



HM Government

EU Exit

Legal position on the Withdrawal Agreement

Cm 9747



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Presented to Parliament
by the Attorney General
by Command of Her Majesty

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Introduction

1. This document describes the overall legal effect of the draft Withdrawal Agreement of 25 November 2018 ('the Agreement'). It considers each Part of the Agreement, together with the Protocols on Ireland/Northern Ireland, Gibraltar and the UK Sovereign Base Areas in Cyprus, and describes the overall legal effect of the provisions.
2. The Agreement is a treaty which will be binding on the EU¹ and the UK under international law. The EU Treaties² will cease to apply to the UK from the date that the Agreement enters into force ('exit day'), at which point the UK's ongoing legal relationship with the EU will be governed by the terms of the Agreement. The Agreement sets out the arrangements for the UK's orderly withdrawal from the EU's legal framework following a 'transition (or implementation) period', and for those purposes provides for the continued application of EU law (Union law) in defined respects.
3. Since the Agreement provides for the winding-down of Union law in the UK, it makes provision for a role for the Court of Justice of the European Union (CJEU) in interpreting Union law to the extent that it is applied by the Agreement. This is important in the interests of the consistent interpretation and application of the Agreement as between the EU and the UK, which in turn provides an assurance for individuals and businesses. The CJEU has a different role in relation to different aspects of the Agreement and has a much more limited role after the end of the implementation period. The detail of this is set out under the relevant sections of the Agreement.
4. The Agreement will need to be implemented in domestic law through legislation. The EU (Withdrawal Agreement) Bill will be the primary vehicle for that, the contents of which is outside the scope of this document.

¹ The parties to the Agreement are the EU and the UK. In accordance with Article 216(2) Treaty on the Functioning of the European Union (TFEU), the Agreement will be binding on the EU and on its Member States (the EU 27).

² Treaty on European Union (TEU), TFEU and the Treaty establishing the European Atomic Energy Community (Euratom Treaty) together referred to as 'the EU Treaties'.

Part One: Common Provisions (Articles 1 to 8)

Definitions and scope

5. Part One sets out the provisions which apply to the Agreement as a whole. These provisions are concerned with the overall interpretation and application of the Agreement.
6. Article 1 provides that the objective of the Agreement is to set out the arrangements for the UK's withdrawal from the EU and the European Atomic Energy Community (Euratom). Article 2 defines a number of terms that are used throughout the Agreement.
7. Article 3 defines the territorial scope of the Agreement as regards the UK. It provides for the Agreement to apply to Gibraltar, the Crown Dependencies, the Sovereign Base Areas (SBAs) in Cyprus and the other UK Overseas Territories to the same extent as the EU Treaties apply to those territories.

Implementation, application and interpretation

8. Articles 4, 6 and 7 are all concerned with ensuring that the Agreement is applied and interpreted consistently in the UK and the EU respectively.
9. Under Article 4, all provisions in the Agreement and the provisions of Union law that it makes applicable in the UK have the same legal effect in the UK as in the EU and its Member States. This includes (but is not limited to) the application of the principles of primacy and direct effect (Articles 4(1) and 4(2)) and the availability of remedies (*Francovich* damages³). This means, in particular, that all provisions of the Agreement which confer rights on individuals and meet the conditions in Union law for having direct effect⁴ can be enforced directly by individuals in the UK courts, and that in such cases the UK courts must disapply domestic law in the event that it is incompatible with the relevant provision of the Agreement which is being relied on.

³ Under the principle in *Francovich and Bonifaci v Italy*, C-6/90 and C-9/90, EU:C:1991:428.

⁴ I.e. that the provision is sufficiently clear, precise and unconditional (see for example *Van Gend en Loos*, 26/62, EU:C:1963:1).

10. Article 4 also provides for the consistent interpretation of the provisions of Union law which are made applicable by the Agreement. Under this provision, general principles of Union law would be used to interpret Union law applied by the Agreement (Article 4(3)).
11. Provisions of Union law applied by the Agreement must be interpreted by UK courts in accordance with any decisions of the CJEU given before the end of the implementation period (Article 4(4)), which is defined in Article 126. After the implementation period, UK courts must give “*due regard*” to relevant CJEU case law when interpreting those provisions of Union law which continue to apply as part of the winding down of Union law in the UK (Article 4(5)). This reflects the fact that the aim of the Agreement is that those provisions are interpreted and applied consistently by EU and UK courts, as ultimately determined through the applicable dispute settlement procedures (see Part Six below). However, the language of “*due regard*” indicates that in some circumstances it may not be appropriate to apply a CJEU judgment about a provision of Union law that is given after the end of the implementation period, bearing in mind that the provision in question will apply in the different context of the Agreement.⁵
12. These provisions also define the nature and scope of Union law which is applied by the Agreement. During the implementation period, Union law as a whole continues to apply to the UK including as it develops during that time (see Part Four). Following the end of the implementation period, the Agreement provides that certain aspects of Union law continue to apply for specified purposes in order to ensure an orderly withdrawal. In general, these provisions of the Agreement apply Union law as it stands at the end of the implementation period (Article 6(1)) and therefore do not change at the end of that period. However, there are exceptions to this general rule, where certain provisions of the Agreement include subsequent developments to Union law. These exceptions include social security coordination under Part Two (Citizens’ Rights – Article 36), limited parts of Part Five (Financial Settlement) relating to the winding down of EU budgetary rules, those parts of Union law which apply under the Protocol on SBAs and certain aspects of the Ireland/Northern Ireland Protocol (Article 15(4) of the Protocol) (see further below).
13. Article 7 provides that references to “*Member States*” in Union law which is made applicable by the Agreement are to be interpreted as including the United Kingdom, subject to certain exceptions which reflect that the UK is no longer a Member State and will not participate in the decision making of the EU’s institutions except where otherwise provided (e.g. Article 34(1)). This enables Union law to operate in relation to the UK in so far as is necessary for the purposes of the Agreement.

⁵ For example, *Demirkan*, C-221/11, EU:C:2013:583 (paragraphs 44-49).

Good faith

14. Article 5 provides that the UK and the EU must, in good faith, assist each other in carrying out the tasks which flow from the Agreement and ensure that obligations arising from it are fulfilled. See also Article 20 of the Ireland/Northern Ireland Protocol, below. A reciprocal legal obligation on the parties to act in good faith is a common feature of international agreements. The principle of good faith is a rule of customary international law, as has been recognised by the CJEU⁶ and the International Court of Justice.⁷ A dispute about compliance with this obligation could be raised under the applicable dispute resolution mechanism in the Agreement (see below). It is likely that there would only be a finding of breach where it was supported by clear evidence.⁸

Access to Union systems

15. Article 8 provides that following the end of the implementation period the UK will no longer be entitled to access networks, systems and databases established under Union law, unless that is provided for in the Agreement (see Articles 29(2), 34(2), 50, 53, 62(2), 63(1)(e), 63(2), 78, 96(6), 99(3), 100(2) and 138(4)). During the implementation period the UK's access to such networks, systems and databases will continue on the same terms as prior to exit day, subject to specific exceptions which are set out in the Agreement (in particular in Part 4, see below).

⁶ For example, *Opel Austria GmbH v Austria*, T-115/94, EU:T:1997:3 (paragraph 90); *Portugal v Council*, C-149/96, EU:C:1999:574 (paragraph 41).

⁷ For example, *Nuclear Test cases (Australia v France)*, Judgment of 20 December 1994, ICJ Reports 1974, p. 253 (paragraph 46).

⁸ *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v Chile)*, Judgment 1 October 2018 (paragraphs 86-87); *Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v Greece)*, Judgment of 5 December 2011, ICJ Judgments 2011, p.644 (paragraphs 131-138).

Part Two: Citizens' Rights (Articles 9 to 39)

Purpose and scope

16. Part Two provides for the rights of Union citizens in the UK and UK nationals in the EU at the end of the implementation period and for the protection of rights relating to social security coordination.

17. Article 10 provides that the following persons are in the main personal scope of Part 2:

- Union citizens residing lawfully under Union law in the UK at the end of the implementation period and continuing to reside after that date; and vice versa for UK nationals residing in the EU;
- Union citizens who are working as frontier workers in the UK at the end of the implementation period and continuing to do so after that date; and vice versa for UK nationals frontier working in the EU;
- family members of residents and frontier workers who are lawfully resident in the host state at the end of the implementation period;
- close family members (spouses, civil partners, dependent children and grandchildren, and dependent parents and grandparents) who live outside the host state at the end of the implementation period, if the relationship existed at that date and still exists when the person wishes to come to the host state;
- children born to, or legally adopted by, residents and frontier workers in scope where both parents are covered by the agreement, one parent is covered and the other is a national of the host state or one parent is covered by the agreement and has rights of custody;
- extended family members (durable partners, other family members dependent on members of the household of the Union citizen or where serious health grounds require the personal care of the family member by the Union citizen) whose residence has been facilitated or applied for before the end of the implementation period; and
- durable partners who live outside the host state at the end of the implementation period, if the durable relationship existed at that date and still exists when the person wishes to come to the host state.

18. The 'host state' for Union citizens and their family members resident in the UK at the end of the implementation period is the UK. For UK nationals, it is the Member State in which they resided at the end of the implementation period (Article 9(c)).

19. The 'state of work' for Union citizens frontier working into the UK at the end of the implementation period is the UK. For UK frontier workers, it is the Member State/s in which they are frontier working at the end of the implementation period (Article 9(d)).

Residence rights

20. Title II of Part Two provides that Union citizens and their family members in scope continue to have rights of residence in the UK subject to the limitations and conditions provided in relevant provisions of Union law and vice versa for UK nationals in the EU (Article 13). Persons in scope who have lawfully and continuously resided in the host state for five years have the right to reside permanently; until that five year period is reached they have the right to reside until they meet that threshold. The right to reside permanently can be lost through absence from the host state for more than five years. If a person does not yet have the right to reside permanently, the right to reside can be lost through absence of more than six months but extended to 12 months in certain circumstances, for example childbirth (Article 15).
21. The Agreement provides for rights of entry and exit into the host state and state of work on production of a valid passport or identity card. Five years after the end of the implementation period, the host state may choose to no longer accept identity cards that are not compliant with the relevant International Civil Aviation Organisation standards (Article 14).
22. Article 17 provides that rights under the Agreement are not affected by a change of status. For example, a person who was a worker at the end of the implementation period may become a self-employed person in the future.
23. The Agreement allows Member States and the UK to require persons to apply for a residence status that confers rights under Title II. There is a 'grace period' of at least six months from the end of the implementation period to allow persons to make their application; this can be extended by a year in the event of technical problems. Until that deadline is passed and whilst a decision on an application for a residence status is pending a person is deemed to have rights under the Agreement. Family members seeking to join a rights holder after the end of the implementation period have three months from their arrival to make the application if later than the end of the 'grace period' (Article 18). A host state may allow applications for a residence status to be made from exit day but decisions made in respect of such applications shall have no effect until the end of the implementation period (Article 19). The UK has taken the decision to require persons to apply for residence status and has set up the EU Settlement Scheme.
24. A person's rights of entry or residence can be restricted on grounds of conduct. Conduct committed before the end of the implementation period will be assessed using the EU thresholds as set out in Directive 2004/38 ('the Free Movement Directive'). Conduct after the end of the implementation period will be assessed using the criteria in national legislation (Article 20). Rights may also be refused, terminated or withdrawn in the case of abuse of rights or fraud.

Equal treatment/non-discrimination and rights of workers and the self-employed

25. The Agreement provides that those residing on the basis of the Agreement shall enjoy equal treatment with nationals of the host state (Article 23). There is also a general non-discrimination on grounds of nationality provision (Article 12).
26. Article 24 provides that workers in the host state and frontier workers in the state of work shall enjoy the rights guaranteed under Article 45 TFEU, including the right to work in accordance with the rules applicable to the nationals of the host state or the state of work. Article 25 provides that self-employed persons and self-employed frontier workers shall enjoy the rights guaranteed by Articles 49 and 55 TFEU, including the right to work as a self-employed person and the right to set up and manage an undertaking. Article 24 contains a non-exhaustive list of the rights conferred on workers and self-employed persons, which includes, for example, the right to tax and social advantages and the rights and benefits accorded to national workers in matters of housing.

Mutual Recognition of Professional Qualifications

27. The Agreement provides for continued recognition of professional qualifications for those within scope of the Agreement where recognition decisions regarding the qualification were granted, or where an application for recognition was made, before the end of the implementation period. This covers qualifications recognised under the Professional Qualifications Directive (but not where the decision is related to the temporary and occasional provision of services), decisions enabling lawyers to practise under the host state's professional title under the Lawyers Establishment Directive, audit qualifications recognised under the Audit Directive, and decisions enabling persons to be engaged in the trade and distribution of toxic products (Articles 27 to 29).

Social security coordination

28. Title III of Part Two provides for the protection of rights relating to social security coordination. It has a separate personal scope to Titles I and II but there is some overlap between the Titles as those persons who have rights of residence, by virtue of their falling within Article 10 above, will also be in full scope of Title III for as long as they retain these residence rights.
29. Articles 30 and 31 provide that Regulations 883/2004 and 987/2009 ('the Coordination Regulations') will continue to apply fully to persons in scope of Article 30 of the Agreement ('full scope of Title III'). The vast majority of people who fall within the full scope of Title III will do so because they are either a UK national subject to the legislation of a Member State at the end of the implementation period,

or because they are an EU citizen subject to UK legislation at the end of the implementation period. Which legislation a person is subject to is determined by reference to the rules on applicable legislation in the Coordination Regulations, which consider, for example whether a UK national is employed or self-employed in a Member State. The Agreement however makes provision for the Coordination Regulations to continue to apply also to persons in a number of other specified cross-border situations. For example, where a UK national is subject to UK legislation at the end of the implementation period but resident in a Member State. Third country nationals and stateless persons and refugees who are in one of the specified situations at the end of the implementation period involving both the UK and a Member State are also in full scope of Title III. In relation to third country nationals, the coordination provisions in EU regulations 1408/71 and 574/72 apply instead.

30. Persons who are in scope of Article 30 of the Agreement for full social security coordination purposes will continue to benefit from the coordination rules for as long as they remain without interruption within the scope of that section. This will ensure, for example, that workers (and their employer) will only pay into one social security system at a time, and that they will continue to have the right to aggregate contributions and periods of insured residence for the purposes of meeting different states' benefit entitlement conditions. This includes all contributions made both in the UK and the EU before and after the implementation period, and the rules will protect the rights that flow from such contributions in accordance with the Coordination Regulations (for example certain associated benefits and healthcare).
31. The Agreement also provides for the protection of EU citizens who have previously been subject to UK legislation and vice versa but are no longer in that situation (Article 32(1)(a)). For example, where a UK national has previously paid social security contributions in a Member State, those contributions and the rights flowing from them such as the right to claim certain benefits and receive reciprocal healthcare will be protected in accordance with the Coordination Regulations. On receipt of a relevant benefit based on past contributions, associated rights to benefits under the regulations, including healthcare, will apply to those individuals (Article 32(2)).
32. The Agreement also provides for further special situations. For example, a UK national who is in a Member State for a holiday or for the duration of a course of study at the end of the implementation period, and who is entitled to a UK European Health Insurance Card (EHIC), will be able to continue to benefit from that scheme for as long as the stay in that state continues. The Agreement also protects the rights of people visiting the UK or the EU for planned medical treatment, where authorisation was requested before the end of the implementation period, so they are able to commence or complete their treatment.
33. Article 36 provides that amendments to the social security regulations in the future will apply to persons in scope of Title III. In relation to certain amendments, this is the case unless the Joint Committee decides otherwise.

Part Three: Separation Provisions (Articles 40 to 125)

Overview

34. Part Three is concerned with ensuring the orderly winding down of certain transactions, processes, arrangements and legal proceedings which are ongoing at the end of the implementation period in a number of defined areas of Union law. Transitional arrangements of this nature are a common legal device to ensure legal certainty for individuals and businesses when laws change. The specific provisions of Union law which are made applicable in the UK under this Part will therefore generally only apply in a limited set of circumstances and for a limited period of time until the specific transactions, processes, arrangements and proceedings are completed. Part Three will apply from the end of implementation period, subject to the possibility of many of these provisions being superseded by a future relationship agreement between the UK and the EU.

Scope and approach

35. Part Three does not cover every aspect of the UK's relationship with the EU but rather a number of defined areas concerning economic matters, cooperation on security and other matters, and wider operational and institutional issues. In terms of its overall approach, this Part identifies processes and arrangements which are ongoing at the end of the implementation period, defines what is included and how they should be handled and wound down based on the applicable Union law in the relevant area and provides for continued administrative cooperation to facilitate this. This approach enables those processes and arrangements, which invariably involve a cross-border dimension, to be wound down using the same legal rules and methods in both the UK and the EU in order to ensure their consistent application.

36. In relation to those areas of Union law which are not covered by this Part (such as rules on the provision of services, or application of consumer rights), there are no winding-down arrangements in place with the EU after the implementation period. However, these rules may continue to apply in domestic law after the end of the implementation period. The European Union (Withdrawal) Act 2018 will retain (former) Union law in the UK domestic legal system as at the end of the implementation period, subject to further domestic legislation that overrides it. The future relationship agreement between the UK and the EU will also determine the extent and nature of any new arrangements that may apply in these areas between the UK and the EU.

37. As regards the respective rights and obligations between the parties according to this Part, the position is as follows. As a matter of law, the Agreement ensures that the UK is treated as if it were a Member State for the purposes of winding down the specific aspects of Union law set out in this Part (see Article 7). The EU (and its remaining 27 Member States) continue to be bound by the specific aspects of Union law in this Part as a matter of general EU law. The overall effect is to ensure that the rights and obligations between the parties are reciprocal.

Areas covered

38. In line with the above principles, there are arrangements in respect of economic matters in the following areas:

- **Goods placed on the market (Articles 40 to 46)**, where there are arrangements to ensure that goods placed on the UK or EU market in accordance with Union law before the end of the implementation period may continue to circulate freely between the EU and the UK.
- **Ongoing customs procedures (Articles 47 to 50)**, where there are arrangements to ensure that goods under a customs movement that begins before the end of the implementation period will continue to be treated in the same way.
- **Ongoing value added tax and excise duty matters (Articles 51 to 53)**, where there are arrangements to ensure that VAT excise treatments for goods that are part way through an intra-EU customs movement that began before the end of the implementation period will continue to be treated in the same way.
- **Intellectual property and geographical indications (Articles 54 to 61)**, where there are arrangements to ensure the continued protection in the UK of existing EU trade marks, registered and unregistered Community designs and Community plant variety rights. In relation to geographical indications, existing EU geographical indications will continue to be protected in the UK unless and until this arrangement is superseded by the future economic relationship between the UK and the EU.

39. In relation to other areas of cooperation and participation, there are arrangements in the following areas:

- **Ongoing police and judicial cooperation in criminal matters (Articles 62 to 65)**, where there are arrangements to provide for the completion, under broadly the same rules, of certain specified Union legal procedures which are ongoing at the end of the implementation period. There is also provision for continued, time-limited access to certain EU networks, information systems and databases after the end of the implementation period in certain circumstances.
- **Ongoing judicial cooperation in civil and commercial matters (Articles 66 to 69)**, where there are arrangements to provide for continued cooperation between the UK and the EU on cross-border civil and commercial proceedings which are underway at the end of the implementation period.

- **The processing of data and other information (Articles 70 to 74)**, where there are arrangements to provide for the protection of data and information exchanged between the UK and the EU before the end of the implementation period or processed on the basis of the Agreement (referred to as the 'stock' of data). The relevant Union law in this area will continue to apply to the stock of non-personal data. It will also apply to the stock of personal data unless and until the UK obtains 'adequacy decisions' from the European Commission under the General Data Protection Regulation (Regulation 2016/679) and the Law Enforcement Data Protection Directive (Directive 2016/680), confirming that its data protection regime provides an adequate level of protection. If one adequacy decision is granted, then the relevant Union law will not apply to the relevant stock of personal data. In the event that an adequacy decision is granted but subsequently ceases to apply for some reason, the UK would be required to apply a standard of protection to the relevant stock of personal data that is "*essentially equivalent*" to Union law. In addition, there is provision for the continued protection of UK and EU classified information which is held by either the UK or the EU at the end of the implementation period.
- **Ongoing public procurement and similar procedures (Articles 75 to 78)**, where there are arrangements to provide for the continued application of certain EU rules to public procurement or similar procedures which are ongoing at the end of the implementation period.
- **The UK's withdrawal from the European Atomic Energy Community (Euratom) (Articles 79 to 85)**, where the UK will have sole responsibility at the end of the implementation period for its nuclear safeguards arrangements to meet international nuclear standards. The Agreement defines the UK's responsibilities in relation to certain types of nuclear material and radioactive waste, makes provision in respect of ownership of special fissile material located in the UK and provides for the transfer of specified Euratom equipment (see also Annex V) and responsibilities to the UK at the end of the implementation period.
- **Judicial procedures (Articles 86 to 91)**, where there are arrangements to provide for the winding down of the UK's involvement in the EU's judicial procedures and rights for the UK to participate in CJEU cases after the end of the implementation period. Those cases which are pending before the CJEU at the end of the implementation period (brought by or against the UK, or referred by a UK court) will continue to a final resolution. In relation to infraction (enforcement) proceedings by the European Commission, those can continue to be brought against the UK, as regards failures to comply with Union law prior to the end of the implementation period, for a period of up to four years after the end of the implementation period. They will also be able to bring such proceedings for four years following an administrative decision referred in Article 95 with which the UK fails to comply. UK qualified lawyers will be able to continue to represent clients in all cases pending before the CJEU at the end of the implementation period until their resolution, and act wherever the UK is permitted to intervene or participate in CJEU proceedings.

- **Administrative procedures (Articles 92 to 97)**, where there are arrangements to provide for the winding down of administrative procedures (such as regulatory procedures concerning competition rules or state aid). Administrative procedures involving the UK or UK individuals or businesses, or relating to competition in the UK, which are ongoing at the end of the implementation period will continue to a final decision. The EU is required to provide the UK with a list of all such ongoing procedures within three months of the end of the implementation period (and within one month in respect of certain specified procedures). In relation to procedures against the UK or UK individuals or businesses concerning facts arising before the end of the implementation period, EU enforcement procedures in specified areas will apply for up to four years after the end of the implementation period. The areas specified are state aid and investigations by the European Anti-Fraud Office (OLAF), including in relation to certain customs debts.
- **Administrative cooperation procedures (Articles 98 to 100)**, where there are arrangements to ensure continued administration cooperation on tax and customs matters after the end of the implementation period. These arrangements include the sharing of information for specified periods in respect of customs movements, VAT transactions and excise movements that took place before the end of the implementation period.
- **Privileges and immunities (Articles 101 to 119)**, where there are arrangements to preserve privileges and immunities for official actions taken by EU representatives before the end of the implementation period and to provide such privileges and immunities in relation to EU activities under the Agreement.
- **Other issues relating to the functioning of the institutions, bodies, offices, and agencies of the Union (Articles 120 to 125)**, where there are arrangements concerning miscellaneous issues. In respect of the European Central Bank and European Investment Bank (EIB), there is provision to ensure continuity in respect of their key operating conditions in the UK after the end of the implementation period. In relation to the activities of EU officials and representatives in the UK after the end of the implementation period, there is provision to ensure that the UK will continue to respect obligations of professional secrecy to which those persons are subject. As regards the EU's access to documents regime, the UK will continue to have protections equivalent to a Member State when the EU is considering whether to disclose a document originating from the UK. Finally, there is provision to ensure continuity in respect of the UK's participation in the European Schools Convention during the implementation period.

Part Four: Transition (Articles 126 to 132)

Overview

40. Part Four sets out the terms of the implementation period (or transition period). During this period, subject to certain exceptions which are discussed below, Union law continues to apply to the UK in the same way as prior to exit day (Article 127). This includes the application of Union law as it develops during the implementation period.

Duration

41. The implementation period will end on 31 December 2020 (Article 126), unless both the UK and the EU agree to a single, time-limited extension (Article 132(1)). This could extend the Implementation period for “*up to 1 or 2 years*” (i.e. any period up to two years) and would involve reaching further agreement on the UK’s financial contribution (Articles 132(2) and 132(3)) and some consequential amendments to dates and time periods elsewhere in the Agreement.
42. During any extended implementation period, the UK would not be within EU budget arrangements, and would not be a Member State for the purposes of Union programmes and activities committed under the next Multiannual Financial Framework. So the Joint Committee would decide on an appropriate financial contribution, taking into account that the UK would not be receiving receipts as a Member State participating in the Union programmes and activities committed under the next Multiannual Financial Framework. In addition, since the UK would not be part of the Common Agricultural Policy (CAP) during this extended period, it would be necessary to make provision for the UK to be able to make agricultural support payments which are exempt from EU state aid rules, but which ensure a level playing field. The maximum level of exempted support would be specified in the decision of the Joint Committee based on particular criteria linked to the amount of support payable to UK farmers in 2019 (Article 132(2)(c)).

Scope

43. As outlined above, Union law continues to apply to the UK during the implementation period in the same way as prior to exit day (subject to certain exceptions outlined below). This includes the application of Union law as it develops during the implementation period (Article 127).

44. The application of Union law to the UK during the implementation period reflects that the UK has opt outs and/or special arrangements as regards the monetary union, the Schengen acquis and the area of freedom, security and justice (JHA) (Article 127(1)(a)). In the JHA field, the UK will not have the right to opt into entirely new JHA measures during the implementation period but it can be invited to cooperate in these (Article 127(5)). The Agreement also excludes the UK from certain areas which can only apply in respect of Member States, including rights of UK citizens to participate in European Parliament elections, Member States' local elections⁹ and citizens' initiatives (Article 127(1)(b)).

Participation

45. As regards participation in EU institutions and decision-making, the UK will have exited the EU and will no longer be a Member State which means (for example) being excluded from nominating, appointing and electing of members of EU institutions, bodies, offices and agencies, and no longer participating in the decision-making of the EU's institutions (Article 7 and Article 128(3)). However, subject to certain conditions the UK may exceptionally be invited to participate in meetings of certain representative or expert groups and committees (Article 128(5)). This does not include participation in Council meetings. The conditions are that either the discussion concerns individual acts to be addressed to the UK or UK persons, or the UK's presence is necessary and in the interests of the EU, in particular to ensure effective implementation of Union law. There are also specific rules for the UK's participation on an exceptional basis in bodies set up under international agreements concluded by the Union with third countries (Article 129(2)).

Other exclusions

46. There are further, specific rules concerning the operation of the implementation period, including the possibility for the EU to exclude the UK from having access to "*security related sensitive information*" in certain exceptional circumstances (Article 127(7)(b)), the exclusion of UK nationals for the purposes of the recruitment of officials to institutions, bodies, offices or agencies of the EU (Article 127(7)(c)) and the exclusion of certain UK authorities acting as "*leading authority*" for risk assessments, examinations, approvals and authorisation procedures in the areas of Union law which are listed in Annex VII (Article 128(6)). In addition, the UK parliament is excluded from participating in the 'yellow card' and 'orange card' procedures set out in Protocol (No 1) of the EU Treaties which allow national parliaments to submit reasoned opinions if they consider that an EU legislative proposal infringes the principle of subsidiarity (Article 128(2)).

⁹ The Government is pursuing bilateral arrangements with individual Member States to secure reciprocal voting rights for UK nationals living elsewhere in Europe, and EU citizens in the UK.

Disputes and enforcement

47. Given that Union law as a whole applies to the UK as if it were a Member State during the implementation period (subject to the exceptions outlined above), the normal enforcement mechanisms continue to apply during this period, including the role of the Commission and the CJEU (Article 131). During the implementation period, the CJEU also has jurisdiction over the interpretation and application of those provisions of the Agreement which apply during this period (Parts One, Four and Five and limited aspects of Parts Two and Six: see further below).

Common Foreign and Security Policy

48. There are several provisions which are specific to Common Foreign and Security Policy (CFSP) and Common Security and Defence Policy (CSDP), in particular making it possible for the future relationship in this area to take effect before the end of the implementation period (Article 127(2)), as well as a mechanism for the UK to not apply a CFSP decision in exceptional cases for “*vital and stated reasons of national policy*” which reflects the specific nature of policy making in this area (Article 129(6)).

International agreements

49. From the entry into force of the Agreement, without further action, international agreements concluded by the EU, with or without its Member States, with third countries will no longer apply to the UK where the UK is bound by the agreement solely in its capacity as a Member State. This is a consequence of the UK ceasing to be a Member State of the EU. Multilateral agreements ratified by the UK such as the Climate Change Convention and almost all WTO agreements are not affected. The Agreement provides that Union law, including international agreements as defined in Article 2(a)(iv), continues to apply to the UK during the implementation period. In the case of certain categories of those agreements, the UK makes a specific commitment under Article 129(1) to be bound by their obligations. The EU will notify third countries that the UK is to be treated as a Member State for the purposes of these agreements during the implementation period (as reflected in the asterisk to Article 129(1)). The commitments made by the UK in the Agreement to continue to comply with these agreements and the notification will provide a platform by which third countries can accept to treat the UK as a Member State for the purposes of these agreements during the implementation period.

50. Although during the implementation period the UK will continue to be bound by the duty of sincere cooperation¹⁰ (Article 129(3)), reflecting the continued application of Union law during this period, the Agreement recognises that the UK will need to prepare, during the implementation period, for its future international relations with third countries after the end of that period and establish new international arrangements of its own. This is specifically referenced in the ninth paragraph of the preamble to the Agreement. Article 129(4) reflects this by providing that during the implementation period the UK can negotiate, sign and ratify new international agreements, even in areas of exclusive Union competence such as trade, provided these Agreements only come into effect at the end of the implementation period.

Fisheries policy

51. Finally, in relation to fisheries policy the Agreement provides that the EU must consult the UK in respect of the fixing of UK-related fishing opportunities for any period falling within the implementation period and the UK may comment on the scientific advice and proposals for fishing opportunities (Article 130(1) and (2)). Also, the EU may exceptionally invite the UK to attend, as part of the EU delegation, relevant international fishing consultations and negotiations (Article 130(3)). In this way, the UK can prepare for its future participation in international fora. Article 130(4) provides that the relative stability keys (the system of allocation of shares of fishing opportunities between Member States) will continue to apply during the implementation period. As regards fishing opportunities after the implementation period, however, the UK will be able, during the implementation period, to negotiate with the EU and other states and to conclude new agreements which take effect after that period ends, when it will no longer be bound by the Common Fisheries Policy (see Article 129(4)).

¹⁰ As set out in Article 4(3) TEU: “Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.”

Part Five: Financial Settlement (Articles 133 to 157)

52. Part Five of the Agreement contains the financial settlement. It includes almost all of the provisions in the Agreement that would require payments to be made by the UK to the EU and vice versa (examples of provisions outside Part Five are Article 49(2) on customs debt, Articles 50, 53 and 99(3) on access to databases, Articles 62(2) and 63(1)(e) on access to information exchanges, and Article 84(1) on equipment related to Euratom). The provisions do not set out an agreed amount in respect of these payments, but determine the process for calculating the financial liabilities of the UK to the EU and of the EU to the UK. The financial settlement has three main components.
53. **First**, the UK will contribute to the EU budget in the usual way in 2019 and 2020, up to the end of the current Multiannual Financial Framework (Article 135(1)). The UK's contributions will be determined almost as if UK had remained a Member State, in accordance with the relevant EU Treaty provisions, the Own Resources Decision, the Multiannual Financial Framework Regulation and the Financial Regulation. However, amendments made to the Multiannual Financial Framework Regulation and the Own Resources Decision adopted on or after the date of the entry into force of the Agreement will not apply to the UK in so far as the amendments impact upon the UK's financial obligations (see Article 135(2)).
54. Correspondingly, the UK will benefit from EU spending in 2019 and 2020. The UK will benefit from the Union spending programmes and activities committed under the Multiannual Financial Framework for the years 2014-2020 (see Article 137). However, the UK will not participate in the Direct Payments measures of the CAP in 2020; direct payment support to UK farmers will however retain an exemption from EU State aid rules, provided that the UK direct payments scheme is equivalent to the EU scheme. Union law relating to own resources will continue to apply to the United Kingdom after 2020 in respect of the financial years until 2020 (Article 136), so the normal process of revisions and corrections to the UK's contributions related to past periods will take place in the light of, for example, updated statistical information about Gross National Income in the period before the end of 2020. Union law relating to the UK's participation in Union programmes and activities committed under the Multiannual Financial Framework for 2014-2020 will also apply to the UK after 2020, until the closure of those programmes and activities (Article 138). This means that the UK will continue to receive receipts relating to the period before the end of 2020 and will, for example, have to comply with the usual audit requirements in respect of the programmes and activities committed under the Multiannual Financial Framework 2014-2020, until their closure.

55. **Second**, the UK will be liable for its share of the budgetary commitments of the EU budget (i.e. the amount committed but not yet paid out to beneficiaries, known as 'outstanding commitments' or the 'RAL', which is an acronym for the French term 'reste à liquider') outstanding as at the end of 2020 (see Article 140). The UK will also benefit from some of these commitments, since it will benefit from EU programmes committed under the Multiannual Financial Framework 2014-2020 until the closure of those programmes.
56. **Third**, the UK will be liable for its share of the financing of those Union liabilities as at the end of 2020 for which there are not corresponding assets (see Article 142(1)). These liabilities include, in particular, the EU's pension liabilities which have accrued on or before the end of 2020 (Article 142(2)).
57. Article 139 determines what is meant by the UK's 'share' of the RAL and of the Union's liabilities as at the end of 2020. It will be based on the UK's average share of EU contributions during the current Multiannual Financial Framework i.e. the UK's share will be the average of its share of the EU budget (taking into account the rebate) in the period 2014-2020.
58. The EU will pay a share of certain assets to the UK, including a share of certain fines levied by the Union (Article 141), and the UK's paid-in capital of the ECB (Article 149). The EU will also pay the UK's paid-in capital of the EIB (Article 150(4)). The UK will cease to be a member of the EIB (Article 151) and will be liable, on equal terms as the Member States, for its share of subscribed capital up to the amount as it stood on exit day in respect of the EIB's financial operations that were approved before exit day (Articles 150 and 151). These liabilities decrease as those operations conclude or reduce. The UK will also be liable for a share of the EU's contingent liabilities, but only those entered into up to the date of withdrawal (Articles 143 and 144), except for legal cases related to the budget and linked policies and programmes, where the cut-off point is the end of 2020 (Article 147).
59. The UK will get a share of the associated pre-paid guarantee funds and reflows from the financial operations (Articles 143(7) and 144(3)). The UK will also receive its share of the net assets of the European Coal and Steel Community in liquidation as at the end of 2020 (Article 145), as well as its share of the Union's investment in the paid-in capital of the European Investment Fund as at the same time (Article 146).
60. The UK will continue to participate in the current European Development Fund (EDF), which covers the same period as the 2014-20 Multiannual Financial Framework (Article 152). UK Overseas Territories will benefit from the current EDF until its closure, and from previous EDFs until their closure (Article 152(3)). The UK will honour the commitments it made to the EU Trust Funds and the Facility for Refugees in Turkey (Article 155). The UK will contribute to the costs of agencies not funded by the EU budget as well as to the costs of CSDP operations (Articles 156 and 157).

61. Article 148 sets out when payments made by the UK to the EU, or by the EU to the UK, will be made after 2020. Except for the UK's participation in the EU budgets for 2019 and 2020, which will be under the current arrangements and paid in sterling, the financial settlement will be drawn up and paid in euro (Article 133). The UK will appoint auditors to audit the implementation of the financial settlement. On the UK's request, the EU will provide these auditors with information and assistance to allow them to accomplish their task (Article 134).

Part Six: Institutional and Final Provisions (Articles 158 to 185)

Consistent interpretation and application (Articles 158 to 163)

62. These provisions deal with mechanisms and principles for ensuring that the Agreement is interpreted and applied in a consistent manner by the UK and the EU. These provisions complement the general rules in Article 4 which explain how the Agreement is to be given legal effect within the UK.
63. Articles 158 and 159 deal specifically with arrangements to ensure that the rights of citizens under Part Two of the Agreement are interpreted in a way which is consistent with their interpretation and application in the EU. Article 158 allows (but does not require) UK courts to refer questions of interpretation of Part Two to the CJEU for a period of eight years from the end of the implementation period (for questions relating to “*the EU settlement scheme*” (Article 18) the period of eight years starts from the beginning of the implementation period because those provisions apply from that point). Article 159 requires the UK to set up an independent UK authority to monitor the application of Part Two in the UK which will have powers “*equivalent*” to the Commission but operating under UK law.
64. Article 160 allows for the Commission to bring infraction proceedings and for UK courts to make preliminary references to the CJEU with respect to the Union law which is applicable under two articles of the financial settlement (Articles 136 and 138(1) or 138(2)). These articles provide for the continued application of the EU budgetary framework to the payments and receipts due under Part Five of the Agreement, but only in respect of the financial years up to the end of 2020 or to programmes and activities committed under the Multiannual Financial Framework 2014-2020.
65. Some proceedings before the CJEU in future will affect the UK’s interests under the Agreement and the EU will have an interest in certain proceedings before UK courts where they concern the agreement. Articles 161 and 162 therefore set out the circumstances in which the UK can make representations in the CJEU and the Commission can make representations in UK courts, as well as dealing with related issues as to legal representation in those proceedings. Article 163 makes a broad commitment to regular dialogue between the CJEU and the UK’s highest courts.

Institutional provisions (Articles 164 to 166)

66. These provisions establish the Joint Committee which is the means by which the UK and the EU will govern the relationship between them and which will act by mutual consent. Its tasks include generally supervising the Agreement's implementation and application and the work of its specialised committees. The Joint Committee can in limited circumstances adopt amendments to the Agreement in the circumstances set out in Article 164(5)(d) (to deal with errors, omissions, deficiencies or unforeseen circumstances provided these do not affect the essential elements of the Agreement) or in other specified cases, including Article 36 (updates to social security rules) and Article 132(3)(d) (consequential amendments in the event of an extension to the implementation period).
67. Certain specialised committees are also established to deal with specific subject matters, and the Joint Committee may establish more. The initially established specialised committees cover Citizens' Rights, Separation Provisions, the Ireland/Northern Ireland Protocol, the Protocol on the Sovereign Base Areas, the Protocol on Gibraltar and the Financial Settlement. The specialised committees do not make decisions or recommendations themselves but produce only draft recommendations and decisions to be referred to the main Joint Committee for adoption (or not, as the case may be).

Dispute settlement (Articles 167 to 181)

68. These provisions set out the mechanisms by which disputes between the parties are to be resolved. The formal dispute settlement mechanism only applies after the end of the implementation period. For any disputes arising under the Agreement, the EU and the UK can only have recourse to this dispute settlement mechanism (Article 168).
69. The parties are under an obligation to try to settle their disputes by negotiation and it is expected that most differences which arise will be resolved politically by mutually acceptable means on an ongoing basis without having to adopt more formal procedures. However, where a dispute cannot be resolved by negotiation the matter may be referred to the Joint Committee. The EU and the UK will then enter into consultations in the Joint Committee with a view to reaching a mutually agreed solution (Article 169).
70. If no such mutually agreed solution can be found within three months, either party can refer the matter to arbitration (Article 170). A reference can be made at an earlier stage by agreement. Arbitration is a common method of settling disputes under international law. The Agreement sets out how the arbitration panel is to be established, how the arbitrators will be selected and the rules which govern its operation.

71. The Agreement provides for the establishment of a five person panel of arbitrators who are to be selected from a list of potential arbitrators established by the EU and the UK jointly (Article 171). There are provisions to deal with the situation where the parties are unable to agree on the list. The persons nominated to serve as arbitrators must be independent of the UK and Member State Governments and of the EU, they must possess the qualifications required for appointment to the highest judicial office in their respective countries or be lawyers of recognised competence, and they must possess specialised knowledge or experience of Union law and public international law.
72. When a dispute is referred to arbitration, the EU and the UK will each nominate two members of the panel and those members then appoint a fifth person as chairperson. If the members cannot agree on the chair, the Secretary-General of the Permanent Court of Arbitration will be asked to choose the chairperson by lot from the shortlist of names proposed by the parties (Article 171). The panel should deliver its ruling within 12 months, although this timeframe may be shortened to six months if either side submits a reasoned request that the case is urgent, or extended by the panel after providing reasons for the delay (Article 173).
73. If the dispute before the arbitration panel raises a question concerning the interpretation of a provision of Union law made applicable by the Agreement (such as the Separation Provisions under Part Three), or of a concept of Union law incorporated into the Agreement (such as the citizens' rights provisions in Part Two), or a question of whether the UK has complied with a prior decision of the CJEU, the panel must refer that question to the CJEU for a ruling (Article 174).
74. Either the EU or the UK can request the panel to make such reference. In that case, the panel must assess whether such a question of Union law is at issue and make a reference if so, giving reasons for its decision. Either party may ask the panel to review its decision on whether to make a reference. The panel will give a reasoned response after hearing the parties. If a question of the interpretation of Union law is referred to the CJEU, the Court's interpretation of Union law is binding on the arbitration panel, but the panel remains competent to settle the dispute between the EU and the UK in light of the Court's interpretation. The time limits referred to above will be suspended until the CJEU has given its ruling.
75. The UK and the EU must take any necessary measures to comply with an arbitration panel ruling within a reasonable period of time (Articles 175 and 176). The panel can decide whether sufficient steps have been taken to comply. In case of non-compliance by either party after the reasonable period of time has expired, the other party may request the panel to impose a lump sum or penalty payment as a temporary remedy to enforce compliance (Articles 177 and Article 178(1)). If the party in breach fails to pay, or if that party has still not complied with the original panel decision after a further six months, the other party may suspend obligations arising from the Agreement (other than Part Two on citizens' rights) or parts of "*any other agreement between the Union and the United Kingdom under the conditions set out in that agreement*" (Article 178(2)). Any suspension of obligations must be proportionate to the breach of the Agreement. The arbitration panel can be asked to review the proportionality of a suspension (Article 179).

Final provisions (Articles 182 to 185)

76. Article 184 provides a link between the Agreement and the political declaration agreed in parallel with it which sets out the framework for the UK's future relationship with the EU. This article requires the EU and the UK to use their "*best endeavours, in good faith*" to negotiate the agreements governing the future relationship "*expeditiously*", with a view to ensuring that they apply from the end of the implementation period. The EU and the UK have acknowledged that Article 184 imposes no obligations regarding the territorial scope of the future relationship, and creates no obligation or presumption that the future relationship will have the same territorial scope as the Withdrawal Agreement (see Article 3).
77. This is an obligation as to the conduct of the parties, rather than an obligation to achieve a particular result. There is a related obligation to use best endeavours to conclude a future Agreement in Article 2(1) of the Ireland/Northern Ireland Protocol. See also the duty of good faith in Article 5, discussed above. A dispute about whether a party has complied with this obligation could be resolved under the dispute resolution mechanisms in the Agreement, which during the implementation period would be the CJEU (see Article 131) and afterwards would be the mechanism in Articles 167 to 181 (see above). A reciprocal legal obligation to negotiate in good faith with a view to concluding agreements is a well recognised concept in international law. Relevant precedents indicate that such obligations require the parties to conduct negotiations in a meaningful way, contemplate modifications to their respective positions and pay reasonable regard to each other's interests.¹¹
78. The remainder of this Part contains further provisions concerning the mechanics of the Agreement, including on its entry into force. In summary, Part One (Common Provisions), Part Four (Transition), Part Five (Financial Settlement) and some aspects of Part Six (Institutional and Final Provisions) apply from exit day (30 March 2019).¹² With some limited exceptions, Part Two (Citizens' Rights), Part Three (Separation Provisions) and most of Part Six (Institutional and Final Provisions) apply from the end of the implementation period.
79. In the event that the Ireland/Northern Ireland Protocol comes into effect, in general it would apply from the end of the implementation period although there are some exceptions to this (see Annex).
80. The Protocol on the Sovereign Base Areas applies for the most part from the end of the implementation period.

¹¹ For example: *North Sea Continental Shelf*, Judgment 20 February 1969, ICJ Reports 1969, p. 3 (paragraph 85); *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v Chile)*, Judgment 1 October 2018 (paragraphs 86-87).

¹² For the purposes of UK law, 'exit day' means 29 March 2019 at 11.00 pm (section 20 of the European Union (Withdrawal Act) 2018).

81. The Protocol on Gibraltar only applies during the implementation period, except for one article dealing with citizens' rights.
82. The Agreement does not contain any provision on its termination. In the absence of such a provision, it is not possible under international law for a party to withdraw from the Agreement unilaterally. The Protocol on Ireland/Northern Ireland contains specific provisions on when and in what circumstances it ceases to apply – see the discussion below of Articles 2 and 20 of the Protocol.

Protocols to the Withdrawal Agreement

Protocol on Ireland/Northern Ireland

83. The Northern Ireland Protocol is discussed in the Annex.

Protocol relating to the Sovereign Base Areas in Cyprus

84. This Protocol makes specific provision in respect of the UK's Sovereign Base Areas (SBAs) on the island of Cyprus. With the exception of Article 11 (which ensures that new areas of Union law cannot be applied to the SBAs during the implementation period when the UK does not have a vote in the Council), the Protocol applies from the end of the implementation period. Prior to this, the implementation period ensures that the current arrangements that relate to Union law (contained in Protocol 3 to the Cyprus Accession Treaty) continue to apply to the SBAs.
85. The purpose of the Protocol is to define the arrangements applicable between the SBAs and the EU after the end of the implementation period, respecting the 1960 Treaty concerning the Establishment of Cyprus (to which the UK is a party) and the associated commitments the UK and the Republic of Cyprus made at the time that treaty was concluded. In particular, this includes ensuring the effective operation of the UK military bases and fulfilment of the commitments that there should be no frontier or customs posts between the SBAs and the Republic of Cyprus and that the laws applicable to Cypriots living or working in the SBAs should, as far as possible, be the same as those applicable in the Republic of Cyprus.
86. The Protocol therefore provides for the SBAs to continue to be part of the customs territory of the Union and makes other associated provision, such as applying relevant Union law on goods to the SBAs and making clear which goods may enter and leave the island of Cyprus via the SBAs themselves for the purposes of supporting the operation of the SBAs as military bases (Article 2). The Protocol preserves the UK's duty reliefs in respect of goods and services for the armed forces and associated civilian staff in accordance with the Treaty of Establishment (Article 4).
87. The Protocol makes provision for other areas of Union law relevant to the civilian Cypriot population to apply in the SBAs (taxation, agriculture, fisheries, veterinary and phytosanitary rules). Reflecting the arrangements which currently operate between the SBAs and the authorities of the Republic of Cyprus, the UK has conferred responsibility on the Republic of Cyprus for implementing and enforcing these provisions of the Protocol (Articles 3 and 6). This is, however, subject to the continuing responsibility of the United Kingdom for enacting the relevant domestic legislation necessary to implement the Protocol and being responsible for

implementing and enforcing in respect of UK authorities, property owned by the Ministry of Defence and in respect of coercive enforcement powers (Article 13).

88. The Protocol preserves existing social security arrangements (Article 5) and arrangements relating to checks on persons crossing the external borders of the Sovereign Base Areas (Article 7). The Protocol also provides for relevant EU data protection law to apply in respect of personal data processed in the SBAs on the basis of the Protocol (Article 1(3)).
89. In terms of supervision and enforcement, the Protocol provides for EU institutions, bodies, offices and agencies to continue to have the same powers in respect of Union law applied in the SBAs as they do now. The CJEU continues to have jurisdiction (Article 1(2) and Article 12). This reflects the fact that Union law continues to apply in the SBAs in the areas provided for in the Protocol.
90. Finally, the Protocol specifies the functions of the Specialised Committee on the SBA Protocol (Article 9) and provides for the Joint Committee to be able to make certain technical amendments (Article 10), in particular in relation to the law applicable at the crossing points on the 'Green Line' between the Eastern SBA and northern part of Cyprus.

Protocol on Gibraltar

91. This Protocol makes specific additional provision in respect of Gibraltar and, in particular, provides for cooperation between the UK in respect of Gibraltar and Spain in specified areas. With the exception of Article 1 (citizens' rights) it applies only for the duration of the implementation period. The Protocol (Article 6) also specifies the particular tasks of the Specialised Committee on the implementation and application of the Protocol established by the institutional provisions of the Agreement. The Protocol is to be implemented in accordance with the constitutional orders of the UK and Spain, which means, in the case of Gibraltar, that it will be for the Government of Gibraltar to give effect to most of its provisions.
92. In respect of citizens' rights (Article 1) the Protocol provides that there must be close cooperation between the United Kingdom in respect of Gibraltar and Spain in preparing and underpinning the effective implementation of Part Two of the Agreement (Citizens' Rights), including through relevant data exchange.
93. Article 2 means that Union law on air transport which does not apply to Gibraltar airport before exit day will only apply to that airport during the implementation period from a date to be set by the Joint Committee. This will follow the UK and Spain notifying the Committee that they have reached an agreement on the use of Gibraltar airport.

94. Article 3 deals with fiscal matters and protection of financial interests. It requires the United Kingdom in respect of Gibraltar and Spain to cooperate to achieve full transparency in tax matters and in respect of protecting financial interests, such as by enhancing cooperation in tackling fraud. It also requires certain international standards on fiscal matters to be complied with in Gibraltar. In respect of tobacco, it requires the UK to ensure that certain international conventions on tobacco control are extended to Gibraltar by 30 June 2020 and also to ensure that there is a system of traceability and security measures for tobacco products in Gibraltar which is equivalent to Union law by 30 June 2020.
95. Articles 4 and 5 require the UK and Spain to establish coordinating committees for discussion between the relevant competent authorities on certain environmental matters and fishing (Article 4) and for monitoring and coordination between the relevant competent authorities in police and customs matters (Article 5). The Union is invited to participate in meetings and the coordinating committee must report to the Specialised Committee.

Annex – Protocol on Ireland/Northern Ireland

Objectives, subsequent agreement and extension of the implementation period

1. Articles 1 and 2 of the Protocol set out its objectives and relationship to the subsequent agreement that is intended to supersede it. The objective of the Protocol is to address the unique circumstances on the island of Ireland, maintain the necessary conditions for continued North-South cooperation, avoiding a hard border on the island of Ireland, and protect the Belfast (Good Friday) Agreement ('the 1998 Agreement') in all its dimensions (Article 1(3)).
2. The Protocol sets out that it does not affect the constitutional status of Northern Ireland, the principle of consent, or the essential State functions or territorial integrity of the United Kingdom (Articles 1(1) and 1(2)). According to the principle of consent, as set out in the 1998 Agreement¹³, section 1 of the Northern Ireland Act 1998 and Article 2 of the Constitution of Ireland¹⁴, Northern Ireland in its entirety remains part of the United Kingdom and cannot cease to be so without the consent of a majority of the people of Northern Ireland.¹⁵ The principle of consent relates only to the constitutional position of Northern Ireland as part of the United Kingdom, and does not, for example, require the consent of a majority of the people of Northern Ireland to the withdrawal of the UK from the EU.¹⁶ The Protocol and the UK's withdrawal from the European Union do not affect the principle of consent, or any other provision of the 1998 Agreement, in any way.

¹³ Annex, Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland, Constitutional Issues, 1(iii).

¹⁴ In addition to the provisions in the Northern Ireland Act 1998, the Irish Government were required to amend their constitution in line with Annex A, Constitutional issues, Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland. Article 2 of their Constitution was amended on 3 June 1998 by the Nineteenth Amendment of the Constitution Act 1998 to provide "...recognising that united Ireland shall be brought about only by peaceful means with consent of the majority of people, democratically expressed, in both jurisdictions in the island."

¹⁵ The 1998 Agreement was ratified in referendums held on 22 May 1998 both in Northern Ireland and in Ireland.

¹⁶ See *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5. At paragraph 135 the Supreme Court found that section 1, "which arose out of the Belfast Agreement, gave the people of Northern Ireland the right to determine to remain part of the United Kingdom or to become part of a united Ireland." It did not require "the consent of a majority of the people of Northern Ireland to the withdrawal of the United Kingdom from the European Union."

3. The main provisions of the Protocol come into force from the end of the implementation period (31 December 2020 – see Article 185 of the Agreement) in the event that a subsequent agreement is not in place by then, and the Protocol will continue to apply unless and until it is superseded, in whole in or part, by a subsequent agreement establishing alternative arrangements (Article 1(4), and the fifth recital in the preamble). However, if the implementation period is extended in accordance with Article 3 of the Protocol and Article 132 of the Agreement, then the Protocol will not start to apply until after the end of that extended period. Certain provisions, relating to preparatory work or the obligation to use best endeavours to conclude an agreement to replace the Protocol, come into force immediately on the coming into force of the Agreement.
4. If the Protocol starts to apply after the end of the implementation period, then it will continue to do so unless and until its provisions are superseded by a subsequent agreement between the UK and the EU establishing alternative arrangements. However, the Protocol records the parties' intention that the Protocol should indeed be superseded by such a subsequent agreement, and that if it does start to apply then it should do so only temporarily (Article 1(4)). The recitals confirm that the Withdrawal Agreement, which is based on Article 50 TEU, does not aim at establishing a permanent future relationship between the EU and the UK. Article 50 TEU only provides a legal basis for an agreement setting out the arrangements for the UK's withdrawal, which can take account of the framework for the future relationship but cannot itself include or constitute that relationship. The EU and the UK therefore agree to use their best endeavours to conclude a subsequent agreement by 31 December 2020 (Article 2(1); see also Article 184 of the Agreement). Once such an agreement becomes applicable, then in accordance with provisions of that agreement setting out its effect on the Protocol, the Protocol, or certain of its provisions, will either not come into force or cease to apply.

Review

5. Article 20 of the Protocol contains a review provision, under which the parties may decide that the Protocol should cease to apply if it is no longer necessary to achieve its objectives. This needs to be considered in light of the other provisions in the Agreement to which it refers.
6. The first paragraph provides that if at any time after the end of the implementation period the EU or the UK considers that the Protocol is, in whole or in part, no longer necessary to achieve the objectives set out in Article 1(3) and should cease to apply, in whole or in part, it may notify the other party, setting out its reasons.
7. The conditions in Article 1(3), as described above, are that the Protocol is necessary "*to address the unique circumstances on the island of Ireland, maintain the necessary conditions for continued North-South cooperation, avoid a hard border and protect the 1998 Agreement in all its dimensions.*" These conditions would be met if the parties had established alternative arrangements for ensuring the absence of a hard border.

8. Under the second paragraph of Article 20, within six months of receiving such a notification, the Joint Committee must meet at ministerial level to consider it, having regard to all of the objectives referred to in Article 1. So in addition to the conditions in Article 1(3), it must have regard to Article 1(4), which provides that “*the objective of the Withdrawal Agreement is not to establish a permanent relationship between the Union and the United Kingdom. The provisions of this Protocol are therefore intended to apply only temporarily, taking into account the commitments of the Parties set out in Article 2(1)*”. Article 2(1) is the obligation on the UK and the EU to “*use their best endeavours to conclude, by 31 December 2020, an agreement which supersedes this Protocol in whole or in part*”. It is also relevant to note in this context the obligation in Article 184 of the Agreement to use best endeavours to negotiate agreements governing the future relationship, and the reference in the recitals to the Protocol recalling that the Agreement, which is based on Article 50 TEU, does not aim at establishing a permanent future relationship between the EU and the UK. At this stage the Joint Committee may seek an opinion from institutions created by the 1998 Agreement: the Northern Ireland Assembly, the Northern Ireland Executive, the North/South Ministerial Council, the British-Irish Intergovernmental Conference, and the British-Irish Council.
9. The third paragraph of Article 20 provides that if – after the consideration described in the second paragraph, and acting in full respect of the duty of good faith in Article 5 of the Agreement (see above) – the EU and the UK decide jointly within the Joint Committee that the Protocol, in whole or in part, is no longer necessary to achieve its objectives, then the Protocol shall cease to apply, in whole or in part.
10. If the Joint Committee does decide that the Protocol should cease to apply, it must make recommendations on necessary measures, taking into account the obligations of the parties to the 1998 Agreement (i.e. the UK and Ireland).
11. It follows from the general provisions of the Agreement and the Protocol that the provisions in this article are subject to the dispute resolution procedure in Title III of Part Six of the Agreement (see above), including reference by the Joint Committee to an arbitration panel whose decision is binding. An arbitration panel would be able to consider, for instance, whether the parties had acted in good faith in accordance with Article 5 during the process, and whether a party had acted lawfully in reaching a view about whether the Protocol was necessary to achieve its objectives. A tribunal would only find a breach of the duty of good faith if there was a clear basis for doing so (see the discussion above of Article 5 of the Agreement). In the absence of such a clear basis, a panel would be unlikely to find that a party had acted unlawfully in reaching its view under Article 20 about whether the Protocol continued to be necessary.

Rights of individuals and Common Travel Area

12. The UK commits in Article 4 to ensuring that its withdrawal from the EU does not lead to any diminution of the rights of individuals protected by the chapter on Rights, Safeguards and Equality of Opportunity of the 1998 Agreement, including in respect of the area of protection against discrimination enshrined in provisions of Union law detailed in Annex 1. The UK has agreed to implement this obligation through a dedicated mechanism, drawing on existing human rights and equalities bodies established in Northern Ireland.
13. The provisions of Union law detailed in Annex 1 cover equal treatment in matters of employment and occupation, equal treatment irrespective of racial or ethnic origin and equal treatment between men and women in the access to and supply of goods and services, self-employment, and matters of social security. Article 4 does not directly require compliance with these provisions of Union law: it just prohibits any diminution in rights falling within the relevant provisions of the 1998 Agreement, including but not limited to the listed provisions of Union law, and only if the diminution is a result of the UK's withdrawal from the EU.
14. Article 5 provides that the UK and Ireland may continue to make arrangements between themselves in respect of the Common Travel Area relating to the movement of persons between their territories, but in a way which does not affect Ireland's obligations under Union law, in particular with respect to free movement for Union citizens and their family members.

Single customs territory and movement of goods

15. Articles 6 to 12 of the Protocol contain the rules applicable from the end of the implementation period, in the event that the agreement envisaged in Article 2(1) of the Protocol has not yet become applicable by that date, to apply until that agreement does become applicable.

UK-wide provisions

16. Article 6(1) provides for a single customs territory comprising the customs territory of the UK and the customs territory of the EU (as defined in Article 4 of the Union Customs Code, Regulation 952/2013). The third subparagraph of Article 15(1) (Common provisions) establishes that this is a single customs territory as defined in Article XXIV of the General Agreement on Tariffs and Trade 1994 (GATT).¹⁷ Article

¹⁷ Under Article XXIV:2 of GATT, a customs territory is any territory with respect to which separate tariffs or other regulations of commerce are maintained for a substantial part of the trade of such territory with other territories.

6(1) also makes clear that Northern Ireland is in the same customs territory as Great Britain.¹⁸

17. Article 6(1) and Annex 2 define the scope of that single customs territory, under which the UK aligns itself with the Union's external tariff and there can be no tariffs or quantitative restrictions on imports and exports between the UK and the EU. The single customs territory therefore constitutes a customs union for the purposes of GATT¹⁹, but it is not the EU's customs union as defined in Article 28 TFEU. The provisions in Article 6(1) and Annex 2 establishing the single customs territory do not directly apply provisions of Union law to the UK, but create new concepts that are to be interpreted in accordance with normal principles of international law.
18. Article 1 of Annex 2 defines the scope of the single customs territory, by defining the goods that benefit from the provisions. The single customs territory applies to all goods produced in the EU or the UK, and goods coming from outside the customs territory on which the correct tariff has been paid. Article 6(1), fifth subparagraph, excludes fishery and aquaculture products from the scope of the single customs territory, unless an agreement on access to waters and fishing opportunities is applicable (i.e. is in effect) between the UK and the EU. The UK and the EU must use best endeavours to reach such an agreement by 1 July 2020. Absent such an agreement, the single customs territory still has effect but tariffs are chargeable on fish and aquaculture products.
19. Article 2 of Annex 2 prohibits customs duties on goods moving between the parts of the single customs territory, as defined in Article 15(2) of the Protocol. It also applies the rules in GATT concerning national treatment, freedom of transit, and elimination of quantitative restrictions, and includes a national security exemption.
20. Article 3 requires the UK to align its tariffs with the EU's Common Customs Tariff. If for any reason that is not possible then in any event the UK may not charge lower tariffs than the EU, although it may in such circumstances charge higher tariffs pending the conclusion of a third country agreement that allows for alignment with the EU's preferential rates. The Common Customs Tariff includes preferential tariffs under the EU's trade agreements with other countries, preferential tariffs that the EU has adopted unilaterally, retaliatory duties imposed in the context of a trade dispute, and tariffs imposed under the EU's trade defence instruments. Article 4(3) requires the EU to consult the UK about any trade defence measures or actions that it is considering taking under the Generalised Scheme of Preferences and for the EU's trade defence regime to cover both parts of the single customs territory.

¹⁸ The arrangements under the Protocol are therefore consistent with s.55 of the Taxation (Cross-border Trade) Act 2018, under which it is unlawful for the Government to enter into arrangements under which Northern Ireland forms part of a separate customs territory to Great Britain. The Act says that for these purposes, "customs territory" has the same meaning as in the General Agreement on Tariffs and Trade 1947 as amended. This is the same as the General Agreement on Tariffs and Trade 1994 referred to in Article 15(1) of the Protocol.

¹⁹ As defined in Article XXIV:8(a).

21. Article 4 requires the UK to harmonise its commercial policy with the EU's common commercial policy to the extent necessary for the operation of the single customs territory.
22. Article 5 provides for administrative cooperation. Article 6 allows the EU to impose specific remedies, including tariffs, if the UK has not complied with its legal obligations under the Annex with respect to goods entering Great Britain from third countries. The EU can do so without first having to go through the dispute resolution mechanism in the Agreement, although the UK may use that mechanism to dispute measures that the EU has taken.
23. Article 6(1), third subparagraph, of the Protocol requires the Joint Committee to adopt a decision establishing detailed rules on goods movements between the two parts of the single customs territory, as defined in Article 15(2) of the Protocol. In the absence of such a decision, the provisions in Annex 3 apply, which include matters such as rules about the documentary evidence required for goods to move between the parts of the single customs territory. That Annex can also be amended by the Joint Committee at any time, so long as the amendment does not affect essential elements of the Protocol of the Agreement itself (Article 6(1), fifth subparagraph).
24. Annex 4 contains 'level playing field' obligations attached to the single customs territory (see further below).

Provisions specific to Northern Ireland

25. Articles 6(2) and 10 make specific provision in respect of Northern Ireland, requiring Union law to be applied to the extent necessary to ensure the absence of any border controls between Northern Ireland and Ireland. The Union Customs Code (Regulation 952/2013) is applied to Northern Ireland (excluding any territorial waters), together with the provisions of Union law listed in Annex 5. That legislation is read as including Northern Ireland in the EU's customs territory for the purposes of applying the EU legislation (see Article 15(1) of the Protocol). To ensure this does not mean that Northern Ireland vessels face tariffs on fish landed in the customs territory of the EU, the Joint Committee is required to establish the conditions under which UK vessels registered at a port in Northern Ireland are exempted from duties.
26. The provisions of Union law listed in Annex 5 include goods regulations, product requirements, sanitary and phytosanitary (SPS) measures, and customs and trade defence regulations. As these obligations apply in Northern Ireland but not Great Britain, the UK is required to ensure that goods moving to Northern Ireland from Great Britain comply with those rules. However, Article 7(2) of the Protocol requires the EU and the UK to use their best endeavours to facilitate Great Britain-Northern Ireland trade, taking into account their respective regulatory regimes. The Joint Committee is required to keep such facilitation under constant review, and adopt recommendations to avoid to the extent possible controls at ports and airports of Northern Ireland.

27. Under the third subparagraph of Article 6(2), customs duties, quantitative restrictions and discriminatory taxation are prohibited between the EU and Northern Ireland. These concepts have the same meaning as in Union law, and are therefore subject to the same exclusions and exceptions (see Article 4 of the main Agreement). The provision therefore prevents both the EU and Northern Ireland from imposing unjustified quantitative restrictions on each other's goods. It does not prohibit "*measures having equivalent effect*" to quantitative restrictions on imports and exports within the meaning of Articles 34 and 35 TFEU²⁰ in areas not covered by specific EU legislation. However, Northern Ireland may not impose such measures on goods imported from the EU, in areas where it applies domestic rather than EU requirements, because Article 8(1) of the Protocol applies Article 34 TFEU to it in full.
28. Article 7 of the Protocol contains provisions facilitating unfettered market access for goods moving from Northern Ireland to the rest of the UK's internal market, in addition to the provisions in Article 7(2) referred to above. Article 7(1) provides that the Protocol does not require prohibitions or restrictions on exports in EU legislation – that is, EU legislation prohibiting or restricting the export of specified goods from the EU – to apply to movements of goods from Northern Ireland to Great Britain, except to the extent strictly necessary for the EU to comply with its international obligations. This reflects the fact that EU legislation in this area may implement international agreements to which the EU is a party. Articles 7(3) and 7(4) clarify that it is compatible with the Protocol for goods originating in Northern Ireland to be sold in the rest of the UK as UK goods, and for goods that meet regulatory requirements in Northern Ireland to be put on the market in the rest of the UK without the need for any further formalities.
29. Article 8 sets out technical rules for product authorisations. Certificates and similar documentation issued by UK bodies and authorities are valid in Northern Ireland, including to show conformity with the EU rules applicable there, and where conformity marking is required it must be accompanied by "UK(NI)". However, they are not valid in EU Member States except in cases where physical inspections of premises in Northern Ireland may be required, or in relation to plant reproductive material or veterinary inspections: in those cases, a certificate issued by UK authorities is valid throughout the EU. A "*qualified person*" in Northern Ireland can also batch test and release into the EU market medicinal products imported into or manufactured in Northern Ireland. See also Article 15(7) of the Protocol, discussed below.
30. Article 9 of the Protocol applies the VAT and excise legislation listed in Annex 6 to Northern Ireland. The UK will continue to set VAT rates in Northern Ireland, subject to requirements for minimum rates in the relevant EU legislation listed in Annex 6.

²⁰ See *Dassonville*, 8/74, EU:C:1974:82, and '*Cassis de Dijon*', 120/78, EU:C:1979:42.

31. Article 11 and Annex 7 of the Protocol apply to Northern Ireland certain provisions of Union law relevant to the generation, transmission, distribution, and supply of electricity, trading in wholesale electricity or cross-border exchanges in electricity to facilitate the operation of the Single Electricity Market. Annex 7 provides that provisions relating to retail markets and consumer protection do not apply.
32. Article 12 provides that the provisions of Union law on State aid listed in Annex 8 apply in the UK in respect of measures which affect trade between Northern Ireland and the EU. Commission and CJEU enforcement and supervision jurisdiction apply in respect of such measures (Article 14(4)). Measures which affect trade between Great Britain and the EU, but not trade between Northern Ireland and the EU, are subject to a separate regime: they are covered by Articles 7 to 15 of Annex 4 to the Protocol concerning the level playing field (see below). The trade that must be affected for the purposes of Article 12 (and Articles 7 to 15 of Annex 4 to the Protocol) is trade in relation to goods (including the Single Electricity Market) and the production of and trade in agricultural products in Northern Ireland. Measures in Northern Ireland supporting the production of and trade in agricultural products will be exempt from Union State aid rules up to a maximum annual level of support, that will be decided in accordance with the provisions in Annex 9.

North-South cooperation

33. Article 13 of the Protocol requires the Protocol to be implemented and applied so as to maintain the necessary conditions for continued North-South cooperation, including in the areas of environment, health, agriculture, transport, education and tourism, as well as in the areas of energy, telecommunications, broadcasting, inland fisheries, justice and security, higher education and sport. This partly relates to Strand II of the 1998 Agreement, which committed the signatories to the creation of institutional arrangements for this purpose, including the establishment of the North South Ministerial Council (NSMC) and other bodies, and reflects other aspects of cooperation that have already been agreed separately from the formal remit of the NSMC and put into practice between the jurisdictions in Northern Ireland and Ireland. Article 13 does not alter the remit or functions of the NSMC or the North-South Implementation bodies, nor does it alter Strand II of the 1998 Agreement in any way. The Protocol acknowledges that, in full respect of Union law, the UK and Ireland may continue to make new arrangements that build on the provisions of the 1998 Agreement in other areas of North-South cooperation on the island of Ireland. In accordance with the position set out in the recitals, the functions and safeguards of the Assembly and the NSMC (including cross-community provisions) will be respected in full. This means that arrangements for North-South cooperation remain a matter for the Northern Ireland Executive and the Government of Ireland to determine. The Joint Committee is tasked with keeping under constant review the extent to which the implementation and application of this Protocol maintains the necessary conditions for North-South cooperation.

Supervision and enforcement

34. Article 14 of the Protocol provides for its implementation, application, supervision and enforcement. The starting point is that it is UK authorities who are responsible for implementing and applying the provisions of Union law made applicable by the Protocol in respect of Northern Ireland (Article 14(1)). EU officials can be present and request information from the UK authorities and, in individual cases (for example, contaminated consignment identified through risk management and intelligence), for duly stated reasons, request the UK authorities to carry out control measures which the UK authorities must then carry out. The practical arrangements are to be determined by the Joint Committee (Articles 14(2) and 14(3)).
35. The arrangements are different for Articles 6(2) and 8 to 12, which concern the application in respect of Northern Ireland of the Union Customs Code and related legislation, agriculture and environment, product certification, VAT and excise, the Single Electricity Market and State aid (see above; but see further detail below for how State aid obligations apply in Annex 4). Article 14(4) provides that the EU institutions, including the CJEU and Commission, have the same powers as under the EU Treaties, including in relation to preliminary references from UK courts and tribunals to the CJEU. Article 14(5) provides that acts of EU bodies and institutions in these areas produce the same legal effects in the UK as in the EU. Provision is made in Article 14(6) for UK lawyers to have the same treatment in EU procedures as Member State lawyers, including rights of audience before the CJEU.²¹
36. For the rest of the Protocol, the general dispute resolution procedures in Title III of Part Six of the Agreement apply (see above), including the Joint Committee and arbitration mechanisms. The application of any dispute resolution procedure is also excluded for certain articles within Annex 4 (Level Playing Field), discussed below.

Common provisions

37. In general, provisions of the main Agreement apply to the Protocol, except where the Protocol makes specific provision to the contrary, for example some aspects of dispute resolution discussed above (Article 15(1)).
38. However, Article 15 makes an exception for the provisions of Union law imported into the Protocol. They must be interpreted and applied in accordance with CJEU case law regardless of when the relevant judgment was handed down (Article 15(3) – compare the position under Article 4 of the main Agreement). Where EU legislation referred to in the Protocol is amended or replaced, references in the

²¹ Article 14(4) of the Protocol also applies to Article 7(1) of Annex 4, concerning State aid, “in respect of measures of the Member States”. This does not give any powers to the EU institutions in relation to the UK. Its purpose is to give the CJEU jurisdiction over the 27 Member States in relation to State aid affecting trade between the UK and the EU, which it would not otherwise have under the EU Treaties.

Protocol are to be read as if to the amended or replaced act (Article 15(4) – compare the position under Article 6(1) of the main Agreement).

39. The position is different, however, for new EU legislation that falls within the scope of the Protocol but neither amends nor replaces EU legislation listed in the Annexes to the Protocol. Article 15(5) sets out a procedure for the Joint Committee to decide whether to add such legislation to the Annexes. If agreement cannot be reached within the Joint Committee – for instance, if the UK opposes inclusion of the measure in the Protocol – then the Joint Committee must consider what other steps can be taken to maintain the good functioning of the Protocol. If the Joint Committee fails to take such a decision within a reasonable time, the EU can take appropriate remedial measures. The UK can use the dispute resolution mechanisms in the Agreement if it considers that the measures taken by the Union are inappropriate.
40. Article 15(6) also provides that, while automatic UK access to EU networks, information systems or databases will not be continued by the application of the Agreement, full or partial access may be agreed to the extent necessary for the UK to comply with its obligations under the Protocol.
41. Article 15(7) provides that UK authorities cannot act as “*leading authority*” for risk assessments, examinations, approvals and authorisation procedures provided for in Union law made applicable by the Protocol. This refers to situations where representatives from a single Member State take on a lead function in assessing the suitability of a product such as a medicine for sale in the EU market. Compare Article 8(3) of the Protocol, discussed above.
42. Article 15(9), which applies Articles 346 and 347 TFEU to the Protocol, ensures the UK is not prevented from taking certain steps in relation to Northern Ireland in order to protect its essential security interests or maintain law and order, peace or international security.

Implementation including specialised committee and working groups

43. Article 16 and Article 17 set out specific forums for engagement between the UK and the EU on issues concerning the implementation of the Protocol.
44. Article 16 creates a Specialised Committee, with representatives of both the UK and the EU, whose functions include facilitating the implementation and application of the Protocol and examining proposals made by bodies established by the 1998 Agreement or issues raised by the Northern Ireland Human Rights Commission, the Equality Commission for Northern Ireland, and the Joint Committee of representatives of the Human Rights Commissions of Northern Ireland and Ireland in their role overseeing the UK’s commitment to no diminution of rights under Article 4 of the Protocol. The Specialised Committee reports to the Joint Committee

established under the Agreement, and can make recommendations to the Joint Committee.

45. Article 17 creates a joint consultative working group, again composed of representatives of the UK and the EU, which reports to the Specialised Committee. This group provides in particular a forum for information exchange including a route for UK views and information (including technical and scientific data) to be communicated promptly to EU institutions and agencies.

Safeguards and protection of financial interests

46. Article 18 permits either the UK or the EU to take unilateral safeguard measures in the event that the application of the Protocol leads to serious economic, societal or environmental difficulties liable to persist, or to diversion of trade. If the application of safeguards creates an imbalance of rights and obligations, the other party can take proportionate rebalancing measures. Annex 10 sets out a procedure involving the Joint Committee to be used in such circumstances.
47. Article 19 requires the UK and the EU to counter fraud or illegal activities that could affect the other's financial interests.

Level Playing Field commitments

48. Annex 4 sets out commitments that bind the whole of the UK under the Protocol, in accordance with Article 6(1). These commitments would apply only in the event the backstop comes into force. The purpose of these provisions is to ensure fair and open competition between the EU and the UK, given that the UK will be in a single customs territory with the EU (see above).

Taxation

49. Article 1 sets out commitments in respect of taxation. The EU and the UK commit to implement the principles of good governance in the area of taxation including recognised global and Organisation for Economic Co-operation and Development (OECD) standards, and to curb harmful tax measures (Article 1(1)). In particular, the UK commits to maintain in its domestic law those provisions transposing Union law as they stand at the end of the implementation period concerning administrative cooperation in the field of taxation, anti-tax-avoidance rules, and country-by-country reporting by credit institutions and investment firms (so as an exception to the rule in Article 15(4) of the Protocol, amendments to this Union law after the implementation period will not apply in respect of the UK) (Article 1(2)). The UK also reaffirms its commitment to the Code of Conduct for business taxation as it stands at the end of the implementation period (Article 1(3)).

50. Other than the obligation to maintain domestic laws transposing the provisions of Union law set out above, disputes about the taxation obligations are not subject to the arbitration mechanism of the Agreement, and are instead for resolution in the Joint Committee alone (Article 1(4)).

Environmental protection

51. Article 2 sets out commitments on the EU and the UK not to lower the level of environmental protection below the common standards that apply in both the EU and the UK at the end of the implementation period (with certain further commitments to be fleshed out by the Joint Committee), otherwise known as a non-regression commitment (Article 2(1)). The EU and the UK also commit to respect certain principles such as the precautionary principle in their respective environmental legislation, as well as to effective implementation of multilateral environmental agreements including on climate change, and the UK agrees to implement a carbon pricing system of at least the same effectiveness and scope as the EU's Emissions Trading System (Article 2(2) to 2(6)).

52. Disputes in respect of these particular obligations are not subject to the arbitration mechanism of the Agreement, and are instead for resolution in the Joint Committee alone (Article 2(7)).

53. Under Article 3, the UK agrees to ensure effective domestic enforcement of the common environmental standards set out in its laws, regulations and practices, and must ensure public authorities and individuals are able to challenge such domestic laws or practices through administrative and judicial proceedings, with appropriate remedies (Article 3(1)). In addition, the UK agrees to provide for an independent monitoring body or bodies with necessary functions and powers to conduct enquires or bring a legal action before a competent court (Article 3(2)). Because no exception is made from the dispute resolution provisions in the main Agreement, the EU could use the arbitration mechanism provided for in the Agreement if it considered the UK had not met its obligation to ensure effective domestic enforcement.

Labour and social standards

54. Articles 4 and 5 set out similar commitments in respect of labour and social standards. In particular the EU and the UK agree not to lower the level of labour and social protection below the common standards (i.e the relevant EU acquis) that apply in both the EU and the UK at the end of the implementation period (Article 4(1)), and reaffirm their commitments and cooperation in respect of International Labour Organisation and Council of Europe Conventions to which they are already party (Article 5(2) to 5(3)).

55. As with the similar commitments in respect of the environment set out above, disputes in respect of these obligations are not subject to the arbitration mechanism of the Agreement, and are instead for resolution in the Joint Committee alone (Articles 4(2) and 5(4)).

56. Under Article 6, the UK agrees to ensure effective domestic enforcement of the common labour and social standards set out in its laws, regulations and practices, and must ensure public authorities and individuals are able to challenge such domestic laws or practices through administrative and judicial proceedings, with appropriate remedies. Disputes in respect of this particular obligation are subject to the arbitration mechanism of the Agreement, so the EU could use that mechanism if it considered the UK had not met its obligation to ensure effective domestic enforcement.

State aid

57. Articles 7 to 15 concern obligations in respect of State aid. These provisions apply to measures that affect trade between Great Britain and the EU, but not trade between Northern Ireland and the EU. Measures that affect trade between Northern Ireland and the EU are subject to the regime in Article 12 of the Protocol, discussed above, under which the Commission and the CJEU retain their monitoring and enforcement jurisdiction (see Article 7(3) of Annex 4).

58. In areas covered by Annex 4, the UK agrees to dynamically align with EU State aid rules (Article 7(1)), to establish or maintain an independent authority with the necessary functions and powers to ensure effective enforcement of State aid obligations (Article 9), and to ensure domestic courts and tribunals have the necessary jurisdiction and powers to review and enforce compliance (Article 11). There are specific provisions on exemption from State aid rules for measures in the UK supporting production of and trade in agricultural products, up to a maximum annual level of support (Articles 7(2) and 8).

59. The independent authority and the European Commission must cooperate in respect of State aid measures so as to ensure consistent surveillance within the single customs territory (Article 10(1) to 10(2)). Where the independent authority brings enforcement action in respect of a UK measure, it must provide the Commission with the opportunity to submit comments (Article 10(3)). Where the independent authority proposes to adopt a binding decision, it must consult the Commission (Article 10(4)). The Commission may submit its opinion on the draft measure within three months (subject to extension where it requires further information) which the independent authority must take into account. The Commission may bring cases in the UK courts in respect of decisions of the independent authority and may also intervene in related cases (Article 11). The opening words of Article 11(1) reflect the fact that the UK or a private party in the UK would have a right to bring challenges or to intervene in State aid cases in the CJEU where they satisfy the conditions of Article 263 or 265 TFEU.

60. Article 13 sets out a procedure for consultation in the Joint Committee where the EU considers the application or implementation by the UK of a State aid measure threatens to seriously undermine the equal conditions of competition between the parts of the single customs territory. In accordance with Article 14, the EU may take appropriate remedial measures where the Joint Committee process is unable to resolve the matter or where the EU considers the UK has failed to comply with its obligations in respect of State aid and has followed the appropriate disputes

procedure. Under Article 14(3), such remedial measures cease to apply where the EU is satisfied there is no longer a risk to equal conditions of competition or, in cases submitted to arbitration, the arbitration panel has decided that the UK has not failed to comply with its obligations (disputes about these State aid obligations being subject to the arbitration mechanism in the Agreement).

Competition

61. Articles 16 to 24 concern obligations in respect of competition. The UK and the EU acknowledge that anti-competitive practices have the potential to distort the proper functioning of markets and undermine the benefits of trade liberalisation (Article 16). To this end the EU and the UK agree that certain practices must be prohibited so far as they may affect trade between the UK and the EU: certain agreements between undertakings which have as their object or effect the prevention, restriction or distortion of competition (Article 17); the abuse of dominant positions by undertakings (Article 18); certain concentrations of undertakings which threaten to significantly impede effective competition or substantially lessen competition (Article 19); and measures relating to public undertakings or undertakings with special or exclusive rights which are contrary to those rules (Article 20). These provisions of the Annex, insofar as they reflect Union law, must be implemented and applied using Union law as a source of interpretation (Article 21). However, Article 16 is without prejudice to the specific provisions and exceptions to competition rules for certain support relating to agricultural products.
62. The UK and the EU agree to take all measures to address the prohibited practices and promote cooperation between relevant enforcement authorities (Articles 22 to 23). The UK also agrees to establish or maintain an independent authority or authorities which have the necessary powers and functions to enforce UK competition laws addressing the prohibited practices (Article 22(2)).
63. Disputes in respect of any of these obligations are not subject to the arbitration mechanism of the Agreement, and are instead for resolution in the Joint Committee alone (Article 24(2)).
64. The UK agrees to ensure effective domestic enforcement of the prohibited anti-competitive practices described and must not reduce the effectiveness of public and private enforcement of its competition laws, regulations and practices, and must ensure public authorities and individuals are able to challenge such domestic laws or practices including through administrative and judicial proceedings, with appropriate remedies (Article 24(1)). Disputes in respect of this particular obligation to ensure effective enforcement are subject to the arbitration mechanism of the Agreement (compare Article 24(2)).
65. Article 25 sets out obligations in respect of State-owned undertakings, including the obligation to ensure any regulatory body is independent of any such undertaking it regulates.

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