



Rt Hon David Davis MP
Secretary of State for Exiting the European Union
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21 March 2018

Dear Secretary of State

Draft Withdrawal Agreement

The European Union Select Committee, at its meeting on 13 March 2018, considered the draft Withdrawal Agreement ('the Agreement') published by the European Commission on 28 February, including the Commission's draft legal text on transition; we also considered your letter to me dated 21 February, and the annexed 'Draft text for discussion: implementation period'. We took account of analysis provided by our Legal Advisers, and agreed on a number of questions to Government.

We have not had an opportunity to consider in detail the revised draft text published by the Commission and sent to the Government on 15 March, but at our meeting on 20 March we briefly considered the updated text published the previous day, in which articles agreed by the two negotiating teams were highlighted. We reviewed our observations and our questions, which are set out below. We look forward to receiving your answers to our questions by 13 April 2018.

The Agreement in the context of the Brexit negotiations

We note at the outset that the overarching purpose of the Agreement is to translate into legally binding form the December 2017 Joint Report, in which the UK and EU negotiators set out their agreement in principle on the key 'phase 1' issues. Later that month, the European Council called on "the Union negotiator and the United Kingdom to ... start drafting the relevant parts of the Withdrawal Agreement". Yet while the European Council appears to have envisaged the two sides working together to prepare a Withdrawal Agreement, the document published on 28 February seems to have been prepared solely by the Commission. It follows that the articles agreed on 19 March also reflect in large part the Commission's interpretation of the Joint Report.

The Government, if it is to safeguard the UK's national interest, will need to contribute fully to the process of translating political agreements into binding legal texts. Time is short: over the next six months the UK and the EU must finalise the remaining articles on withdrawal and transition, as well as agreeing the framework for future UK-EU relations. If the Government does not set out its stall early, it will be too late, and the Commission will, in effect, dictate the terms of the negotiations.

More broadly, the way in which the text of the Agreement has evolved falls short of the desired standards of transparency. The Commission published its draft on 28 February, but by this stage there had clearly been informal discussions with the UK, as evidenced by the Government's comments on the articles on transition, which were leaked in mid-February and sent to the Committee on 21 February. The Commission then formally transmitted an updated text to the UK Government on 15 March, before the meeting of the two Chief Negotiators on 19 March. After that meeting yet another text was published, in which areas agreed by the two sides were highlighted in green.

As a result, a number of far-reaching changes have been made without any possibility of effective parliamentary scrutiny. For instance, on 21 February, you wrote that you expected differentiated arrangements for EU citizens arriving during the transition period; your comments on the draft text said that the length of transition should be determined by "how long it will take to prepare and implement the new processes and systems". Those positions seem to have been abandoned.

To give another example, the Commission text transmitted to the UK Government on 15 March included a new provision (Article 122(7)(c)), which would have authorised Member States to refuse to extradite their own nationals to the UK during the transition period. This damaging provision then disappeared, equally inexplicably, in the text published on 19 March.

We therefore have the following questions:

1. Was the text of the Agreement published on 28 February 2018 the work of Commission lawyers, or did UK lawyers contribute to its preparation, as mandated by the European Council in its December 2017 Conclusions?
2. Will negotiations on issues that have yet to be agreed (e.g. the Protocol on Ireland and Northern Ireland, or the provisions on dispute settlement) continue on the basis of the published Commission text, or will UK lawyers prepare alternative draft articles? If the latter, when and how do you expect to publish such articles?
3. Do you share our concern that the process has been lacking in transparency thus far? What steps will you take to ensure that, as negotiations on the text of the Agreement progress, parliamentary committees are kept abreast of the Government's position on issues of substance?

It is also now clear, for instance in the Draft European Council Guidelines, dated 7 March 2018, that the EU sees the principle that "nothing is agreed until everything is agreed" as applying only to the Withdrawal Agreement (including transition): there is a clear distinction in the Draft Guidelines between conclusion of the Withdrawal Agreement and the "opening of negotiations" on the future relationship. Thus the UK will, on 29 March 2019, when the Withdrawal Agreement comes into force, enter into binding commitments (for instance, in respect of the financial settlement, articles on which have now been agreed), without either side having entered into comparable legal commitments in respect of future relations.

4. Do you accept that the UK will, by virtue of the Articles agreed on 19 March, enter into binding commitments on 29 March 2019, for instance in respect of the financial settlement, without either side having at that point entered into legal commitments in respect of future relations?

Dispute resolution

The fact that the draft Agreement is a Commission document helps to explain its most striking feature: it is, quintessentially, an expression of EU law. This is most apparent in Part Six, the institutional provisions, where Articles 160–165 make it clear that disputes arising in relation to the Agreement will ultimately be settled by the Court of Justice of the European Union (CJEU). Articles 162-165 have yet to be agreed, but if they are, an institution that is part and parcel of the EU will, for an indefinite period, determine the UK's obligations towards the EU.

There is some logic to this approach, in that the act of withdrawal is being undertaken by the UK as an EU Member State, under the terms of Article 50 TEU, and any obligations the UK enters into will flow ultimately from that source. Nevertheless, Article 50(3) TEU provides that the Treaties “shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement.” An indefinite role for the CJEU would appear to contradict both the Government's ‘red line’ in respect of CJEU jurisdiction, and more broadly the basic rationale for Brexit, which is that the UK should cease to be part of the EU, or subject to the obligations of EU membership. As the Institute for Government has noted, most international agreements incorporate independent state-to-state dispute resolution procedures, reflecting a degree of parity between the parties.

We therefore seek your views on the following questions:

5. Are you content that the CJEU should have an indefinite jurisdiction over disputes relating to the Agreement, including, for instance, disputes relating to future UK payments arising out of the financial settlement?
6. If not (and we note that Articles 162-165 have not been agreed), what proposals will the Government bring forward to ensure that the final Withdrawal Agreement includes provision for neutral arbitration and dispute resolution between the UK and the EU?

The Joint Committee

Under the terms of Article 157 of the Agreement, which has been agreed, before reaching the CJEU any disputes would first be referred to a Joint Committee, comprising and co-chaired by “representatives of the Union and of the United Kingdom”. The Joint Committee would conduct an “in-depth examination” of any dispute referred to it, “with a view to finding an acceptable solution”. The Joint Committee would be able at any time to refer a dispute to the CJEU, and if after three months the Joint Committee was not able to settle a dispute, either the UK or the EU could refer it to the Court.

More broadly, the task of the Joint Committee will be to “supervise and facilitate the implementation and application of this Agreement”. It will seek to pre-empt disputes, seeking “appropriate ways and methods of preventing problems”, and will also have the power to “adopt amendments” to the Agreement in specified areas, which will have “the same legal effect” as the Agreement.

The Agreement also establishes “specialised committees”, on citizens’ rights, “other separation provisions”, the island of Ireland, Sovereign Base Areas, and on the financial provisions (Article 158, which has also been agreed). Recommendations by the specialised committees will be referred for adoption to the Joint Committee.

The Joint Committee will thus be a powerful body, not only monitoring the operation of the Agreement in all key areas, but with the power, by consensus, to amend the terms of the Agreement itself. We note that similar bodies exist under other international agreements—for instance, the provisions in the Withdrawal Agreement closely resemble those establishing the CETA Joint Committee. But we would be grateful for your views on whether, given the constitutional significance of the Withdrawal Agreement, the Joint Committee model is appropriate. In particular:

7. Are you satisfied that, given the constitutional importance of the Agreement, for instance in respect to Ireland or citizens’ rights, the Joint Committee model provides an appropriate level of oversight and accountability?
8. Will you bring forward proposals to ensure appropriate parliamentary involvement in or oversight of the work of the Joint Committee?
9. We note that you have agreed the list of specialised committees contained in Article 158. What is the rationale for this list? Would you see any scope (subject to the agreement of the governments of the relevant territories) for adding a specialised committee or committees on Gibraltar, and on issues affecting the Crown Dependencies and Overseas Territories more broadly?

Territorial scope: Gibraltar

Article 3 of the Agreement states that any reference to the United Kingdom includes Gibraltar—but this is qualified by an asterisked footnote, explaining that the application of the Agreement must “fully respect” the European Council’s earlier guidelines that no agreement may apply to Gibraltar without the express agreement of Spain and the UK. The Government has stated its belief “that Gibraltar is covered by our negotiations for withdrawal, the implementation period and the future relationship”, and you repeated this commitment at the 19 March press conference announcing the agreement. However, Michel Barnier said that “Gibraltar leaves the European Union at the same time as the United Kingdom [and] legally, we’ve specified the territorial scope of the agreement. But there’s a reference which remains valid [and] which member states are keen on, all member states of the European Union on behalf of whom I negotiate. Twice, the 27 member states and heads of state and government indicated their position on the question of Gibraltar, in total solidarity with the Spanish Government.”

There is thus an unhelpful lack of clarity in the Agreement, which needs to be resolved:

10. What steps is the Government taking, in discussions with the EU Chief Negotiator, with Gibraltar and with Spain, to confirm unequivocally that Gibraltar falls within the territorial scope of any Withdrawal Agreement, including the transition elements?

Transition

The analysis undertaken by our Legal Advisers demonstrates that during transition the UK will in effect enjoy continuing EU membership, but shorn of the institutional rights and privileges enjoyed by ‘full’ EU Member States. This has now largely been accepted by the Government, but you proposed in your letter of 21 February that “a Joint Committee should have specific functions in relation to the implementation period”. You appear to have envisaged that the Joint Committee that will oversee the implementation of the Agreement as a whole would be tasked with these additional functions in relation to transition.

The Government proposed that this Joint Committee should “have regard to a duty of good faith which should apply between the United Kingdom and the EU, for example in relation to acts of Union law adopted during the implementation period”. We support this proposal, and note that Article 4a of the revised draft Agreement, published on 15 March, establishes a general duty of good faith, though without explicit reference to the Joint Committee. This was agreed on 19 March. This leaves some questions:

11. What “specific functions” in respect of transition does the Government envisage being conferred upon the Joint Committee? What specific amendments will you bring forward to give effect to this proposal?
12. Does Article 4a in the revised draft Agreement published on 15 March, and confirmed on 19 March, satisfy your wish that the Joint Committee should have regard to a duty of good faith?

A number of more specific issues arise in respect of transition. The first relates to UK fisheries, where the Commission envisages merely consulting the UK over fishing quotas and EU positions in international fisheries negotiations; the Government proposed that the EU and UK should “agree” quotas, and that the UK should participate “alongside” the EU in international fisheries negotiations—proposals that we support. Article 125 of the text of the Agreement published on 19 March, however, appears to only partially meet the Government’s proposals.

13. Are you satisfied that Article 125 of the Agreement, as amended on 19 March, meets your concern over UK participation in the adoption of fishing quotas and in international fisheries negotiations during transition?

There is also the question of the role of national parliaments, where you proposed preserving the status of the Westminster Parliament under Article 12(a) TEU and Articles 1 and 2 of the Protocol (No 1) on the role of national parliaments in the EU, which would require the institutions to continue to forward draft legislative acts to Westminster, as well as to national parliaments of the EU 27. This appears to be a necessary precursor to any effective ongoing scrutiny, and we therefore fully support the Government's objective, which appears to have been achieved in Article 123(2) of the text published on 19 March.

Finally, we note that Article 122(1)(b) of the Agreement would remove the right of EU citizens resident in the United Kingdom to vote or stand as candidates in elections to the European Parliament or in local elections. That right, as defined in Article 20(2) TFEU, is linked to residence in a Member State, so its loss may be unavoidable—but the issue was not addressed in the Joint Report, and the loss of voting rights may therefore come as a surprise to the 3 million or so EU citizens currently resident in the UK.

14. Do you agree that under the Agreement EU citizens resident in the UK will, like British citizens, lose the right to vote in the 2019 European Parliament elections? Will you be making any representations to the Commission on this issue?

Ireland and Northern Ireland

The Protocol to the Agreement covering Ireland and Northern Ireland ('the Protocol') is intended to give effect to the third of the "three different scenarios" contained in the December Joint Report. Under that scenario, the two sides agreed that "the United Kingdom will maintain full alignment with those rules of the Internal Market and the Customs Union which ... support North-South cooperation, the all-island economy and the protection of the 1998 Agreement". The preamble states that the Protocol will apply "unless and until an alternative arrangement implementing another scenario is agreed".

The Protocol, most parts of which have not yet been agreed, thus embodies the logical contradiction that has been at the heart of negotiations over the past year: the issue of Ireland and Northern Ireland is a "phase 1" issue, in that both sides agreed at the outset that it would be addressed in the Withdrawal Agreement; yet it can only be resolved as part of an agreement on future relations, in other words as part of a negotiation that cannot formally begin until after Brexit.

This contradiction was already apparent in the Joint Report: the first scenario described in paragraph 49 of the Joint Report was that the UK would "achieve these objectives through the overall EU-UK relationship"—a relationship that is unlikely to be finalised until at least 2020. The Protocol could therefore be regarded as no more than a temporary measure, intended to bridge the gap between UK withdrawal and the ratification of the agreement on future relations—though whether such a temporary measure is currently needed, given the likelihood of agreement on transition, is at least open to question.

The second scenario outlined in the Joint Report was that the UK would “propose specific solutions to address the unique circumstances of the island of Ireland”. The suggestions contained in last summer’s Position Paper on Ireland and Northern Ireland were clearly not set out in sufficient detail to satisfy either the Irish government or the EU, which is why the Protocol places the onus on the UK to propose its preferred solutions.

As far as the content of the Protocol is concerned, it seems to us to be broadly consistent with the terms of the third scenario set out in the Joint Report. But that does not mean that there could not be other equally consistent approaches. The wording of the Joint Report meant different things to different audiences, and the Commission’s transposition of one possible interpretation into legally binding text underlines the need for the Government to take ownership of the issue. Indeed, this seems to have been the intention of the Joint Report, which explicitly placed the onus on the UK not just to propose “specific solutions”, but, in the absence of such solutions, to “maintain full alignment” in the relevant areas. The Government has neither proposed specific solutions nor set out in detail how it would “maintain full alignment”. That has left a void, which the Commission, by means of the Protocol, has now occupied.

We note also that even the reference to “the United Kingdom” in the final sentence of paragraph 49 of the Joint Report, was ambiguous. At the time, media reports interpreted the sentence (particularly when juxtaposed with paragraph 50) as implying that the entire UK would maintain “full alignment” in relevant areas—the controversy was over the extent and depth of that alignment. The Commission, in contrast, has interpreted the phrase as referring to the UK only in respect of Northern Ireland, while adopting the widest possible interpretation of “full alignment”. We note that the definitions clause in the Protocol (clause 12(1)) is particularly unhelpful in this regard, as it blurs the distinction between “the United Kingdom” and “the United Kingdom in respect of Northern Ireland”.

The result is a proposal that would leave Northern Ireland within the Single Market and customs union, leading unavoidably to the creation of a “hard border” in the Irish Sea. The political reaction within the UK and within the unionist community in Northern Ireland has, understandably, been hostile. But, as we have noted, the void has been left by the United Kingdom Government—the Commission has simply sought to occupy it.

We wrote to the Secretary of State for Northern Ireland on 27 February, with a number of questions specifically relating to Ireland and Northern Ireland, and we await the Government’s response to that letter. In light of the publication of the Agreement and Protocol, we would now also be grateful for your answers to the following questions:

15. The first scenario described in the Joint Report refers to the Government’s wish to maintain North-South cooperation and avoid a hard border through the “overall EU-UK relationship”. Yet the Protocol represents an attempt by the Commission to identify a ‘fall-back’ position, as part of the Withdrawal Agreement. Do you agree that a fall-back position is required, ahead of UK withdrawal, to guard against the possibility that negotiations on future UK-EU relations do not succeed?

16. Do you accept that an agreement on transition would mean that such a fall-back position would not need to become operational until 1 January 2021? If so, how should any text on Northern Ireland/Ireland relate to the Withdrawal Agreement, which will need to be ratified no later than March 2019?
17. Why has the Government not yet formally proposed “specific solutions to address the unique circumstances of the island of Ireland”, as envisaged in the second scenario described in the Joint Report? When will you do so?
18. In respect of the third scenario, Paragraph 49 of the Joint Report says that “the United Kingdom will maintain full alignment” with relevant EU rules. Does this mean that the entire United Kingdom will maintain such alignment, or just Northern Ireland? If the latter, how would this be reconciled with the avoidance of a hard border in the Irish Sea?
19. The onus to bring forward proposals to implement the third scenario in paragraph 49 of the Joint Report appears to have been placed upon the United Kingdom, not the Commission. When will the Government bring forward its own proposals, or are you content to take the Commission’s proposed text as the basis of negotiations?
20. In the event that Northern Ireland were to remain in the EU internal market for goods, as envisaged in the Protocol, would you expect the United Kingdom to make budgetary contributions to the EU, as is the case for other non-EU states that belong to the Single Market?

Citizens’ rights

The citizens’ rights section of the Joint Report was relatively comprehensive and clear, and is largely reflected in the Agreement, which has now been agreed.

Article 9 confers rights by reference to the “end of the transition period”, rather than the “specified date” (i.e. the date of withdrawal), which was the date used in the Joint Report. This contrasts with the Government’s earlier view (set out in your letter of 21 February) that EU citizens arriving in the UK during transition should be subject to different rules. We note, though, that the rights set out in the Agreement will also be enjoyed by UK citizens moving to the EU during transition, and we therefore welcome the Government’s change of heart.

Article 9(1) of the Agreement will also extend family reunification rights to all future family members, including future spouses, regardless of when they entered into the family relationship—again, a position previously resisted by the Government.

Article 17 of the Agreement provides that economically inactive individuals and students may be required to provide evidence of “comprehensive sickness insurance cover” in order to secure settled status. This is a longstanding concern of EU citizens resident in the UK, and there has been disagreement over whether such individuals are required to have private medical insurance. The Government has promised to waive this requirement, but it is not

clear whether a similar undertaking has been made by the EU 27; nor, in the absence of text in the Agreement, can the Government's undertaking be regarded as binding.

The original draft Agreement explicitly precluded UK nationals living in the EU 27 from exercising onward free movement rights—a concern frequently raised in evidence by representative groups. The recent European Parliament resolution registers continuing concern on this point, and in the latest draft Agreement the relevant Article (Article 32 of the 28 February draft) has been removed.

We would therefore be grateful for your answers to the following questions:

21. Can you confirm that under the 19 March text of the Agreement EU citizens resident in the UK and UK citizens resident in the EU 27 before the end of the transition period will enjoy in full the rights conferred by Part Two (Citizens' Rights)?
22. Article 9(1) of the Agreement appears to extend family reunification rights to all future family members, including future spouses, regardless of when they entered into the family relationship. Is this your understanding?
23. Article 17 of the Agreement provides that economically inactive individuals and students may be required to provide evidence of "comprehensive sickness insurance cover" in order to secure settled status. The Government has given an undertaking to waive this requirement, insofar as it might require private medical insurance. Does that undertaking still hold good? And has a similar undertaking been given by the EU in respect of UK citizens resident in the EU 27? Would you see any merit in recording such undertakings in the text of the Agreement?
24. The original draft Agreement would have precluded UK nationals living in the EU 27 from exercising onward free movement rights, but we note that Article 32 of that draft has now been deleted. How did this change come about, and can you explain its significance? Does the Government intend to seek onward free movement rights for UK citizens resident in the EU, and if so, how?

The financial settlement

Part Five of the Agreement deals with the financial settlement, and broadly reflects what was agreed in the Joint Report. We note that the relevant articles have now been agreed, and that the agreement of a fixed end date of 31 December 2020 for the transition period will substantially simplify the calculation of the UK's continuing liabilities. We welcome this clarity.

Conclusion

We look forward to receiving your response to this letter and to our questions, by 13 April 2018.

Yours sincerely,

Tim Boswell

Lord Boswell of Aynho
Chairman of the European Union Committee