

BREXIT DOSSIER

An orderly withdrawal?

'We will control immigration and secure the entitlements of EU nationals in Britain and British nationals in the EU.' So said the Conservative Manifesto for the 2017 General Election. 'Entitlements' connotes claims. It is weaker than 'rights', the term used in the UK Government's White Paper (see below).

This Dossier traces a descent since 29 March 2017, when UK Prime Minister Theresa May invoked Article 50 of the Treaty on European Union to commence the United Kingdom's withdrawal from the Union. Since then, Prime Minister May and Brexit Secretary of State, David Davis, have regressed from seeking a 'deep and special partnership' with the European Union, to threatening, even before talks have commenced, to walk out of negotiations on the withdrawal agreement specified under Article 50. On 21 May, Mr Davis told the Sunday Times, 'we don't need to just look like we can walk away, we need to be able to walk away'.

How can it be that the UK Government, having invoked the Article 50 process, subsequently threatens to disregard the procedures it specifies? On the key question of citizens' rights, the Sunday Times observed that the 'other nations will also demand every EU citizen who has lived in the UK should get full rights to live and work here and claim benefits'. Apparently, Mr Davis rejected this out of hand, later describing EU 'essentials' on citizens' rights as 'ridiculously high'. We include the section on European citizens (including UK ones) in Mr Banier's public negotiating brief, which seems to have taken Mr Davis by surprise.

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Excerpts from Prime Minister Theresa May's letter to European Council President Donald Tusk, 29 March 2017

... I hereby notify the European Council in accordance with Article 50(2) of the Treaty on European Union of the United Kingdom's intention to withdraw from the European Union. In addition, in accordance with the same Article 50(2) as applied by Article 106a of the Treaty Establishing the European Atomic Energy Community, I hereby notify the European Council of the United Kingdom's intention to withdraw from the European Atomic Energy Community. References in this letter to the European Union should therefore be taken to include a reference to the European Atomic Energy Community.

This letter sets out the approach of Her Majesty's Government to the



discussions we will have about the United Kingdom's departure from the European Union and about the deep and special partnership we hope to enjoy – as your closest friend and neighbour – with the European Union once we leave. We believe that these objectives are in the interests not only of the United Kingdom but of the European Union and the wider world too.

It is in the best interests of both the United Kingdom and the European Union that we should use the forthcoming process to deliver these objectives in a fair and orderly manner, and with as little disruption as possible on each side. We want to make sure that Europe remains strong and prosperous and is capable of projecting its values, leading in the world, and defending itself from security threats. We want the United Kingdom, through a new deep and special partnership with a strong European Union, to play its full part in achieving these goals. **We therefore believe it is necessary to agree the terms of our future partnership alongside those of our withdrawal from the European Union.**

The Government wants to approach our discussions with ambition, giving citizens and businesses in the United Kingdom and the European Union – and indeed from third countries around the world – as much certainty as possible, as early as possible.

I would like to propose some principles that may help to shape our coming discussions, but before I do so, I should update you on the process we will be undertaking at home, in the United Kingdom.

The process in the United Kingdom

As I have announced already, the Government will bring forward legislation that will repeal the Act of Parliament – the European Communities Act 1972 – that gives effect to EU law in our country. This legislation will, wherever practical and appropriate, in effect convert the body of existing European Union law (the 'acquis') into UK law. **This means there will be certainty for UK citizens and for anybody from the European Union who does business in the United Kingdom.** The Government will consult on how we design and implement this legislation, and we will publish a White Paper tomorrow. We also intend to bring forward several other pieces of legislation that address specific issues relating to our departure from the European Union, also with a view to ensuring continuity and certainty, in particular for businesses. We will of course continue to fulfil our responsibilities as a member state while we remain a member of the European Union, and the legislation we propose will not come into effect until we leave.

From the start and throughout the discussions, we will negotiate as one



United Kingdom, taking due account of the specific interests of every nation and region of the UK as we do so. When it comes to the return of powers back to the United Kingdom, we will consult fully on which powers should reside in Westminster and which should be devolved to Scotland, Wales and Northern Ireland. But it is the expectation of the Government that the outcome of this process will be a significant increase in the decision-making power of each devolved administration.

Negotiations between the United Kingdom and the European Union

The United Kingdom wants to agree with the European Union a deep and special partnership that takes in both economic and security co-operation. To achieve this, **we believe it is necessary to agree the terms of our future partnership alongside those of our withdrawal from the EU.**

If, however, we leave the European Union without an agreement the default position is that we would have to trade on World Trade Organisation terms. In security terms a failure to reach agreement would mean our co-operation in the fight against crime and terrorism would be weakened. In this kind of scenario, both the United Kingdom and the European Union would of course cope with the change, but it is not the outcome that either side should seek. We must therefore work hard to avoid that outcome.

It is for these reasons that we want to be able to agree a deep and special partnership, taking in both economic and security co-operation, but it is also because we want to play our part in making sure that Europe remains strong and prosperous and able to lead in the world, projecting its values and defending itself from security threats. And we want the United Kingdom to play its full part in realising that vision for our continent.

Proposed principles for our discussions

Looking ahead to the discussions which we will soon begin, I would like to suggest some principles that we might agree to help make sure that the process is as smooth and successful as possible.

*i. We should engage with one another constructively
and respectfully, in a spirit of sincere co-operation*

Since I became Prime Minister of the United Kingdom I have listened carefully to you, to my fellow EU Heads of Government and the Presidents of the European Commission and Parliament. That is why the United Kingdom does not seek membership of the single market: we understand



and respect your position that the four freedoms of the single market are indivisible and there can be no ‘cherry picking’. We also understand that there will be consequences for the UK of leaving the EU: we know that we will lose influence over the rules that affect the European economy. We also know that UK companies will, as they trade within the EU, have to align with rules agreed by institutions of which we are no longer a part – just as UK companies do in other overseas markets.

ii. We should always put our citizens first

There is obvious complexity in the discussions we are about to undertake, but we should remember that at the heart of our talks are the interests of all our citizens. There are, for example, many citizens of the remaining member states living in the United Kingdom, and UK citizens living elsewhere in the European Union, and we should aim to strike an early agreement about their rights.

iii. We should work towards securing a comprehensive agreement

We want to agree a deep and special partnership between the UK and the EU, taking in both economic and security co-operation. We will need to discuss how we 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 United Kingdom’s continuing partnership with the EU. But we believe it is necessary to agree the terms of our future partnership alongside those of our withdrawal from the EU.

iv. We should work together to minimise disruption and give as much certainty as possible

Investors, businesses and citizens in both the UK and across the remaining 27 member states – and those from third countries around the world – want to be able to plan. In order to avoid any cliff-edge as we move from our current relationship to our future partnership, people and businesses in both the UK and the EU would benefit from implementation periods to adjust in a smooth and orderly way to new arrangements. It would help both sides to minimise unnecessary disruption if we agree this principle early in the process.

v. In particular, we must pay attention to the UK’s unique relationship with the Republic of Ireland and the importance of the peace process in Northern Ireland

The Republic of Ireland is the only EU member state with a land border



with the United Kingdom. We want to avoid a return to a hard border between our two countries, to be able to maintain the Common Travel Area between us, and to make sure that the UK's withdrawal from the EU does not harm the Republic of Ireland. We also have an important responsibility to make sure that nothing is done to jeopardise the peace process in Northern Ireland, and to continue to uphold the Belfast Agreement.

vi. We should begin technical talks on detailed policy areas as soon as possible, but we should prioritise the biggest challenges

Agreeing a high-level approach to the issues arising from our withdrawal will of course be an early priority. But we also propose a bold and ambitious Free Trade Agreement between the United Kingdom and the European Union. This should be of greater scope and ambition than any such agreement before it so that it covers sectors crucial to our linked economies such as financial services and network industries. This will require detailed technical talks, but as the UK is an existing EU member state, both sides have regulatory frameworks and standards that already match. We should therefore prioritise how we manage the evolution of our regulatory frameworks to maintain a fair and open trading environment, and how we resolve disputes. On the scope of the partnership between us – on both economic and security matters – my officials will put forward detailed proposals for deep, broad and dynamic co-operation.

vii. We should continue to work together to advance and protect our shared European values

Perhaps now more than ever, the world needs the liberal, democratic values of Europe. We want to play our part to ensure that Europe remains strong and prosperous and able to lead in the world, projecting its values and defending itself from security threats.

The task before us

As I have said, the Government of the United Kingdom wants to agree a deep and special partnership between the UK and the EU, taking in both economic and security co-operation. At a time when the growth of global trade is slowing and there are signs that protectionist instincts are on the rise in many parts of the world, Europe has a responsibility to stand up for free trade in the interest of all our citizens. Likewise, Europe's security is more fragile today than at any time since the end of the Cold War. Weakening our co-operation for the prosperity and protection of our citizens would be a costly mistake. The United Kingdom's objectives for



our future partnership remain those set out in my Lancaster House speech of 17 January and the subsequent White Paper published on 2 February.

We recognise that it will be a challenge to reach such a comprehensive agreement within the two-year period set out for withdrawal discussions in the Treaty. But we believe it is necessary to agree the terms of our future partnership alongside those of our withdrawal from the EU. We start from a unique position in these discussions – close regulatory alignment, trust in one another’s institutions, and a spirit of co-operation stretching back decades. It is for these reasons, and because the future partnership between the UK and the EU is of such importance to both sides, that I am sure it can be agreed in the time period set out by the Treaty.

The task before us is momentous but it should not be beyond us. After all, the institutions and the leaders of the European Union have succeeded in bringing together a continent blighted by war into a union of peaceful nations, and supported the transition of dictatorships to democracy. Together, I know we are capable of reaching an agreement about the UK’s rights and obligations as a departing member state, while establishing a deep and special partnership that contributes towards the prosperity, security and global power of our continent.

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Treaty on European Union (Lisbon Treaty)

Article 50

1. Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.
2. A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.
3. The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.
4. For the purposes of paragraphs 2 and 3, the member of the European

Council or of the Council representing the withdrawing Member State shall not participate in the discussions of the European Council or Council or in decisions concerning it.

A qualified majority shall be defined in accordance with Article 238(3)(b) of the Treaty on the Functioning of the European Union.

5. If a State which has withdrawn from the Union asks to rejoin, its request shall be subject to the procedure referred to in Article 49.

Article 218

1. Without prejudice to the specific provisions laid down in Article 207, agreements between the Union and third countries or international organisations shall be negotiated and concluded in accordance with the following procedure.

2. The Council shall authorise the opening of negotiations, adopt negotiating directives, authorise the signing of agreements and conclude them.

3. The Commission, or the High Representative of the Union for Foreign Affairs and Security Policy where the agreement envisaged relates exclusively or principally to the common foreign and security policy, shall submit recommendations to the Council, which shall adopt a decision authorising the opening of negotiations and, depending on the subject of the agreement envisaged, nominating the Union negotiator or the head of the Union's negotiating team.

4. The Council may address directives to the negotiator and designate a special committee in consultation with which the negotiations must be conducted.

5. The Council, on a proposal by the negotiator, shall adopt a decision authorising the signing of the agreement and, if necessary, its provisional application before entry into force.

6. The Council, on a proposal by the negotiator, shall adopt a decision concluding the agreement.

Except where agreements relate exclusively to the common foreign and security policy, the Council shall adopt the decision concluding the agreement:

(a) after obtaining the consent of the European Parliament in the following cases:

(i) association agreements;

(ii) agreement on Union accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms;

(iii) agreements establishing a specific institutional framework by organising cooperation procedures;

(iv) agreements with important budgetary implications for the Union;



(v) agreements covering fields to which either the ordinary legislative procedure applies, or the special legislative procedure where consent by the European Parliament is required.

The European Parliament and the Council may, in an urgent situation, agree upon a time-limit for consent.

(b) after consulting the European Parliament in other cases. The European Parliament shall deliver its opinion within a time-limit which the Council may set depending on the urgency of the matter. In the absence of an opinion within that time-limit, the Council may act.

7. When concluding an agreement, the Council may, by way of derogation from paragraphs 5, 6 and 9, authorise the negotiator to approve on the Union's behalf modifications to the agreement where it provides for them to be adopted by a simplified procedure or by a body set up by the agreement. The Council may attach specific conditions to such authorisation.

8. The Council shall act by a qualified majority throughout the procedure. However, it shall act unanimously when the agreement covers a field for which unanimity is required for the adoption of a Union act as well as for association agreements and the agreements referred to in Article 212 with the States which are candidates for accession. The Council shall also act unanimously for the agreement on accession of the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms; the decision concluding this agreement shall enter into force after it has been approved by the Member States in accordance with their respective constitutional requirements.

9. The Council, on a proposal from the Commission or the High Representative of the Union for Foreign Affairs and Security Policy, shall adopt a decision suspending application of an agreement and establishing the positions to be adopted on the Union's behalf in a body set up by an agreement, when that body is called upon to adopt acts having legal effects, with the exception of acts supplementing or amending the institutional framework of the agreement.

10. The European Parliament shall be immediately and fully informed at all stages of the procedure.

11. A Member State, the European Parliament, the Council or the Commission may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the Treaties. Where the opinion of the Court is adverse, the agreement envisaged may not enter into force unless it is amended or the Treaties are revised.

White Paper

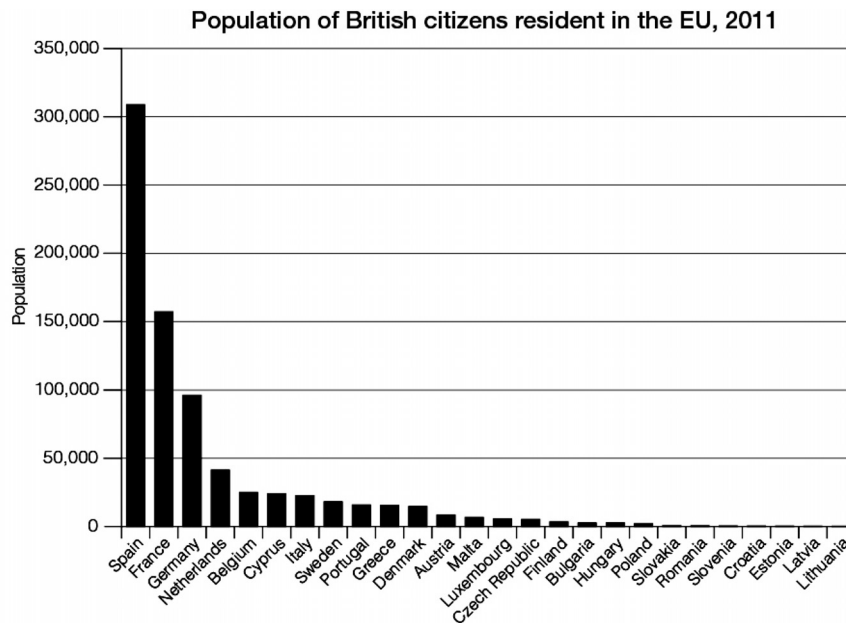
Excerpt from the UK Government Policy Paper, 'The United Kingdom's exit from, and new partnership with, the European Union', updated 15 May 2017.

Securing rights for EU nationals in the UK, and UK nationals in the EU

We want to secure the status of EU citizens who are already living in the UK, and that of UK nationals in other Member States, as early as we can.

Around 2.8 million EU nationals [excluding UK and Irish nationals] were estimated to be resident in the UK, many of whom originate from Poland. It is estimated that around 1 million UK nationals are long-term residents of other EU countries, including around 300,000 in Spain. France and Germany also host large numbers of British citizens.

Chart 6.1 – British citizens resident in the EU



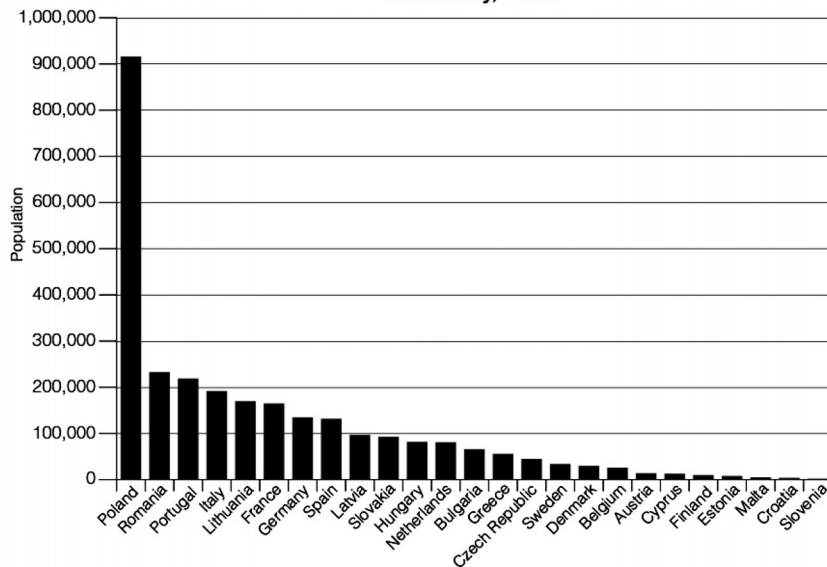
Source – ONS [excludes Irish Republic]

While we are a member of the EU, the rights of EU nationals living in the UK and UK nationals living in the EU remain unchanged. As provided for in both the EU Free Movement Directive (Article 16 of 2004/38/EC) and in UK law,



those who have lived continuously and lawfully in a country for at least five years automatically have a permanent right to reside. We recognise the contribution EU nationals have made to our economy and communities.

Chart 6.2 – EU nationals resident in the UK
Population of EU citizens resident in the UK by nationality, 2015



Source – ONS [excludes Republic of Ireland and Luxembourg]

Securing the status of, and providing certainty to, EU nationals already in the UK and to UK nationals in the EU is one of this Government's early priorities for the forthcoming negotiations. To this end, we have engaged a range of stakeholders, including expatriate groups, to ensure we understand the priorities of UK nationals living in EU countries. This is part of our preparations for a smooth and orderly withdrawal and we will continue to work closely with a range of organisations and individuals to achieve this. For example, we recognise the priority placed on easy access to health care by UK nationals living in the EU. We are also engaging closely with EU Member States, businesses and other organisations to ensure that we have a thorough understanding of issues concerning the status of EU nationals in the UK.

The Government would have liked to resolve this issue ahead of the formal negotiations. And although many EU Member States favour such an agreement, this has not proven possible. The UK remains ready to give





people the certainty they want and reach a reciprocal deal with our European partners at the earliest opportunity. It is the right and fair thing to do.

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Mr Barnier's Negotiating Brief

Selected 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, agreed 22 May 2017.

1. Following the notification by the United Kingdom of Great Britain and Northern Ireland (hereinafter 'the United Kingdom') of its intention to withdraw from the European Union, the Union shall negotiate and conclude a withdrawal agreement with the United Kingdom in accordance with Article 50 of the Treaty on European Union ('the Agreement').

2. This Agreement will set out the arrangements for the withdrawal of the United Kingdom, taking account of the framework for its future relationship with the Union.

3. The main objective of the Agreement is to ensure an orderly withdrawal of the United Kingdom from the European Union and from the European Atomic Energy Community. In these negotiating directives the term 'the Union' means the European Union founded on the Treaty on European Union and on the Treaty on the Functioning of the European Union and/or, as the case may be, the European Atomic Energy Community founded on the Treaty establishing the European Atomic Energy Community ...

5. 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 ...

9. The European Council guidelines set out a two-phased approach to the negotiations. The first phase will aim to:

- Provide as much clarity and legal certainty as possible to citizens, businesses, stakeholders and international partners on the immediate effects of the United Kingdom's withdrawal from the Union;
- Settle the disentanglement of the United Kingdom from the Union and



from all the rights and obligations the United Kingdom derives from commitments undertaken as a Member State ...

11. Safeguarding the status and rights of the EU27 citizens and their families in the United Kingdom and of the citizens of the United Kingdom and their families in the EU27 Member States is the first priority for the negotiations because of the number of people directly affected and of the seriousness of the consequences of the withdrawal for them. The Agreement should provide the necessary effective, enforceable, non-discriminatory and comprehensive guarantees for those citizens' rights, including the right to acquire permanent residence after a continuous period of five years of legal residence and the rights attached to it ...

Citizens' Rights

20. The 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 EU27 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 EU27. Guarantees to that effect in the Agreement should be reciprocal and should be based on the principle of equal treatment amongst EU27 citizens and equal treatment of EU27 citizens as compared to United Kingdom citizens, as set out in the relevant Union *acquis*. Those rights should be protected as directly enforceable vested rights for the lifetime of those concerned. Citizens should be able to exercise their rights through smooth and simple administrative procedures.

21. The Agreement should cover at least the following elements:

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 co-ordination 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.

22. For reasons of legal certainty, the Agreement should ensure, in the United Kingdom and in the EU27, the protection, in accordance with Union law applicable before the withdrawal date, of recognised professional qualifications (diplomas, certificates and other evidence of formal qualification) obtained in any of the Union Member States before that date. The Agreement should also ensure that professional qualifications (diplomas, certificates or other evidence of formal qualification) obtained in a third country and recognised in any of the Union Member States before the withdrawal date in accordance with Union law rules applicable before that date continue to be recognised also after the withdrawal date. It should also provide for arrangements relating to procedures for recognition which are ongoing on the withdrawal date.





Governance of the Agreement

39. The Agreement should set up an institutional structure to ensure an effective enforcement of the commitments under the Agreement, bearing in mind the Union's interest in effectively protecting its autonomy and its legal order, including the role of the Court of Justice of the European Union.

40. It should contain appropriate institutional arrangements allowing for the adoption of measures to deal with unforeseen situations not covered in the Agreement and for the incorporation of future amendments to Union law in the Agreement where this is necessary for the proper implementation of the Agreement.

41. 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.

42. 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.

43. The Agreement should foresee that any reference to concepts or provisions of Union law made in the Agreement must be understood as including the case-law of the Court of Justice of the European Union interpreting such concepts or provisions before the withdrawal date. Moreover, to the extent an alternative dispute settlement is established for certain provisions of the Agreement, a provision according to which future case-law of the Court of Justice of the European Union intervening after the withdrawal date must be taken into account in interpreting such concepts and provisions should be included.

<http://www.consilium.europa.eu/en/press/press-releases/2017/05/22-brexIt-negotiating-directives/>