

**CULTURE, TOURISM, EUROPE &  
EXTERNAL RELATIONS COMMITTEE**  
#SPICeBrexitUpdate

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# BREXIT UPDATE

**EU27 ADOPT  
NEGOTIATING DIRECTIVES**

**TRANSPARENCY DURING  
THE NEGOTIATIONS**

**SCOTLAND'S STRATEGY  
FOR THE BREXIT NEGOTIATIONS**

**SPICe**

The Information Centre  
An t-Ionad Fiosrachaidh

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The Scottish Parliament  
Pàrlamaid na h-Alba

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### About this paper

This regular paper produced by SPICe sets out developments in the UK's negotiations to leave the European Union, the process for which has now formally begun following the Prime Minister's triggering of Article 50 on 29 March.

The weekly updates will provide information on the UK Government's approach to leaving the EU, along with details of the Scottish Government and the other Devolved Administrations positions. The updates will also provide information on developments within the EU with regard to the UK's departure. Finally the update will provide information on the key issues likely to be at play during the negotiations and in developing the UK's future relationship with the European Union.

As was clear during the referendum campaign and since the decision to leave the EU was taken, there is an abundance of information and analysis available, and this SPICe paper will try to cover the key issues by drawing on that information and analysis. This week's update focuses on the EU27's agreement of the negotiating directives and European Council President, Donald Tusk's address to the European Parliament.

## EU27 adopt negotiating directives

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On 22 May, the Council, meeting in its EU27 format for the purposes of the Brexit process, adopted a decision authorising the opening of Brexit negotiations with the UK and formally nominated the Commission as EU negotiator. The Council also adopted [negotiating directives](#) for the talks.

According to the Council, both texts are based on a [recommendation](#) presented by the Commission on 3 May 2017 and build on the [political guidelines](#) adopted by the European Council (Art.50) on 29 April 2017. Their adoption allows for the start of negotiations with the UK following the notification of its intention to withdraw from the EU.

The negotiating directives as agreed by the Council address the negotiations for the UK's withdrawal from the EU only. Negotiations on a future relationship between the EU and UK and any transitional deal will require further negotiating directives in the future.

According to the Council:

*“This first set of negotiating directives is intended to guide the Commission for the first phase of the negotiations. They therefore prioritise issues that have been identified as necessary for an orderly withdrawal of the UK, including citizens' rights, the financial settlement and the situation of Ireland, as well as other matters in which there is a risk of legal uncertainty as a consequence of Brexit.*

*The first phase of the talks aims to provide as much clarity and legal certainty as possible and to settle the disentanglement of the UK from the EU. Once the European Council deems sufficient progress has been achieved, the negotiations will proceed to the next phase.”*

The negotiating directives mirror the draft mandate produced by the European Commission and published on 3 May focussing on four key areas:

- Addressing citizens' rights – both EU nationals in the UK and UK nationals in the EU
- A financial settlement for the UK's withdrawal
- Ireland
- Addressing the situations of goods already placed on the market before Brexit occurs and on-going procedures such as judicial cooperation proceedings in civil, commercial and criminal matters, as well as administrative and law enforcement cooperation procedures

The directives are clear that ratification of the Article 50 withdrawal agreement is an EU competence and does not require member state ratification:

*“The Agreement will be negotiated and concluded by the Union. In this respect, Article 50 of the Treaty on European Union confers on the Union an exceptional horizontal competence to cover in this agreement all matters necessary to arrange the withdrawal. This exceptional competence is of a one-off nature and strictly for the purposes of arranging the withdrawal from the Union. The exercise by the*

*Union of this specific competence in the Agreement will not affect in any way the distribution of competences between the Union and the Member States as regards the adoption of any future instrument in the areas concerned.”*

This confirmation about EU competence relates only to the withdrawal agreement. The ratification procedures for agreeing the future relationship between the EU and the UK or any transitional deal will depend on the content of those agreements.

The directives also confirm that unless there is an agreement to extend the negotiations, the UK will leave the EU at midnight on 30 March 2019.

On citizens' rights, the negotiating directives outline what should be included in the final agreement:

- a) Definition of the persons to be covered: the personal scope should be the same as that of Directive 2004/38 (both economically active, i.e. workers and self-employed, as well as students and other economically inactive persons, who have resided in the UK or EU27 before the withdrawal date, and their family members who accompany or join them at any point in time before or after the withdrawal date). In addition, the personal scope should include persons covered by [Regulation 883/2004](#), including frontier workers and family members irrespective of their place of residence.
- b) Definition of the rights to be protected: this definition should include at least the following rights:
  - i) the residence rights and rights of free movement derived from Articles 18, 21, 45 and 49 of the Treaty on the Functioning of the European Union and set out in [Directive 2004/38](#) (covering inter alia the right of permanent residence after a continuous period of five years of legal residence and the right as regards access to health care) and the rules relating to those rights; any document to be issued in relation to the residence rights (for example, registration certificates, residence cards or certifying documents) should have a declaratory nature and be issued under a simple and swift procedure either free of charge or for a charge not exceeding that imposed on nationals for the issuing of similar documents;
  - ii) the rights and obligations set out in [Regulation 883/2004](#) on the coordination of social security systems and in [Regulation 987/2009](#) implementing Regulation 883/2004 (including future amendments of both Regulations) covering inter alia, rights to aggregation, export of benefits, and principle of single applicable law for all the matters to which the Regulations apply;
  - iii) the rights set out in [Regulation 492/2011](#) on freedom of movement for workers within the Union (e.g. access to the labour market, to pursue an activity, social and tax advantages, training, housing, collective rights as well as rights of workers' family members to be admitted to general educational, apprenticeship and vocational training courses under the same conditions as the nationals of the host State);

- iv) the right to take up and pursue self-employment derived from Article 49 of the Treaty on the Functioning of the European Union.

On the financial statement the negotiating directives state:

*“A single financial settlement - including issues resulting from the MFF as well as those related to the European Investment Bank (EIB), the European Development Fund (EDF) and the European Central Bank (ECB) - should ensure that both the Union and the United Kingdom respect the obligations resulting from the whole period of the United Kingdom membership in the Union. The negotiations relating to the methodology for the financial settlement should be based on the following principles.”*

The negotiating directives state that the financial statement “single financial settlement should be based on the principle that the United Kingdom must honour its share of the financing of all the obligations undertaken while it was a member of the Union”.

The directives also set out a proposal for the way in which the financial settlement should be calculated.

In relation to Ireland, the directives state:

*“In line with the European Council guidelines, the Union is committed to continuing to support peace, stability and reconciliation on the island of Ireland. Nothing in the Agreement should undermine the objectives and commitments set out in the Good Friday Agreement in all its parts and its related implementing agreements; the unique circumstances and challenges on the island of Ireland will require flexible and imaginative solutions. Negotiations should in particular aim to avoid the creation of a hard border on the island of Ireland, while respecting the integrity of the Union legal order. Full account should be taken of the fact that Irish citizens residing in Northern Ireland will continue to enjoy rights as EU citizens. Existing bilateral agreements and arrangements between Ireland and the United Kingdom, such as the Common Travel Area, which are in conformity with EU law, should be recognised. The Agreement should also address issues arising from Ireland’s unique geographic situation, including transit of goods (to and from Ireland via the United Kingdom). These issues will be addressed in line with the approach established by the European Council guidelines.”*

On the way in which goods placed on the European market before Brexit should be dealt with after Brexit, the directives state:

*“Agreement should ensure that any good lawfully placed on the single market on the basis of Union law before the withdrawal date can continue to be made available on the market or put into service after that date both in the United Kingdom and in the EU27 under the conditions set out in the relevant Union law applicable before the withdrawal date. Other matters, such as services, where there may be a need to reduce uncertainty or avoid a legal vacuum, will be covered by subsequent sets of negotiating directives.”*

A further interesting aspect of the directives is the proposal that provision for settling disputes and enforcement of the agreement should be included in the final settlement. On this issue, the negotiating directives state:

*“The Agreement should include provisions ensuring the settlement of disputes and the enforcement of the Agreement. In particular, these should cover disputes in relation to the following matters:*

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

*In these matters, the jurisdiction of the Court of Justice of the European Union (and the supervisory role of the Commission) should be maintained. For the application and interpretation of provisions of the Agreement other than those relating to Union law, an alternative dispute settlement should only be envisaged if it offers equivalent guarantees of independence and impartiality to the Court of Justice of the European Union.”*

Given the UK Government has indicated that removal from the jurisdiction of the European Court of Justice is one of the primary aims of Brexit, this proposal for settlement of disputes and enforcement mechanisms in relation to the withdrawal agreement could be an element of the negotiations to watch.

Professor Steve Peers from the University of Exeter has written a [series of tweets](#) analysing the negotiating directives.

## **Transparency during the negotiations**

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At the same EU27 meeting on 22 May, the Council agreed some [guiding principles for transparency in negotiations](#). According to the guidelines:

*“Ensuring that the negotiations are conducted in a transparent manner will be one of the keys of their success. The guidelines of the European Council clearly confirm this principle by specifying that negotiations under Article 50 TEU will be conducted with transparency. In this regard, a coherent EU approach to transparency arrangements for the negotiations should be carefully defined well ahead of the formal start of negotiations.”*

The guidelines set out the which document will be made public during the Brexit negotiations with an emphasis placed on making as much information publicly available as possible.

The Council also agreed to establish a [dedicated working party](#) with a permanent chair to assist the Council and Coreper (Committee of Permanent Representatives) on all matters related to the UK withdrawal from the EU. This working group will always meet in an EU27 format.

## President of the European Council addresses the European Parliament on Brexit

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On 17 May, Donald Tusk, the President of the European Council [updated the European Parliament](#) on the first formal meeting of the European Council of 27, which took place on 29th April. The EU27 met to discuss the Brexit negotiations.

In his address, President Tusk spoke about the [political guidelines](#) for the Brexit negotiations which the EU27 agreed. President Tusk began by re-emphasising the EU27's belief that the negotiations should follow a phased approach with the priority being to make progress on the withdrawal agreement before any discussions over the future EU-UK relationship can begin.

On the withdrawal agreement, President Tusk once again outlined the EU27's top priorities – the future of EU and UK citizens, agreeing a financial settlement and addressing the situation on the island of Ireland.

On the future relationship, President Tusk told the European Parliament:

*“When it comes to our future, the European Council shared the United Kingdom's desire to establish a close partnership. It is obvious, however, that a relationship between the European Union and a non-Member State cannot offer the same benefits as EU membership. It is clear that a free trade agreement between the EU and the UK, which is what the UK has chosen, even if it is ambitious and wide-ranging, cannot mean participation in the Single Market or its parts. And at the same time, the UK must be aware that any free trade agreement will have to ensure a level playing field, and encompass safeguards against unfair competitive advantages through, inter alia, tax, social, environmental and regulatory measures and practices. Today it is too early to tell much more about our common future, but we will make our guidelines more precise when the time comes, namely when sufficient progress in the first phase is achieved.”*

The President concluded by telling the European Parliament that he believed the EU27's priority should be adopting a positive agenda for the Union of 27, he added:

“I agree with my friend Guy Verhofstadt that this should be our priority, not Brexit. Today I will meet President Macron in Paris and I am really happy that also thanks to you, to this debate, we will be able to devote our meeting to the future of 27, not to Brexit.”

A transcript of the session in the European Parliament which includes statements from a number of Members of the European Parliament is provided in the Parliament's [official record](#).

## Scotland's strategy for the Brexit negotiations

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Writing for the [Scottish Centre on European Relations](#) (SCER), its Director Kirsty Hughes has [examined](#) what strategy the Scottish Government and Scottish politicians should adopt during the Brexit negotiations.

Kirsty Hughes identifies challenges in seven strategic areas:

- (1) The Exit deal: EU and UK citizens, money and borders
- (2) UK-EU27 comprehensive trade and security deal
- (3) Transition deal
- (4) What policy and regulatory choices?
- (5) Repatriation of EU powers and devolved competences
- (6) Migration policy
- (7) Scotland-EU relations

Kirsty Hughes paper highlights the following issues across the seven strategic areas she has identified:

***“Money, EU & UK citizens and borders:*** *The eventual deal to ensure a soft border between Ireland and Northern Ireland may have many implications for Scotland and needs closely watching, but it may only be relevant in part to Scotland.*

***UK-EU comprehensive trade deal:*** *The UK is currently heading towards a relatively hard Brexit, outside the single market and customs union, with negative implications for Scotland's trade with the EU as there will be new non-tariff barriers. Scottish politicians will find it hard to influence these talks.*

***Transition deal:*** *The best transition arrangements for the UK – after it leaves the EU in March 2019 and before a full UK-EU27 deal is agreed some years later – would be to transition via the European Economic Area. Most of Scotland's political parties – those which support staying in the EU's single market – should back this. If May rejects this route, it will be vital to avoid a hard transition – one that is abrupt, inadequately planned and that creates uncertainty.*

***Policy and regulatory choices:*** *In the absence of clarity from the UK government, Scottish politicians and parties should set out their desired regulatory structures and which of the EU's 34 regulatory agencies the UK should aim to stay associated with. They should also set out clear proposals for new UK and Scottish regulatory structures.*

***Repatriation of EU powers and devolved competences:*** *Political battles are already under way over repatriation of agriculture, fisheries and environmental policies. Full return of these powers to Scotland would require Scotland to have significant powers with respect to future UK trade policy. A partial return of powers will also require rapid choices to be made between different policy options in these areas – both at UK level and in Scotland – in particular whether the Scottish government would aim to keep policies closely aligned to EU ones.*

**Migration policy:** *The UK looks likely to establish a more restrictive migration policy under Theresa May. Scottish interests in a more open migration policy will need to continue to be argued for – whether through flexibility in UK-level migration policy or through devolution of some aspects of migration policy. The latter currently looks unlikely.*

**Scotland EU relations:** *The Scottish government’s diplomatic efforts across the EU in the last year have been well received. But the EU27 are unlikely to take Scotland’s interests into account when negotiating with the UK. Nicola Sturgeon’s push for Scotland to be represented at the table is unlikely to happen.”*

## The financial settlement for Brexit

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Writing for the UK in a Changing Europe blog, Professor Iain Begg, a Senior Fellow of The UK in a Changing Europe analysed what the [financial settlement element of the withdrawal agreement](#) might look like.

Professor Begg outlines the different components of the likely settlement. He highlights three areas where the UK is likely to owe the EU money upon Brexit:

**Commitments already made by the EU or due to be made before the date of Brexit** – *“known in Brussels-speak as *reste à liquider* (RAL), meaning “still to be settled.” These commitments arise because many of the EU’s programmes, especially for research and regional development, are multi-annual. Typically, projects will receive a proportion of their money at the outset, but will—quite properly—only receive final payment when the project is completed. For example, there might be funding for new transport links that take several years to build, with binding contracts signed in 2017, but only concluded in 2021.”*

**Continuing commitments towards the 2014-2020 EU financial framework** – *“Some on the EU side, especially the net recipients from the budget, argue that the UK is liable for the full seven years, irrespective of when Brexit occurs. On the assumption Brexit is completed by the end of March 2019, the implication is the UK will still have to pay its share for the remaining seven quarters, that is from April 2019 until the end of 2020.”*

**Longer term obligations** – *“especially the pensions of employees of EU institutions who retire while the UK is a member state, a proportion of whom are British citizens. In the EU’s accounts, there is a figure for the implicit pension pot needed to pay the future pensions, and one possibility would be that the UK buys out its share of this pot.”*

Professor Begg also outlines areas where the EU might owe the UK money, he summarises these as:

- EU assets purchased while the UK has been an EU member. It could be argued that a proportion of these should be distributed to the UK, although new members joining the EU are not asked to pay up-front.
- Some of the money for RAL, future EU programmes and pensions would, if Brexit did not happen, have been spent in the UK. EU spending in Britain has

run at around €7bn per annum recently, and deducting these payments would reduce the bill substantially.

On the likely final settlement figure, Professor Begg writes:

*“What, therefore, would be a reasonable amount? No one really knows—it is after all a negotiation on many fronts, and it must be expected that a satisfactory outcome on the money will influence other dimensions such as the quality of a trade deal.*

*Best guess? Somewhere around the €30bn mark...”*

## **Brexit Negotiations – the key documents**

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With the negotiations for the UK’s withdrawal set to begin following the UK General Election, attached are links to all the key negotiating documents at this stage:

### **UK Government**

[The United Kingdom’s exit from and new partnership with the European Union White Paper](#) published on 2 February 2017

[Prime Minister’s letter to Donald Tusk triggering Article 50](#) published on 29 March 2017

### **EU Institutions**

[European Council \(Art. 50\) guidelines for Brexit negotiations](#) published on 29 April 2017

[Council of the European Union: 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](#) published on 22 May 2017

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

[Recommendation for a Council Decision authorising the Commission to open negotiations on an agreement with the United Kingdom of Great Britain and Northern Ireland setting out the arrangements for its withdrawal from the European Union](#) published on 3 May 2017

[Recommendation for a Council Decision authorising the Commission to open negotiations on an agreement with the United Kingdom of Great Britain and Northern Ireland setting out the arrangements for its withdrawal from the European Union ANNEX](#) published on 3 May 2017

[European Parliament Resolution: Negotiations with the United Kingdom following its notification that it intends to withdraw from the European Union](#) published on 5 April 2017

## **Scottish Government**

[Scotland's Place in Europe](#) published on 20 December 2016

[Letter from David Davis, UK Government Secretary of State for Exiting the EU to Michael Russell MSP, Scottish Government Minister for UK Negotiations on Scotland's Place in Europe](#) on 29 March 2017

[Letter from Michael Russell MSP, Scottish Government Minister for UK Negotiations on Scotland's Place in Europe to David Davis MP UK Government Secretary of State for Exiting the EU](#) on 12 April; 2017

## **Scottish Parliament**

[SPICe Infographic – Timeline for the United Kingdom's withdrawal from the European Union](#) published on 19 April 2017

[SPICe Infographic - The UK's withdrawal from the EU – who's who](#) published on 25 April 2017

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