resources not to become a burden on the social assistance system (Member States may not require such declaration to refer to any specific amount of resources (Article 8(3))).
Non-economically active	Proof of sufficient resources; Comprehensive sickness insurance

Jobseekers staying longer than three months will be required to 'provide evidence that they are continuing to seek employment and that they have a genuine chance of being engaged',⁵² and family members need to provide evidence of a family relationship.⁵³

The above list of documents is **exhaustive**: Member States may not require more documentation than proof of the above, or make residence documentation subject to additional conditions.⁵⁴ Member States may, however, require documents to be translated, notarised or legalised in certain circumstances.⁵⁵ In specific cases where there is *reasonable doubt* as to whether a Union citizen satisfies the conditions for residence, Member States are entitled to **verify** if these conditions are fulfilled. However, such verification shall *not* be carried out systematically.⁵⁶

⁵⁰ Article 8 of Directive 2004/38.

⁵¹ See the [Evaluation of EU rules on free movement of EU citizens and their family members and their practical implementation, ICF in association with Milieu Ltd](#), Final Report, October 2013. Since the report was published, the Netherlands, for example, has abolished the registration requirement.

⁵² Article 14(4)(b) Directive 2004/38.

⁵³ Article 8(5) Directive 2004/38. Conditions applicable for non-EU family members are listed in Article 10.

⁵⁴ This is evident from the wording of Article 8(3) of the directive ('Member States may *only* require that..'), Recital 14 of the preamble (which states that 'supporting documents required by the competent authorities for the issuing of a registration certificate ... *should be comprehensively specified* in order to avoid divergent administrative practices or interpretation constituting an undue obstacle' to free movement). See also relevant case law on equivalent provisions of the predecessor directives, e.g. case [C-157/03, Commission v Spain](#), paras 29 and 30.

⁵⁵ According to Commission guidance ([COM\(2009\) 313 final](#)), this is possible 'where the national authority concerned cannot understand the language in which the particular document is written, or have a suspicion about the authenticity of the issuing authority.'

⁵⁶ Article 14(2), Directive 2004/38.

Regarding permanent residents, application for a document certifying permanent residence is optional, but, upon application, Member States have to issue 'as soon as possible' a document certifying such residence.⁵⁷ Member States are entitled to *verify* the duration of residence and thus request documents for such verification, including the 'legality' of such residence (i.e. compliance with the directive's conditions).

In practice, the above provisions are being implemented and applied differently across Member States. Several reports have suggested that, in practice, several Member States require more documentation than that provided for in the directive, interpret the respective conditions (overly) strictly or make the issuance of residence documents subject to further conditions.⁵⁸ In the face of Brexit these issues have come to the fore amidst reports of thousands of EU citizens' seeking confirmation of their residence status in the UK but being turned down in high numbers. These issues focused on, inter alia, minimum wage requirements for workers or 'comprehensive sickness insurance' cover, as well as the length and complexity of application forms. It should be noted that, in the absence of a registration requirement for persons resident longer than three months in the UK, citizens applying for permanent residence need to prove *retrospectively* that they have been residing in the UK in compliance with the directive's conditions. As has been suggested, for many this raises 'enormous evidential problems',⁵⁹ which are difficult or impossible to overcome.

One such problem relates to the definition of **worker**. As mentioned above, EU worker is an EU law concept which, according to the Court of Justice, includes those who work part-time or even a 'small number of hours per week'.⁶⁰ However, the application forms for a residence certificate currently in use in the UK require workers to provide details of salary,⁶¹ and thereby goes beyond the provisions of Directive 2004/38, which exhaustively lists the required documents. As discussed, Member States are entitled 'in specific cases where there is reasonable doubt' to verify whether the conditions for residence are fulfilled by, for example, verifying the existence of 'effective and genuine employment'. However, such verification shall not be systematic, as the opposite would mean subjecting all EU workers to a general suspicion of not performing genuine work activities. Another controversy has evolved around the notion of the requirement of 'comprehensive sickness insurance' cover, discussed above.

⁵⁷ Article 19(2), Directive 2004/38.

⁵⁸ For a comprehensive study regarding administrative formalities, including a ranking of Member States, see [Evaluation of EU rules on free movement of EU citizens and their family members and their practical implementation](#), ICF in association with Milieu Ltd, Final Report, October 2013. See also a study on [Obstacles to the right of free movement and residence for EU citizens and their families. Comparative Analysis](#), European Parliament 2016 (Policy Department C).

⁵⁹ G. Davies, [The UK and sickness insurance for mobile citizens: an inequitable mess for Brexit negotiators to address](#), European Law Blog, 17 March 2017.

⁶⁰ Cases C-53/81, *Levin*, para. 17; C-268/99, *Jany v Staatssecretaris van Justitie*, C-139/85 *Kempf* and [C-46/12](#), *L.N. v Styrelsen for Videregående Uddannelser og Uddannelsesstøtte*, paras 39-43.

⁶¹ See application for a [residence certificate](#) and UK Visas & Immigration, [Guidance notes](#).

2.4. Equal treatment

The right of EU citizens to live, work and study in another Member State is intrinsically connected with their right to be treated equally to nationals of the host Member States. Without the right to equal treatment, the free movement rights could not be exercised to their full effect since possible discriminatory treatments would deter EU citizens from exercising or continuing to exercise their free movement rights. Not only direct discrimination on the grounds of nationality is forbidden (e.g. higher tuition fees;⁶² higher prices for museum entry,⁶³ or higher requirements for identity verification for non-national EU citizens,⁶⁴ etc.), but also indirect discrimination. The latter exists when the different treatment is not explicitly based on nationality but in practice affects non-national EU citizens rather than nationals of the host state. This is the case, for instance, when a provision draws on the place of residence (current or past),⁶⁵ or, for access to university, on the country where the school qualifications were obtained.⁶⁶

Whilst Article 18 TFEU contains a general right to non-discrimination for EU citizens, Article 45 TFEU establishes a special non-discrimination right for workers, and Article 49 TFEU refers to non-discrimination regarding the right to establishment.

The right to equal treatment is, however, not absolute and is subject to limits needed to pursue a legitimate goal and proportionate for the achievement of that goal.⁶⁷

The equal treatment principle as a pre-condition for the effective exercise of all Union citizenship rights has so far featured prominently in the EU negotiation documents. The Commission's working paper, 'Essential Principles on Citizens' Rights', states that EU-27 citizens in the UK should be treated equally, as compared to UK nationals, and thus makes clear that mere equal treatment with other categories (e.g. common law citizens in the UK) will not be accepted. On the other hand, it aims that UK nationals in the EU-27 are treated on an equal basis to EU-27 citizens. Notably, the working paper states that equal treatment shall be granted in accordance with Union law, as interpreted by the Court of Justice at the date of entry into force of the withdrawal agreement. This means on the one side that the negotiators will seek to secure the application of the equal treatment principle as established in the current EU legal framework, but on the other side that future changes, restricting or extending the equal treatment principle, would not *per se* be applicable to UK nationals living in the EU-27 or to EU-27 citizens living in the UK.

Furthermore, the working paper states that equal treatment among EU-27 citizens will be guaranteed in all matters covered by the withdrawal agreement. This reflects the principle of unity established in the European Council's guidelines for the negotiations, according to which there will be no separate negotiations between individual Member States and the United Kingdom on matters pertaining to the withdrawal of the UK from the Union. An exception could be made, according to the working paper, regarding the Common Travel Area arrangements between the UK and Ireland that allow for free

⁶² CJEU judgment of 3 May 1994, C-47/93 *Commission v Belgium*.

⁶³ CJEU judgment of 16 January 2003, C-388/01 *Commission v Italy*.

⁶⁴ CJEU judgment of 17 February 2005, C-215/03 *Salah Oulane*.

⁶⁵ CJEU judgment of 26 February 2006, C-192/05 *Tas-Hagen and Tas*; CJEU judgment of 15 March 2005, C-209/03 *Bidar*.

⁶⁶ CJEU judgment of 7 July 2005, C-147/03 *Commission v Austria*.

⁶⁷ CJEU judgment of 25 January 2011, C-328/08 *Neukirchinger*.

movement without passport controls between the two countries.⁶⁸ However, the document makes no reference to the special status of Irish citizens under UK law, which may be subject to changes following Brexit.⁶⁹

2.5. Social security benefits

2.5.1. General principles of EU social security coordination

The principle of equal treatment between host-country citizens and other EU citizens is also at the core of the EU's social security coordination. EU coordination measures in the field of social security are required by Article 48 TFEU in order to ensure that citizens do not suffer disadvantages in their social security protection when exercising their right to free movement across the EU. Otherwise, and due to the principle of territoriality applicable to a great extent in the Member States, only contributions and periods in the Member State concerned would be considered for the provision of social security benefits.

Social security rules are based on four principles:

- Equal treatment: non-national EU citizens have the same rights and obligations as nationals of the host Member State;
- One country only: Union citizens who have exercised their free movement rights are covered by the system of one Member State at a time, and pay contributions in one country only.
- Aggregation: previous periods of insurance, work or residence in other Member States are taken into account for the provision and calculation of social security benefits.
- Exportability: cash benefits (but not in-kind benefits such as medical care) can be exported to the Member State of residence.

The EU regulations on the coordination of social security coordinate the national social security systems but do not harmonise them, so that the Member States decide on the benefits to be granted, their amount, etc., provided equal treatment is ensured.⁷⁰

The central piece of social security coordination legislation is **Regulation 883/2004**, in force since May 2010.⁷¹ It contains rules for establishing the **Member State (of work or of residence) responsible for the provision of social security benefits** such as sickness benefits, maternity and equivalent paternity benefits, invalidity benefits, old-age benefits, survivors' benefits, benefits in respect of accidents at work and occupational diseases, death grants, unemployment benefits, pre-retirement benefits and family allowances. As a general rule, social security benefits are paid in the Member State where the activity (employment, self-employment)⁷² is undertaken, regardless of the place of residence⁷³ and nationality of the claimant.

⁶⁸ M. Gover, [The Common Travel Area, and the special status of Irish nationals in UK law](#), House of Commons Library, July 2016.

⁶⁹ Ibidem, p. 17.

⁷⁰ CJEU judgment of 17 January 2012, C-347/10 *Salemink*, para. 38.

⁷¹ [Regulation 883/2004](#) of the European Parliament and Council of 29 April 2004 on the coordination of social security systems replaced Regulation 1408/71 as of 1 May 2010. The procedure for the implementation of the regulation is laid down by [Regulation 987/2009](#).

The social coordination rules also apply, since 2012, to the EEA countries – Iceland, Liechtenstein and Norway – and to Switzerland.

⁷² The regulation is applicable to refugees and stateless people too.

Social security coordination between Member States does not extend to social and medical assistance. However, the boundaries between social security and social assistance are often blurred, and rendered hard to define by the existence of mixed-type benefits.⁷⁴

In addition, EU citizens working in another Member State enjoy equal treatment with national workers as regards social advantages (Regulation 492/2001/EU).

2.5.2. Workers⁷⁵

EU citizens working in another Member State and, under certain conditions (see above), jobseekers, are granted the furthest reaching equal treatment rights since they have an immediate connection with the host society due to their contribution to the economy of the host Member State. In this context, Article 45 TFEU requires equal treatment between national and non-national EU workers as regards employment, remuneration and other conditions of work and employment. It applies not only vis-à-vis the public authorities of the host Member State but also between private persons.⁷⁶

Regulation 492/2011⁷⁷ contains, at secondary law level, detailed provisions on the equal treatment right of EU citizens, working or wishing to take up work in another Member State, and their family members.⁷⁸

The Regulation requires, for instance, equal treatment of EU and host-country workers as regards **social and tax advantages**. A worker who is a national of a Member State and who is employed in the territory of another Member State enjoys all the rights and benefits accorded to national workers in matters of **housing**.

Moreover, [Regulation 1231/2010](#) extends the new social coordination provisions to third-country nationals legally resident in the EU and in a cross-border situation and provides rights to them for instance when they have moved from one EU country to another for work, but their children have stayed in the previous EU country. The regulation does not apply to Denmark or the United Kingdom. Non-EU nationals can continue to benefit from the previous EU coordination rules in cases concerning the United Kingdom, as Regulation (EC) No 859/2003 (which extended Regulation (EEC) No 1408/71 to nationals of non-EU countries) continues to apply there.

⁷³ The place of residence is relevant where it is unclear where the focal point of the activity is.

⁷⁴ In general, social assistance benefits are regarded as those that are means-tested, i.e. dependent on the actual needs of the claimant and not on previous contributions to the social security system through insurance or completion of a given period of employment. While social assistance tends to be needs-related, social security seeks to cover certain types of social risks, such as those relating to sickness, invalidity, old age, unemployment, and maternity/paternity.

Special non-contributory benefits (SNCBs) are of a mixed type (between social assistance and social security). According to Regulation 883/2004, SNCBs are granted in the Member State of residence according to its legislation and are not exportable to other Member States (Article 70(3), (4) Regulation 883/2004). Each Member State's SNCBs are listed in Annex X to that regulation. Examples include the compensatory supplement in Austria, supplementary allowance in France, minimum income guarantee in Spain, the jobseeker's allowance in Ireland, basic subsistence income for the elderly or disabled in Germany, and income support in the UK.

⁷⁵ EU social security coordination extends to frontier and posted workers too.

⁷⁶ CJEU judgment of 6 June 2000, C-281/98 *Angonese*.

⁷⁷ [Regulation \(EU\) No 492/2011](#) of the European Parliament and Council of 5 April 2011 on freedom of movement for workers within the Union (codification). It repealed and consolidated Regulation 1612/68.

⁷⁸ The Court considers that for the purposes of EU law there is no such thing as abusively creating the situation of becoming a worker, provided the work involved is not marginal or ancillary. See CJEU judgment of 6 November 2003, C-413/01 *Ninni-Orasche*, para. 31.

Moreover, the **children** of a national of a Member State who is or has been employed in the territory of another Member State shall be admitted to that state's general educational, apprenticeship and vocational training courses under the same conditions as the nationals of that state, if such children are resident on its territory.

The principle of equal treatment with nationals of the host Member State ensures that workers and their family members have access to the host Member State's social security system under the same conditions as nationals, since they contribute to public funds, for example, through their taxes. Typical **social security benefits** include old-age pensions, survivor's pensions, disability benefits, sickness benefits, birth grants, unemployment benefits, family allowances and healthcare (Article 3 of Regulation 883/2004).

Brexit implications

In the UK, several in-work benefits are granted to workers whose salary is below a certain threshold (which is why they are non-contributory in nature), and include universal credit (working tax credit and housing benefit), as well as child tax credits. These non-contributory in-work benefits are not granted to non-EU foreigners⁷⁹ which means that if no agreement was reached during the Brexit negotiations on securing them, EU workers in the UK would not be entitled to them.

It should be noted in this context that such in-work benefits were already in the spotlight during the negotiations on the 'New settlement for the UK in the EU' in the run up to the EU referendum, where the UK government had proposed to start granting these benefits to workers from other EU Member States only after four years of work in the UK.

Furthermore, UK nationals living and working in the EU and becoming third-country nationals after the UK withdrawal would not be entitled to those social security benefits that Member States reserve to nationals and EU citizens.

Family allowances

The EU regulations on the coordination of social security were adopted to ensure that citizens do not suffer disadvantages in their social security protection when exercising their right to free movement across the EU, but also so that social benefits are not paid twice, in the home and host Member States. Regulation 883/2004 establishes that family benefits (including child benefits) are paid by the Member State where EU citizens work, even if their family members reside in another Member State (Article 67) (principles of equal treatment and **waving of residence** rules).

Brexit implications

In the UK, child benefits are not paid for children of non-EU nationals who do not reside with them in the UK, except for some countries (not including EU Member States).⁸⁰ Accordingly, if no agreement has been reached, the residence requirement would apply so that EU citizens working in the UK will not be entitled to child benefits for their children living in the EU.

On the other hand, in those EU Member States where the residence requirement is applied for child benefits, UK workers there will not receive such benefits if their children live in the UK.

⁷⁹ E. Guild, Brexit and social security in the EU, *CEPS commentary*, November 2016.

⁸⁰ Ibidem.

2.5.3. Jobseekers

Access to work

Regulation 492/2011 requires, regarding **access to employment**, that EU citizens have the right to take up available employment in the territory of another Member State with the **same priority** as nationals of that state. Furthermore, Member States may not subject eligibility for employment to conditions of registration with employment offices or impede recruitment of individual workers, where persons who do not reside in the territory of that state are concerned. In addition, Member States may not introduce **quotas** for the employment of EU citizens, either for certain branches of activity or for a specific territorial area, including the whole national territory.

Unemployment benefits

Jobseekers can take their unemployment benefits with them to another Member State. The principle of **exportability** is limited in the case of unemployment benefits, so that they can be exported only for three months, with a possible extension to six months. The employment services of the Member State providing the unemployment benefit may request a monthly report on the jobseekers' activities from the host Member State.

Furthermore, under the principle of aggregation, working periods in other Member States will be taken into account for the acquisition or revival of a right to unemployment benefit (e.g. to assess if the unemployed person meets the minimum period to qualify for unemployment benefits).

Brexit implications

Under UK law, unemployment benefits are not exportable outside the EU.⁸¹ Accordingly, EU citizens entitled to unemployment benefits in the UK will not be able to export them to their own Member State or to another Member State if the current rules cease to apply to the UK.

Vice versa, UK citizens becoming unemployed in an EU Member State and wishing to return to the UK exporting their unemployment benefit for three or maximum six months, would not be able to do so.

2.5.4. Economically inactive citizens and social assistance

As for economically inactive EU citizens resident in another Member State, the Citizenship Directive, which gives more specific expression to the principle of non-discrimination of EU citizens (Article 24(1)),⁸² establishes the right to residence under the directive as a pre-condition for equal treatment regarding **social assistance** provided in the host Member State. According to the CJEU, economically inactive citizens (who are not jobseekers) cannot claim to be treated equally to nationals of the host Member State regarding social assistance⁸³ since their lack of self-sufficiency prevails over their right to residence.⁸⁴

⁸¹ Ibidem.

⁸² CJEU judgment of 11 November 2014, C-333/13 *Dano*, para. 61.

⁸³ According to the Court, social assistance in the sense of Article 24(2) of the Citizenship Directive refers to 'all assistance schemes established by the public authorities, ..., to which recourse may be held by an individual who does not have resources sufficient to meet his own basic needs and those of his family and who by reason of that fact, may, during his period of residence, become a burden on the public finances of the host Member State which could have consequences for the overall level of assistance which may be granted by that State.' Ibidem, para. 63.

⁸⁴ Ibidem, para. 77-81.

Moreover, the equal treatment principle as regards social assistance does not apply during the **first three months of residence** in the host Member State, including to **first-time jobseekers** (who have not worked in the host Member State but have entered it to seek a job) (Article 24(2) Citizenship Directive).⁸⁵

2.5.5. Pensioners

The EU rules on social security coordination cover old-age, invalidity, and survivor's pensions. In principle, they apply to state pension schemes but not to occupational or private schemes.⁸⁶ Pensions are granted after aggregation of all periods of work in other Member States. Every Member State in which an EU citizen has been insured for at least one year will pay them an old-age pension, when they reach its national pensionable age. If the period during which a person was insured in an EU Member State (as well as in Iceland, Liechtenstein, Norway or Switzerland) is not long enough to qualify for a pension there, periods of insurance or residence in other Member States will be taken into account. The equal treatment principle applies regarding the calculation of pensions according to the national legislation of the Member States.

Pensions can be exported to other Member States, so that EU citizens retiring in a different Member State from that which pays their pension cannot be discriminated against in comparison to pensioners who do not exercise their Treaty right to move to another Member State.

Pensioners living in a Member State different from that which pays their pension can also invoke the equal treatment principle to claim a complementary pension supplement that is provided to pensioners to compensate for their low pension, unless the grant of the benefit to non-national EU citizens would place an unreasonable burden on the social assistance system of the host state. According to the CJEU, while an individual claim might not place the Member State concerned under an unreasonable burden, it should be examined whether the accumulation of all individual claims would be bound to do so.⁸⁷

Pensioners are entitled to medical treatment in the Member State in which they reside. As a general rule, the costs are first borne by the Member State of residence, which is then reimbursed by the Member State that pays the pension on the basis of a fixed amount established for each calendar year. This fixed amount shall be as close as possible to actual expenditure (Article 63(2)b Regulation (EC) 987/2009).

⁸⁵ CJEU judgment of 15 September 2015, C-67/14 *Alimanovic*, para. 56-57.

The Citizenship Directive does not provide for equal treatment from day one for Union citizens who wish to enter the territory of another Member State for up to three months. Rather, EU rules establish a proportional relationship between residence and equal treatment of EU citizens and nationals. Known as the 'incremental approach', this means that the longer migrants reside in a Member State, the greater the number of benefits they can receive on equal terms with nationals, thus ensuring integration into and solidarity from the host society. See also C. Bernard, 'EU citizenship and the principle of solidarity', in *Social Welfare and EU Law*, Dougan and Spaventa (eds.), 2005, p. 166.

⁸⁶ In order to overcome obstacles to free movement related to these supplementary pensions, the Council adopted Directive 98/49/EC on safeguarding supplementary pension rights of employed and self-employed persons moving within the European Union. This directive has a very limited scope and concerns the preservation of rights for people leaving a supplementary scheme, the payment of pensions in the different EU countries and the possibility for posted workers to remain affiliated in their home country scheme under the same conditions existing under the EU coordination rules for state schemes.

⁸⁷ *Alimanovich* case, para. 62, op. cit.

Brexit implications

Although there are some agreements between the EU and third countries providing for limited coordination in the social security field, the principles of aggregation and exportability underlying the pension rights of EU citizens exercising their free movement rights are generally not guaranteed outside the EU social coordination framework. This means that, if the current rules ceased to apply, both UK citizens working or having worked in the EU and EU citizens working or having worked in the UK will see their pension rights curtailed, particularly if they have worked both in the UK and in the rest of the EU as their insurance periods will not be aggregated automatically.

Furthermore, outside the EU social coordination framework, the export of state pensions usually involves disadvantages regarding their calculation, administrative formalities, etc. UK pensions are for instance indexed to insure an annual increase, which is not the case if the pension is exported outside the EU.⁸⁸

If the current rules on the reimbursement of the host Member State for medical treatment provided to pensioners by the Member State paying the pension ceases to apply, UK pensioners in the EU would need to apply for medical treatment under the national legislation of the host Member State. Under these circumstances, some Member States will require them to conclude a private medical insurance policy, whilst those that are currently providing medical assistance free of charge to third-country nationals who have no sufficient income, might consider changing their national legislation due to the increased number of persons relying on such a system as a consequence of Brexit.

2.5.6. Students

The Citizenship Directive also makes an exemption from the equal treatment principle as regards the provision of student grants to students from other Member States. According to Article 24(2), Member States are not obliged, prior to acquisition of the right of permanent residence, to grant maintenance aid for studies, including vocational training, consisting of student grants or student loans to persons other than workers, self-employed persons, persons who retain such status and members of their families. In this sense, the CJEU held that a simple (i.e. not linked to personal circumstances) residence requirement of five years in order to be granted a student maintenance allowance is acceptable as regards establishing the existence of a real link of the claimant with the host society.⁸⁹

Brexit implications

EU students in the UK as well as British students in the EU would not be able to invoke the right to equal treatment under EU law if no agreement has been reached. As a consequence, they will be subject to higher university fees since both the UK and the other EU Member States have in place higher fees for non-EU students than for nationals and EU students.

Furthermore, Member States, as well as the UK, would not be obliged to grant any student allowances to UK citizens in the EU or to EU students in the UK that could be granted according to EU law, at least once the student has obtained permanent residence in the host Member State.

2.5.7. Health care

EU citizens may seek planned medical treatments in a different Member State to that in which they are insured through prior authorisation by their Member State's health

⁸⁸ E. Guild, *Brexit and social security in the EU*, op. cit.

⁸⁹ CJEU judgment of 18.11.2008, C-158/07, *Förster*.

insurance authority. Once authorised, the person receiving medical treatment should be treated in the same way as a resident of that country.

For unplanned medical treatments, EU citizens can rely on the European Health Insurance Card (EHIC) which grants them access to medically necessary, state/provided healthcare at the same costs as for people insured in the host Member State. In order to obtain an EHIC, a person needs to be insured in an EU Member State or in an EEA country.

Brexit implications

Both UK citizens travelling in the EU and EU citizens travelling to the UK would need private insurance to cover any costs for unplanned medical treatments, should the current rules not be upheld in the future.

EU citizens will not be able to ask for authorisation to undergo planned medical treatment in the UK in the same way as UK citizens will not be able to seek medical treatment in the EU.

Table 1 - Summary of benefits rights for EU citizens in a host Member State under the current EU rules⁹⁰

EU citizens	Benefits entitlement
Workers / Unemployed after one year / Unemployed after less than one year – worker status for six months	Same social security benefits as national workers. Same healthcare entitlements as national workers. Right to child benefit without need for children to be resident in host Member State.
First-time jobseekers	No social assistance during first three months or while seeking a job. However, equal treatment with nationals as regards 'benefits of financial nature intended to facilitate access to labour market', if they have a real link to employment market of host Member State, e.g. by having genuinely sought work there. Access to Special Non-contributory Benefits (SNCBs) where habitually resident; in some Member States jobseeker's allowance is not social assistance but falls instead under SNCB (e.g. Ireland).
Economically non-active citizens: <ul style="list-style-type: none"> • Pensioners • Students 	Complementary pension supplements, if no unreasonable burden placed on national social assistance system. Student allowance, if real link with host society (e.g. five years' residence), and if no unreasonable burden.

⁹⁰ Source: E.-M. Poptcheva, [Freedom of movement and residence of EU citizens. Access to social benefits](#), EPRS, June 2014.

3. Settlement of financial obligations

3.1. Financial implications of obligations undertaken during EU membership

EU Member States jointly make decisions with financial implications, which often spread over a number of years. Among other factors, this is due to the multiannual nature of many EU programmes and projects, since the EU budget has a significant investment component.⁹¹

The unprecedented request of one Member State to withdraw from the EU poses the challenge of disentangling the ongoing financial liabilities of the withdrawing country from those of the other 27 Member States, which will continue to honour their obligations through the mechanisms agreed to this effect.⁹²

Immediate examples of such financial liabilities to be disentangled concern the Multiannual Financial Framework (MFF), through which EU Member States unanimously agree on the distribution of resources among the different categories of EU expenditure ('headings') over a number of years,⁹³ and the annual EU budget.

However, the landscape of financial obligations jointly undertaken by EU Member States is more complex than the EU budget and the MFF only. For instance, EU Member States have established a number of common financial tools totally or partially outside the EU budget. A long-standing case dating back to the 1950s is the European Development Fund (EDF), an intergovernmental fund managed by the European Commission, which channels EU development assistance to the African, Caribbean and Pacific (ACP) group of states as well as to overseas countries and territories.⁹⁴ More recent examples include EU Trust Funds⁹⁵ and the Facility for Refugees in Turkey.

Issues related to membership of institutions and bodies established under the EU Treaties are also to be considered, since some of them, such as the European Central Bank (ECB) and the European Investment Bank (EIB), are not included in the consolidated accounts of the European Union.

In addition, it should be noted that joint decisions may trigger not only actual liabilities such as those mentioned above, which sooner or later lead to financial disbursements, but also contingent liabilities. The latter are possible financial obligations deriving from past decisions or events that materialise only if specific future events occur. The consolidated accounts of the EU include an estimate of contingent liabilities:

⁹¹ For an overview of the EU budget, please see: A. D'Alfonso, A. Delivorias, M. Sapala, A. Stuchlik, [Economic and budgetary outlook for the EU 2017](#), EPRS, January 2017.

⁹² For example, in the case of the EU budget, financing is unanimously agreed by Member States in the Own Resources Decision. For an overview of the system, please see: A. D'Alfonso, [How the EU budget is financed: The "own resources" system and the debate on its reform](#), EPRS, June 2014.

⁹³ The current Multiannual Financial Framework covers the 2014-2020 period. Some of the operational programmes implementing it are scheduled to be closed by 2023.

⁹⁴ First created in 1959, the EDF has evolved over time. The 1973 accession of the UK to the then European Economic Community reshaped the map of countries receiving EDF assistance to include many former British colonies. For more information, see: A. D'Alfonso, [European Development Fund. Joint development cooperation and the EU budget: out or in?](#), EPRS, November 2014.

⁹⁵ A. D'Alfonso, B. Immenkamp, [EU Trust Funds for external action: First uses of a new tool](#), EPRS, November 2015.

guarantees on loans granted by the EIB represent a prominent example in this category.⁹⁶

3.2. EU negotiating position on the financial settlement

3.2.1. European Council and Council of the European Union

On 29 April 2017, the European Council adopted its guidelines on the negotiations on UK withdrawal from the European Union. The document outlines a phased approach to the negotiations, and includes the disentanglement of rights and obligations in the first phase of the negotiations, with the aim of achieving an orderly withdrawal of the UK.

Specific reference is made to a 'single financial settlement', whose function is to ensure that both parties meet the obligations resulting from the entire period of the UK's EU membership. The financial settlement should cover all relevant commitments and liabilities (including contingent liabilities). A non-exhaustive list mentions commitments and liabilities relating to Multiannual Financial Frameworks, the EIB, the EDF and the ECB.⁹⁷

The Council Decision of 22 May 2017 authorising the European Commission to open negotiations with the UK is accompanied by a set of negotiating directives, which focus on the first phase of the procedure, and further detail aspects relating to the financial settlement. The negotiating directives make explicit the principle that the UK must honour all the obligations undertaken during its membership of the Union, specifying that these should be defined in euro.⁹⁸

The single financial settlement should cover issues related to the EU budget, the termination of membership of all bodies and institutions established by EU Treaties, including the EIB, and the UK participation in other instruments related to EU policies such as the EDF. While reiterating that all obligations and liabilities (including pensions and contingent liabilities) must be taken into account, the document adds that, by means of the financial settlement, the UK should pay in full the costs triggered by the withdrawal process such as those related to the move of EU agencies or bodies from the UK to new seats (currently, the European Medicines Agency and the European Banking Authority are located in London).

The negotiating directives specify the elements that the withdrawal agreement should detail in relation to the single financial settlement, including a calculation of all UK financial obligations toward the EU, a schedule of payments to honour those obligations and the specific rules to be applied to contingent liabilities.

3.2.2. European Commission: essential principles on financial settlement

Based on the European Council guidelines and the Council negotiating directives, the European Commission has prepared a position paper that details the main principles of the EU position on the financial settlement. In June 2017, the position paper was

⁹⁶ European Commission, [Consolidated annual accounts of the European Union 2015](#), COM(2016) 475 final.

⁹⁷ See paragraph 10 in: [European Council \(Article 50\) guidelines following the United Kingdom's notification under Article 50 TEU](#), 29 April 2017.

⁹⁸ [Council decision authorising the opening of negotiations with the UK](#) and its [Annex \(Negotiating directives\)](#), 22 May 2017.

transmitted to the UK following discussion among the EU-27 in the Council Working Party (Article 50).⁹⁹

The document recalls the general principles for a single financial settlement to be established in euro, adding indicative lists of 74 bodies and funds to be included in it, and of 68 programmes and instruments relevant to the settlement. The establishment of the financial settlement implies the calculation of relevant EU obligations at the date of withdrawal, and the fixing of the UK obligations as a percentage of the total. On this basis, the UK would continue to benefit from all the programmes until their closure provided it respects relevant EU rules.

In particular, the methodology for the calculation and the data sources (i.e. consolidated accounts established at the time of withdrawal and audited by the European Court of Auditors, as well as the latest updated financial programming) are detailed in respect of the EU budget. Total EU obligations should include: 1) outstanding budgetary commitments from the period in which the UK was a Member State of the EU; 2) financial programming for the current, 2014-2020 MFF for the period between the withdrawal date and the end of the MFF; 3) liabilities such as pensions, which are not balanced in the consolidated accounts by corresponding assets; 4) contingent liabilities recorded in the consolidated accounts; and 5) all the costs triggered by the withdrawal process such as the relocation costs of EU agencies.

Once EU obligations at the date of withdrawal are calculated on this basis, the UK obligations would be determined by applying a repartition key to the total (except the specific costs related to the withdrawal process, which should be entirely covered by the UK). The repartition key would be based on the UK contribution to the EU budget under the current own resources decision:¹⁰⁰ it would correspond to the share of own resources transferred by the UK to the EU budget as a percentage of total own resources transferred by all 28 EU Member States over a given reference period (2014-2018).

In addition, the position paper provides details on the schedule of payments and methods to address issues related to other relevant institutions, bodies and instruments that are completely or partially outside the consolidated accounts of the EU. Table 2 sets out the main elements.

⁹⁹ European Commission, [Position paper transmitted to the EU-27: essential principles on the financial settlement](#), 29 May 2017; and European Commission, [Position paper transmitted to the UK: essential principles on the financial settlement](#), 12 June 2017.

¹⁰⁰ Council Decision ([2014/335/EU, Euratom](#)) of 26 May 2014 on the system of own resources of the European Union.

Table 2 – Essential elements of EU negotiating position on the financial settlement

Item	Implications for the UK	Payment schedule
EU budget	The UK should pay its share of all EU obligations established at the withdrawal date, based on its contribution to the own resources system over 2014-2018. In addition, the UK would pay in full the costs triggered by the withdrawal process (e.g. relocation of agencies).	Payment schedule aimed at mitigating the impact of the UK withdrawal on the EU budget and on the EU-27.
European Investment Bank (EIB)	The UK liability resulting from the guarantee for the financing made by the EIB should be maintained and progressively decreased in line with the amortisation of the EIB portfolio outstanding at the date of withdrawal.	Payment schedule aimed at mitigating the impact of the UK withdrawal on the EU budget and on the EU-27. UK paid-in capital should be reimbursed once the amortisation of the EIB portfolio outstanding at the date of withdrawal is completed.
European Central Bank (ECB)	The UK paid-in capital should be reimbursed to the Bank of England.	Payment schedule aimed at mitigating the impact of the UK withdrawal on the EU-27.
European Development Funds (EDFs)	The UK should continue to contribute according to the specific financing keys of all the unclosed EDFs.	Specific rules and schedule of the EDFs should continue to apply.
EU Trust Funds and the Facility for Refugees for Turkey	The UK should respect in full its undertaking for funding each of these tools.	Specific rules and schedule of each tool should continue to apply.
Other bodies	<p>The UK should contribute to funding its teachers seconded to the European schools until the end of the academic year 2020-2021 on the basis of the relevant agreement.</p> <p>The UK should assume its share of financing of all the obligations that Council agencies not financed by the EU budget have undertaken prior to the withdrawal date.</p>	Payment schedule aimed at mitigating the impact of the UK withdrawal on the EU budget and on the EU-27.

Source: Elaboration from European Commission data.

3.2.3. European Parliament

The European Parliament plays an important role in the withdrawal procedure, since the Council must obtain Parliament's consent to the final withdrawal agreement before being able to approve it by qualified majority.

The European Parliament resolution on negotiations with the UK, which fed into the European Council guidelines of 29 April 2017, stresses that Parliament's full involvement in the negotiations is a precondition to any agreement. The Parliament notes that the settlement of financial obligations should be part of the withdrawal agreement, calling for a single settlement to include all outstanding liabilities, as well as provisions to address off-balance sheet items, contingent liabilities and costs triggered by the withdrawal process itself.¹⁰¹

3.3. UK position on a financial settlement

The UK government has so far not detailed its negotiating position on the settlement of financial obligations.

In her January 2017 speech on the UK's negotiating objectives for exiting the EU, the UK Prime Minister, Theresa May, did not explicitly refer to financial obligations stemming from the past, although she ruled out making 'vast' financial contributions to the EU budget in the future. She added that, should the UK want to continue participation in some EU programmes, the country would make appropriate contributions to those.¹⁰²

In February 2017, the UK government's White Paper on the country's exit from and new partnership with the EU stayed on that line. That paper focused on the negotiation of future arrangements but remained silent on the settlement of past obligations, both when mentioning the EU budget and when outlining the UK perspective on an orderly exit from the European Union.¹⁰³

In its March 2017 report on Brexit and the EU budget, the UK House of Lords' Committee on the European Union argued, on the basis of a number of legal opinions, that it would be possible for the UK to withdraw from the Union without being liable for outstanding financial obligations.¹⁰⁴ At the same time, the report warned of the significant political and economic consequences that such a stance would have.¹⁰⁵

The White Paper approach of February 2017 appeared to be confirmed in the letter by which the UK triggered Article 50 TEU on 29 March 2017,¹⁰⁶ suggesting potential friction between the negotiating parties. While the EU has stressed that it will be possible to start the negotiations on future EU-UK relations only once good progress has been made on the withdrawal agreement (including on the method to calculate the financial settlement), the UK will not want to actually make payments until its future relationship with the EU becomes clearer.

¹⁰¹ European Parliament resolution of 5 April 2017 on negotiations with the United Kingdom following its notification that it intends to withdraw from the European Union ([P8_TA\(2017\)0102](#)).

¹⁰² UK Prime Minister, Theresa May, [The government's negotiating objectives for exiting the EU](#), 17 January 2017.

¹⁰³ See point 8.51 and chapter 12 in the UK White Paper, [The United Kingdom's exit from and new partnership with the European Union](#), 2 February 2017.

¹⁰⁴ While underlining the legal complexity and questions posed by a financial settlement, other legal experts have questioned a number of elements in the reasoning of the House of Lords Committee. See for example the postscript added by S. James to his briefing: [Brexit: Will the UK have to pay to leave the EU?](#), Clifford Chance, 21 February 2017.

¹⁰⁵ House of Lords, European Union Committee, [Brexit and the EU budget](#), HL Paper 125, 4 March 2017, pp. 38-39.

¹⁰⁶ Text of PM May's letter to EU's Tusk triggering Brexit process, Reuters, 29 March 2017.

More recently, in the run-up to the UK elections, the manifesto of the Conservative and Unionist Party reiterated the same positions, while adding that the party would:

*determine a fair settlement of the UK's rights and obligations as a departing member state, in accordance with the law and in the spirit of the UK's continuing partnership with the EU.*¹⁰⁷

3.4. Some estimates by analysts and observers

No official figures for the possible amount of the financial settlement are available, since the methodology itself to calculate it will be subject to negotiation. The final result will depend on numerous variables.

Since the aftermath of the UK referendum, a number of analysts and observers have been producing estimates of the possible financial settlement, based on different assumptions, including as regards the approach to negotiations.

Figures differ significantly, with the estimated overall amount due from the UK ranging between €20-25 billion and €100-110 billion. This variation is influenced by numerous factors such as the commitments and liabilities that are taken into account, the estimates of their values at the exit date, the cut-off date, and the share of the total obligations allocated to the UK (estimated repartition keys frequently used being either some 12 % or some 15 % of the total obligations).

During the first quarter of 2017, different press sources have repeatedly quoted a figure of €60 billion for the financial settlement. The Financial Times referred to this figure, said to have been briefed by Commission sources, and its Brussels bureau chief published a paper analysing the factors that could amount to such a result from the calculation of the amount to be paid by the UK when leaving the EU.¹⁰⁸

Despite using different assumptions and data, other calculations came to similar conclusions concerning the possible magnitude of the financial settlement. For example, Professor Iain Begg explained a back-of-the-envelope estimate of €55 billion during a meeting of the House of Lords EU Financial Affairs Sub-Committee.¹⁰⁹

According to the press, in March 2017 sources close to the UK government reported its desire to cap any financial settlement at around €3.6 billion, and its dismissal of €60 billion figures as the EU overstating its position before the withdrawal negotiations start.¹¹⁰

More recently, the Financial Times has revised its estimates upwards, based on an analysis of a draft EU negotiating position. According to the newspaper, this could result in a gross upfront payment of between €91 billion and €113 billion, corresponding to a net financial settlement of €55-€75 billion when considering the

¹⁰⁷ Conservative and Unionist Party, [Forward together: Our plan for a stronger Britain and a prosperous future](#), 2017, p. 36.

¹⁰⁸ A. Barker, [The €60 billion Brexit bill: How to disentangle Britain from the EU budget](#), Centre for European Reform, February 2017.

¹⁰⁹ Select Committee on the European Union, EU Financial Affairs Sub-Committee, [Corrected oral evidence: Brexit: EU Budget](#), 14 December 2016.

¹¹⁰ L. Hughes, [Philip Hammond 'does not recognise' EU demands for a £50 billion Brexit 'divorce bill'](#), The Telegraph, 21 March 2017.

share of EU spending flowing back to the UK and repayments of EU loans in the long-run.¹¹¹

Along similar lines, although using partially different estimates and data, the Bruegel think-tank concludes that the upfront overall payment could reach €109 billion, with significant subsequent EU reimbursements resulting in a net financial settlement between €25 billion and €65 billion, depending on a number of factors, including the overall approach to negotiations.¹¹²

A number of analysts argue that, while the possible amount of the financial settlement may appear high, it is relatively insignificant in pure economic terms in comparison with other issues triggered by the withdrawal process. However, they draw attention to the high sensitivity attached to the issue of the financial settlement, concluding that it could represent a difficult element in the negotiations.¹¹³

4. The Good Friday Agreement regarding Northern Ireland

The Good Friday Agreement¹¹⁴ (also known as the Belfast Agreement) of 10 April 1998 is an agreement between the British and Irish governments and most of the political parties in Northern Ireland. It takes the form of an international agreement between the governments of the UK and Ireland and includes a multi-party agreement. Three strands cover: (i) political arrangements within Northern Ireland; (ii) the relationship of Northern Ireland and Ireland; and (iii) the relationship between Ireland and the UK. The Agreement was endorsed through two referendums held in Northern Ireland and Ireland on 22 May 1998. (In the case of the latter, the referendum was called to amend Articles 2 and 3 of the Irish Constitution to reflect the desire of the country to achieve a united Ireland by peaceful means only). It was given legal force in the United Kingdom through the Northern Ireland Act 1998.

The Agreement is recognised as having made a significant contribution to the Northern Ireland peace process. It has provided the framework for the establishment of Northern Ireland's political institutions such as the Northern Ireland Assembly,¹¹⁵ the North South Ministerial Council¹¹⁶ and the British Irish Council.¹¹⁷ The current system of devolved government established by the Good Friday Agreement has been described as 'a power-sharing, consociational model',¹¹⁸ designed for a society where there has been or is potential for conflict.

¹¹¹ A. Barker, Brussels hoists gross Brexit 'bill' to €100bn, Financial Times, 3 May 2017.

¹¹² Z. Darvas, K. Estathiou, I. Goncalves Raposo, [Divorce settlement or leaving the club? A breakdown of the Brexit bill](#), Bruegel, Working paper, Issue 03, 2017.

¹¹³ A. Barker, Centre for European Reform, op. cit.; Z. Darvas, K. Estathiou, I. Goncalves Raposo, Bruegel, op. cit.

¹¹⁴ The [Good Friday Agreement](#).

¹¹⁵ The [Northern Ireland Assembly](#).

¹¹⁶ The [North South Ministerial Council](#).

¹¹⁷ The [British Irish Council](#).

¹¹⁸ See Northern Ireland Assembly [website](#) for further information on the system of devolved government in Northern Ireland. NB at time of writing devolved government in Northern Ireland has been suspended since January 2017; and despite elections held on 2 March, the main parties representing the two communities have so far failed to reach agreement on a governing programme.

The Good Friday Agreement contains a number of provisions and guarantees which contribute to the peace process. These include:

- the 'principle of consent', which confirms Northern Ireland's position in the UK unless the majority of its population have decided otherwise;
- guarantees of dual nationality: i.e. an acceptance that the people of Northern Ireland can identify themselves as either British or Irish, or both;
- a commitment to internal power-sharing institutions.

In legal challenges to the UK government's decision to withdraw from the EU, it was argued that EU withdrawal would undermine the Good Friday Agreement. The UK Supreme Court¹¹⁹ concluded that the question of Northern Ireland's membership of the EU was a matter for the UK.

4.1. EU funding towards the peace process

The positive role performed by the EU in contributing to the Northern Ireland peace process was analysed in a report¹²⁰ published by the UK House of Lords' EU Committee in December 2016.¹²¹

The peace process in Northern Ireland has received financial support from the EU since 1989, through both EU regional policy, and EU contributions to the International Fund for Ireland (IFI).¹²² Between 1995 and 2013, there have been three EU PEACE programmes, involving total EU funding of €1.3 billion. These have been aimed at supporting peace and reconciliation as well as economic and social progress in Northern Ireland and the border region of Ireland. In the case of the PEACE III Programme (2007-2013), it had two priorities: *Reconciling Communities* (aimed at supporting projects for conflict resolution) and *Contributing to a shared Society* (including the regeneration of urban, rural and border areas, aimed at tackling the separation of communities along ethnic lines).¹²³ A report¹²⁴ on the impact of the programme from the Special EU Programmes Body¹²⁵ indicates that it helped to fund over 1 800 events for victims and survivors, over 2 000 workshops on resolving conflicts and provided trauma counselling for over 6 000 people).

A fourth PEACE Programme for the 2014-2020 period (PEACE IV)¹²⁶ was launched on 14 January 2016. Implemented as a cross-border cooperation programme in the context of European Territorial Cooperation, between Ireland and the UK, it addresses the specific problems caused by the conflict with the aim of creating a peaceful and stable society (see box).

¹¹⁹ The [UK Supreme Court](#).

¹²⁰ [Brexit: UK-Irish Relations](#).

¹²¹ See House of Lords European Union Committee, '[Brexit: UK-Irish relations](#)', HL Paper 76, 2016, in particular pp 39-52. The positive role performed by the EU in relation to the Northern Ireland peace process was analysed in four areas: (i) the safeguards that EU membership provides in underpinning the Good Friday Agreement; (ii) the transformative effect of common EU membership on UK-Irish relations; (iii) the effect of the latter in 'diluting cross-community tensions in Northern Ireland and (iv) EU funding, in particular, the contribution of the EU PEACE Programme for Peace and Reconciliation in Northern Ireland and the Border Region of Ireland.

¹²² Northern Ireland PEACE programme, [EU Fact Sheet](#), European Parliament, April 2017.

¹²³ See also 'The European Union and Northern Ireland', [EPRS 'at a glance'](#) note, November 2014.

¹²⁴ [The impact of EU Funding on the Region](#).

¹²⁵ [The Special EU Programmes Body](#).

¹²⁶ [PEACE IV Programme](#).

The European Parliament has consistently supported EU contributions to the PEACE and IFI programmes both in respect of previous programmes and in relation to the current PEACE IV programme. In its legislative resolution of 15 June 2010¹²⁷ on the proposal for a regulation of the European Parliament and Council concerning EU financial contributions to the International Fund for Ireland (2007-2010), Parliament emphasised that the IFI should complement the activities financed by the Structural Funds, and especially those of the PEACE III programme operating in Northern Ireland and the Border Region of Ireland. Parliament formally called on the Commission to ensure this coordination.

Parliament, in its role as co-legislator on the cohesion package, has strongly supported the continuation of the PEACE programme in the 2014-2020 period. In its resolution¹²⁸ of 13 November 2014, Parliament underlined the importance of the PEACE programme in building up progress, economic and social cohesion and reconciliation between communities.

In a resolution¹²⁹ of 6 July 2016, the European Parliament noted the important contribution that the EU has made to encouraging peace and reconciliation in Ireland through the PEACE programmes. It called on the Commission to continue its support for the peace process through the continued funding of the PEACE programme. In a subsequent resolution,¹³⁰ the European Parliament emphasised that peace and stability 'are core values that need to be maintained by the Union', and in reference to the Good Friday Agreement, 'which has proven vital to peace and reconciliation in Northern Ireland, must be protected'.

PEACE IV programme

Duration: 2014-2020

Budget: €270 million

The ERDF is contributing approximately 85 % of total funding, amounting to some €229 million, with the remainder drawn from the Northern Ireland Executive and the Irish Government.

Priority areas:

The programme addresses the specific problems caused by the conflict, with the aim of creating a peaceful and stable society. It builds upon two main priorities (reconciling communities and contributing to peace) and four main objectives: shared education; helping children and young people; creating shared spaces and services; building positive relations at local level.

4.2. EU position on Brexit regarding the Northern Ireland peace process

Parliament's April 2017 resolution¹³¹ laying down the key principles and conditions for its approval of a UK withdrawal agreement recognises the unique position of, and the special circumstances confronting, the island of Ireland. The resolution urges that all means be used to ensure the continuity and stability of the Northern Ireland peace process and that everything possible is done to 'avoid a hardening of the border'.

¹²⁷ European Parliament [resolution](#) of 15 June 2010 on the proposal for a regulation of the European Parliament and of the Council concerning European Union financial contributions to the International Fund for Ireland (2007-2010).

¹²⁸ European Parliament [resolution](#) of 13 November 2014 on the Northern Ireland peace process.

¹²⁹ European Parliament [resolution](#) of 6 July 2016 on the preparation of the post-electoral revision of the MFF 2014-2020: Parliament's input ahead of the Commission's proposal.

¹³⁰ European Parliament [resolution](#) of 26 October 2016 on the Council position on the draft general budget of the European Union for the financial year 2017.

¹³¹ European Parliament [resolution](#) of 5 April 2017 on negotiations with the United Kingdom following its notification that it intends to withdraw from the European Union (2017/2593(RSP)).

In advance of the negotiations with the UK, the EU's Chief Negotiator, Michel Barnier, in a speech¹³² on 5 April 2017 to the European Parliament, indicated that, in relation to border issues particularly in Ireland, the EU 'will work towards arrangements that do not call into question the existing peace process and dialogue, particularly the Good Friday Agreement'. In a subsequent speech¹³³ to both Houses of the Oireachtas (Parliament of Ireland) in Dublin on 11 May 2017, he referred to the EU's role in strengthening dialogue in Northern Ireland and supporting the Good Friday Agreement. He also confirmed his intention to avoid a hard border.

At a special meeting on 29 April 2017, the European Council adopted guidelines¹³⁴ setting out the overall position and priorities the Union will pursue throughout negotiations with the UK. Acknowledging the 'paramount importance' of supporting and protecting the achievements, benefits and commitments of the peace process, it identifies the need for 'flexible and imaginative solutions...' to avoid a hard border.

On 22 May, the Council of the European Union, meeting in an EU-27 format, adopted¹³⁵ the decision authorising the opening of Brexit negotiations with the UK. Negotiating directives¹³⁶ for the first phase of the negotiations were also adopted. The Council has also emphasised that 'nothing in the UK withdrawal agreement should undermine the objectives and commitments in the Good Friday Agreement'.

4.3. Issues to resolve

In a briefing¹³⁷ on the 'Impact and consequences of Brexit for Northern Ireland' published in March 2017 by the European Parliament's Policy Department on Citizens' Rights and Constitutional Affairs, one expert has highlighted the political sensitivities of Brexit in this particular area. The impact of Brexit on the EU's support for the peace process is likely to feature in the negotiations. A number of issues will need careful consideration such as border controls, the Common Travel Area, the development of the border regions, and the future of the island's energy market as well as the stability of the Northern Ireland peace process. These issues have real significance for all concerned, especially when the scale of the economic links between Northern Ireland and Ireland are considered alongside the trading links which exist between Ireland and the UK. Approximately 52 % of Northern Ireland exports go to the EU, including 38 % to Ireland.¹³⁸ The value of trade between Ireland and the UK is estimated at over €60 billion per year.¹³⁹

¹³² [Statement](#) by Michel Barnier at the plenary session of the European Parliament, 5 April 2017.

¹³³ [Speech](#) by Michel Barnier to the Joint Houses of the Oireachtas, Dublin, 11 May 2017.

¹³⁴ [European Council Guidelines](#) following the United Kingdom's notification under Article 50 TEU.

¹³⁵ [Council \(Article 50\) authorises the start of Brexit talks and adopts negotiating directives](#), press release, 22 May 2017.

¹³⁶ [Directives for the negotiation of an agreement with the United Kingdom of Great Britain and Northern Ireland setting out the arrangements for its withdrawal from the European Union](#), 22 May 2017.

¹³⁷ J. Tonge, [The Impact and Consequences of Brexit for Northern Ireland](#), Policy Department C; Citizens' Rights and Constitutional Affairs, European Parliament, March 2017.

¹³⁸ See House of Lords European Union Committee, '[Brexit: UK-Irish relations](#)', HL Paper 76, 2016, p 13.

¹³⁹ [Brexit: A Status Report](#), Institute of International and European Affairs, Dublin, 2016; see page 31.

5. Main references

A. Barker, [The €60 billion Brexit bill: How to disentangle Britain from the EU budget](#), Centre for European Reform, February 2017.

A. Barker, Brussels hoists gross Brexit 'bill' to €100bn, Financial Times, 3 May 2017.

A. D'Alfonso, A. Delivorias, M. Sapala, A. Stuchlik, [Economic and budgetary outlook for the EU 2017](#), EPRS, January 2017.

A. D'Alfonso, [How the EU budget is financed: The 'own resources' system and the debate on its reform](#), EPRS, June 2014.

Z. Darvas, K. Estathiou, I. Goncalves Raposo, [Divorce settlement or leaving the club? A breakdown of the Brexit bill](#), Bruegel, Working paper, Issue 03, 2017.

G. Davies, [The UK and sickness insurance for mobile citizens: an inequitable mess for Brexit negotiators to address](#), European Law Blog, March 17, 2017.

European Commission, [Position paper transmitted to the UK: essential principles on the financial settlement](#), 12 June 2017.

R. Gordon, and A. Moffatt, A., [Brexit: The immediate legal consequences](#), Report of the Constitution Society & UK Constitutional Law Association, 2016.

E. Guild, S. Peers and J. Tomkin, *The EU Citizenship Directive. A Commentary*, Oxford University Press, 2014.

E. Guild, [Brexit and social security in the EU](#), CEPS commentary, November 2016.

House of Lords, European Union Committee, [Brexit and the EU budget](#), HL Paper 125, 4 March 2017.

House of Lords, European Union Committee, [Brexit: UK-Irish relations](#) HL Paper 76, 12 December 2016

[Brexit: A Status Report](#), Institute of International and European Affairs, Dublin, 2016.

S. James, [Brexit: Will the UK have to pay to leave the EU?](#), Clifford Chance, 21 February 2017.

P. Mindus [European Citizenship after Brexit. Freedom of Movement and Rights of Residence](#), 2017, Palgrave Studies in European Union Politics.

E.-M. Poptcheva, [Freedom of movement and residence of EU citizens. Access to social benefits](#), EPRS, June 2014.

J. Tonge, [The Impact and Consequences of Brexit for Northern Ireland](#), Policy Department C; Citizens' Rights and Constitutional Affairs, European Parliament, March 2017.

Negotiations on the arrangements for the UK's withdrawal from the EU started on 19 June 2017. The European Commission is negotiating on behalf of the EU, on the basis of the European Council guidelines and the mandate given to it by the Council. The European Parliament, for its part, has laid down key principles and conditions for its approval of a UK withdrawal agreement.

Three key priorities are set to dominate the first phase of the negotiations (with the future relationship between the EU and the UK being left to a second phase). These are: citizens' rights for EU-27 citizens in the UK and UK citizens in the EU-27; the settlement of the UK's financial obligations; and ensuring the Northern Ireland peace process is not compromised. This paper looks at the EU negotiating position and the major issues raised under those three priorities to date.

This is a publication of the
Members' Research Service

Directorate-General for Parliamentary Research Services, European Parliament



PE 607.267
ISBN 978-92-846-1200-0
doi:10.2861/004364

This document is prepared for, and addressed to, the Members and staff of the European Parliament as background material to assist them in their parliamentary work. The content of the document is the sole responsibility of its author(s) and any opinions expressed herein should not be taken to represent an official position of the Parliament.