



BRIEFING PAPER

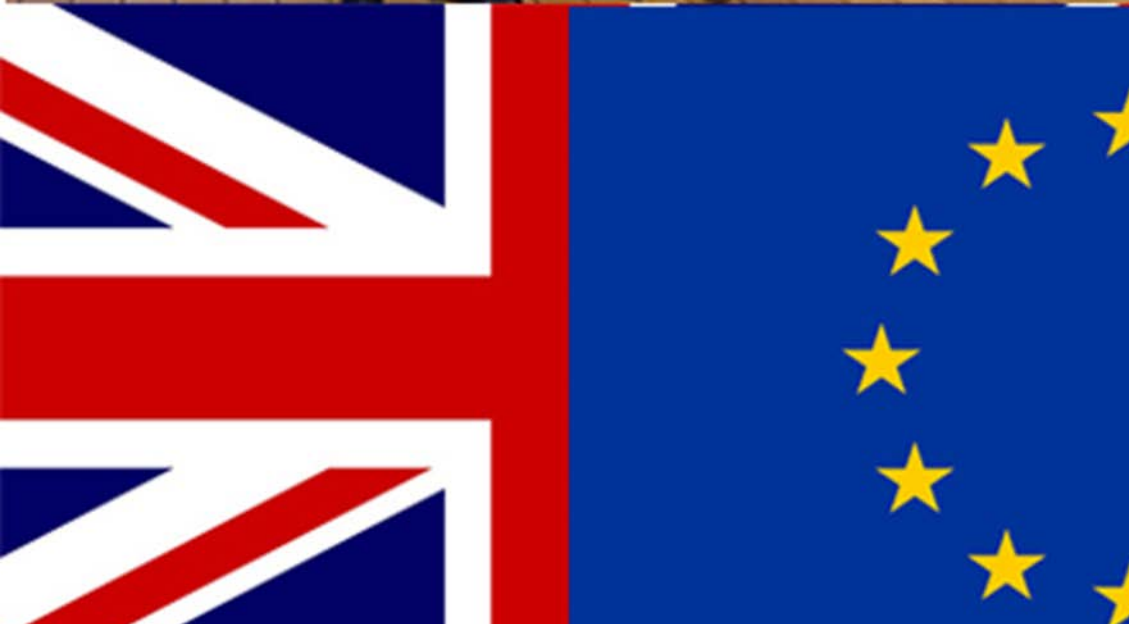
Number 08159, 24 November 2017

Brexit: the November negotiations

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Contents:

1. Round six
2. Progress in priority areas
3. Other developments



Contents

Summary	4
1. Round six	6
1.1 What the negotiators said	6
David Davis	6
Michel Barnier	7
1.2 The pressure is on – or is it?	7
1.3 Are the EU-27 aligned on Brexit?	9
2. Progress in priority areas	10
2.1 Citizens' rights	10
The UK's technical note on administrative procedures for settled status	10
European Parliament	12
External stakeholders	13
Progress in round six: statements by Michel Barnier and David Davis	13
2.3 Financial settlement	14
Negotiations up to November	14
October European Council	16
The November round	16
Must the Government pay to leave the EU?	16
2.4 The Ireland - Northern Ireland border	18
Introduction	18
The Irish dimension	20
Future negotiations and the December European Council meeting	22
Impact studies	23
3. Other developments	25
3.1 Internal EU discussions begin	25
3.2 Exit day	26
Government amendment	26
When will the UK actually leave the EU?	26
Domestic concept of 'exit day'	26
What if the UK leaves the EU on a different date?	27
3.3 New 'Withdrawal Agreement and Implementation' Bill	27
New Bill announced	27
Why is the Bill needed?	28
What about the other votes relating to the withdrawal agreement?	28
Other Brexit-related bills	29
3.4 EU Agencies in the UK are given new homes	30
3.5 UK autumn budget - new Brexit money	30

Summary

Introduction

The sixth round of Brexit negotiations took place on 9 and 10 November 2017. This round was unscheduled but was considered necessary by both sides, given the relative lack of progress in previous rounds and the EU's condition that "sufficient progress" must be made on citizens' rights, the financial settlement and the Ireland-Northern Ireland border before starting discussions on future EU-UK relations.

Progress in priority areas

Citizens' Rights

Some progress was made on citizens' rights and the two sides are seeking political solutions to some outstanding issues. Discussions were about options for resolving issues such as family reunification, exporting social security benefits and a role for the Court of Justice of the EU (CJEU). The EU's approach to mutual recognition of professional qualifications still falls short of the UK's offer and the EU has not yet included voting rights in local elections within the scope of a future Withdrawal Agreement.

The UK confirmed its commitment to incorporate the agreement on citizens' rights into UK law, so that EU citizens in UK will be able to enforce their rights in UK courts. The Government published a paper on new administrative procedures for EU citizens seeking settled status in the UK, which, it says, will be as streamlined, straight-forward and transparent as possible.

Financial Settlement

Technical progress was made, but the UK Government did not suggest a figure for a financial settlement. The Government is reported to be considering raising its offer to around €40 billion. The Prime Minister has promised that the other 27 EU Member States will not pay more or receive less over the current EU budget plan as a result of Brexit and that the UK will honour commitments made during its period of EU membership.

Ireland-Northern Ireland border

Joint principles were drafted on continuing the Common Travel Area and associated rights. Discussions explored how best to preserve North-South cooperation, the challenges around the border, and how to avoid any physical infrastructure. David Davis believes a conclusion will only come in the context of the future relationship.

There is a commitment to upholding the Good Friday Agreement and a mutual recognition of the need for specific solutions for the unique circumstances of Northern Ireland, but not the creation of a new border inside the UK.

Other developments

Internal EU discussions about the future

Towards the end of October EU leaders began internal discussions on the UK's future relations with the EU, including transitional arrangements, future UK-EU bilateral relations and agreements in areas such as trade, defence and security.

Exit day

On 9 November 2017, Theresa May announced that the Government would table amendments to the EUW Bill to fix 'exit day' for all purposes of the Bill at 11:00 pm GMT on 29 March 2019.

New bill on the Withdrawal Agreement

On 13 November David Davis announced that the Government would introduce a Bill to implement the withdrawal agreement – the 'Withdrawal Agreement and Implementation Bill'. Clause 9 of the *European Union (Withdrawal) Bill* provides for the withdrawal agreement to be implemented by secondary legislation, but the use of primary legislation will allow time and opportunity for parliamentary debate and a vote on the final agreement. The new Bill will cover the contents of the agreement and will be in addition to and after the vote the Government promised on a motion on the final Brexit deal before the European Parliament votes on it.

The European Medicines Agency and European Banking Authority get new homes

The other 27 EU Member States voted for Amsterdam and Paris to host the two UK-based EU agencies, the European Medicines Agency and the European Banking Authority.

More money for Brexit

In his autumn budget report on 22 November Chancellor Philip Hammond announced that to prepare for leaving the EU and ensure a smooth transition, the Government was setting aside an additional £3 billion.

Other Library briefings on the negotiations

The last five rounds of negotiations are discussed in Commons Briefing Papers 8068, [Brexit: the July negotiations](#), 8082, [Brexit: the August negotiations](#), 8104, [Brexit: the September negotiations](#) and 8125, [Brexit: the October negotiations](#).

1. Round six

The sixth round of Brexit negotiations took place on 9 and 10 November 2017. This round was unscheduled but considered necessary by both sides, given the need for “sufficient progress” to be made in phase one of the negotiations in order to move to phase two.

On 7 November the Government published a policy paper, [Details of the UK’s proposed administrative procedures for EU citizens obtaining settled status](#).

There were no new position papers from the EU.

According to some reports, the sixth round was billed as a “stock-taking exercise” by the UK side, but the EU side maintained it was “coming to the table to negotiate”, not to discuss the state of play.¹

1.1 What the negotiators said

David Davis

In his [closing remarks](#) the Brexit Secretary David Davis referred to work on the “few outstanding - albeit important – issues”. He reiterated the need for both sides to be flexible and pragmatic, and insisted “This is a serious business”.²

David Davis believes many of the current areas of discussion cannot be taken to a logical conclusion because their context is the future EU-UK relationship. He has urged the EU to move on to this discussion, but the EU negotiator, Michel Barnier, is mandated to pursue the sequenced negotiation set out in the European Council [guidelines](#) of 29 April 2017 and the negotiating [directives](#) of 3 May 2017.

Nevertheless, the UK has taken every opportunity to reiterate its arguments and its wish to move on, and after the sixth round David Davis said he remained “ready and willing to engage as often and as quickly as needed” to secure an agreement to move on to future trade discussions. He would “continue to engage and negotiate constructively as we have done since the start”.

David Davis said in his Berlin [speech](#) on 16 November “we have made a great deal of progress in the negotiations to date – far more than is understood by most people”.

¹ [The Telegraph, 3 November 2017](#)

² Many on the EU side have disputed the UK’s serious engagement with the negotiations. See [Independent, 10 October 2017](#), [Express, 13 October 2017](#), [Financial Times, 28 August 2017](#).

Michel Barnier

The EU Chief Negotiator said further progress had been made on technical details but several issues still needed to be clarified in order to achieve “sufficient progress”.

In his [closing speech](#), Michel Barnier described the sixth round as “a moment of deepening, clarification and technical work”. The EU, he said, was “determined to reach a deal on the orderly withdrawal”. He also insisted the EU was not demanding or issuing concessions; that they were working “on the basis of fact, and law, and on precise, reciprocal commitments”. This has been the EU’s position from the start of the Article 50 process, which the UK Government has criticised as being “inflexible”.

In the key area of citizens’ rights Mr Barnier reported “some progress”, but was concerned about the plans for ‘settled status’: how it would work, how easy it would be to use, how much it would cost, and how people, if rejected, could appeal that decision.

He was also still waiting for “work on the precise translation of the commitments” made by Theresa May on the financial settlement in her [Florence speech](#) in September.

1.2 The pressure is on – or is it?

There are reports that the EU proposed three further rounds of negotiations before the December summit, while the UK wants “continuous” talks.³ [Politico](#) published the EU calendar of Brexit meetings from 8 November until the December European Council. It shows several planned preparatory meetings, but only one negotiating round:

³ [EUObserver, 1 November 2017](#).

Date	Meeting	Content
08.11 (am)	WP art.50	• State of play on negotiations and preparation of Round 6
08.11 (pm)	CRP art. 50	• Orientation debate on internal preparatory discussions • ADA for the Dec. EUCO
09.11 - 10.11	Nego Round	• 6th Negotiation round
10.11 (pm)	WP art.50	• Debriefing of Round 6
14.11	WP art. 50	• Internal preparatory discussions - Seminar mode: - Identification of issues related to the framework for future relationship and transitional arrangements - Trade issues
16.11	WP art.50	• Internal preparatory discussions - Seminar mode: - Economic and security cooperation with third countries
17.11	WP art.50	• Internal preparatory discussions - Seminar mode: - Horizontal and institutional issues
20.11	GAC art. 50	• Agencies: vote • Stocktaking on Negotiations under Art. 50 (Phase 1) • ADA for the Dec. EUCO
22.11	CRP art. 50	• Internal preparatory discussions relating to transition and framework for future relationship. State of play.
29.11	CRP art. 50	• (poss.) Draft EUCO conclusions/guidelines
6.12	CRP art. 50	• Draft EUCO conclusions/guidelines
11.12	Sherpa	• Draft EUCO conclusions/guidelines
12.12	GAC art. 50	• Preparation EUCO
14/15.12	EUCO art. 50	• Assessment of progress • Adoption of conclusions
20.12	CRP art. 50	• Follow-up EUCO

The European Council President, Donald Tusk, after meeting Theresa May at the EU summit on social rights in Gothenburg, insisted the UK must improve its offer on the financial settlement and the Irish border by the beginning of December at the latest, if the EU is to agree to start future trade talks.⁴

There is no guarantee that further rounds of negotiations will result in a move to phase two, and many commentators believe that further delays in progress at this stage could jeopardise the chances of agreeing a withdrawal agreement at all.

Although David Davis has insisted he does not want a no-deal scenario, he appears sanguine about 'no agreement' remaining an option on the table. He [told](#) the Exiting the EU Committee on 25 October "it is no secret that the way the Union makes its decisions tends to be at the 59th minute of the 11th hour of the 11th day and so on", and:

we have reasons why we need no deal as an option literally right up to the moment of signing: because it would not be the first time in European negotiations where sudden, last-minute claims come in because they think they have got you over a barrel. That has happened.

⁴ [Remarks by European Council President Donald Tusk](#) in Gothenburg after meeting Theresa May, 17 November 2017.

1.3 Are the EU-27 aligned on Brexit?

There are conflicting reports about if and when other EU Member States think the negotiations should move on to phase two. David Davis has suggested that many want to do so,⁵ but most reports emphasise the unity of the EU-27 in maintaining the Commission's position that there is no getting round the "sufficient progress" condition.

Some commentators think talks on trade might reveal splits among the EU-27, and that "divergent economic interests could leave negotiators with an EU position that is crisscrossed by red lines, slowing down the talks and making compromise positions harder to find".⁶

Other reports have suggested France and Germany could try and delay talks on post-Brexit relations - allegedly prompting UK Government ministers to increase diplomatic efforts in the run-up to the December summit. Some speculate that the collapse of German coalition talks could mean France driving the Brexit process.⁷

Many press reports point to the 'ticking clock'.⁸ The Financial Times, for example, reported on 9 November that the EU had set a deadline of two to three weeks for the UK to provide greater clarity on the financial settlement. If this is not forthcoming, the report maintained, the EU may not agree to move on to talks on transition and future UK-EU relations in December.

Others maintain there is inflexibility on both sides: a battle of the UK's red lines versus the EU's Article 50.⁹

⁵ He told BBC Radio 4's [Today program](#) on 17 November, for example, that Denmark, the Netherlands, Italy, Spain and Poland were enthusiastic about a future trade deal with the UK.

⁶ [PoliticoPro, 26 October 2017](#)

⁷ A report by the German Council of Economic Experts entitled [Towards a forward-looking economic policy](#) even called for the UK to be prevented from leaving the EU. [Executive Summary](#), Annual Report 2017/18, 9 November 2017.

⁸ E.g. [EurActiv, 23 November 2017](#)

⁹ See The Economist, "[Even as the Brexit clock ticks, many choices remain open](#)", 16 November 2017.

2. Progress in priority areas

2.1 Citizens' rights

The UK's technical note on administrative procedures for settled status

On 7 November the UK Government published a document providing details of the proposed procedure for conferring post-Brexit immigration status on EU citizens and their family members living in the UK.

The [Technical Note: Citizens' Rights – administrative procedures in the UK](#) confirms that individuals would be required to submit an application to the UK authorities in order to obtain status. Having status would be a condition for lawful residence in the UK after the UK's exit from the EU. Those that did not have status would be in the UK unlawfully, thereby without the right to work or access public funds or a range of other services.

However, the document also refers to plans to adopt a "proportionate approach" towards people who did not apply for status within the specified timescale. There would be discretion to allow an out-of-time application where the individual had good reasons for not applying before.

The document outlines plans for a **"streamlined application system"**:

- A completely new system for processing applications will be designed and implemented, "with new processes, technology, rules and support for applicants".
- Individuals would have around two years after Brexit to make an application. During this time their status in the UK would be protected (if they were within the scope of the Withdrawal Agreement). It would also be open to individuals to submit an application before the UK's exit from the EU, under a voluntary application process.
- The fee for applying for "settled status" would be no greater than the cost of a British passport.
- People who already have a permanent residence document would be required to apply for settled status (at a reduced fee). The previous residence assessment would not be repeated, but they would be subject to identity verification, a security check and confirmation of their ongoing residence.
- The online application process would draw on existing government data, such as HMRC employment records in a bid to "minimise the burden of documentary evidence required". An

“assisted digital service” would be developed for people who need assistance to make an application.

In terms of the **criteria for granting or refusing status**, the UK proposes that:

- The conditions for acquiring settled status would be as per Article 16 of the ‘free movement’ Directive ([2004/38/EC](#)), i.e. five years’ continuous lawful residence.
- EU citizens who could not (yet) demonstrate five years’ residence would be eligible for “temporary status” in the interim.
- There would be a “pragmatic approach” to assessing applications, different to current practice in some aspects. Comprehensive sickness insurance checks would not be made, and the ‘genuine and effective work’ test would not be applied. Furthermore, a principle of evidential flexibility would “enable[e] caseworkers to exercise discretion in favour of the applicant where appropriate”.
- Applicants would have recourse to an “administrative review” process in order to resolve any caseworking errors, in addition to a statutory right of appeal (although this would not necessarily have a suspensive effect on a decision to deport pending the outcome of the appeal).
- The only grounds for refusing status would be as specified in the Withdrawal Agreement. The UK intends that these would be that either:
 - the person is not covered by the Agreement (i.e. they were not resident in the UK before the specified cut-off date, or do not meet the conditions specified in the Agreement); or
 - the person falls for refusal on the grounds of being a threat to public order or security.

The UK’s proposals envisage **greater powers in relation to refusing status due to criminality and scope for expulsions from the UK** than EU law currently allows:

- Applicants would be required to declare any criminal convictions. Checks would be made against some UK criminal records databases, and in certain cases for overseas convictions.
- The criteria for deporting an EU citizen on criminality grounds would depend on whether the criminal conduct took place before or after the UK’s exit from the EU:
 - Pre-exit criminal conduct would be assessed in accordance with the criteria specified in the free movement directive (i.e. the individual must pose a genuine, present and sufficiently serious threat to the UK). Pre-exit criminal cases which had been pre-Brexit assessed as not meeting this criteria would not be reopened “without good reason”.

- Post-Brexit criminal conduct would result in the person being considered for deportation according to the same (stricter) criteria as currently applies to non-EEA nationals (i.e. deportation will be considered if the person has committed a serious crime and received a custodial sentence of at least 12 months, subject to human rights considerations).
- The UK's note acknowledges that EU Member States may wish to apply reciprocal measures in respect of British national offenders.

2.2 Reactions to the UK's Technical Note

European Parliament

The European Parliament's Brexit Steering Group quickly issued a cool response to the UK's proposals, which remain at odds with its own agreed priorities in several respects. A [press release](#) on 8 November highlighted its concerns:

Our most important concern is the UK proposals for settled status for EU citizens in the UK, including the administrative procedures as set out in a technical note published by the UK Government yesterday. It is our firm view that acquiring settled status:

- must be an automatic process in the form of a simple declaration, not an application which introduces any kind of conditionality (for example a pro-active 'criminality check');
- must enable families to make one joint declaration, not separate declarations for each individual family member;
- must place the burden of proof on the UK authorities to challenge the declaration and this only on a case-by-case basis and in line with EU law;
- must be cost-free;
- is a system that can only enter into force after any transition period, if requested and agreed, has concluded. Before that, the freedom of movement applies.

In a related tweet, Guy Verhofstadt, the Chair of the Steering Group, commented:

Citizens were promised nothing would change. UK gov't now needs 25 paragraphs to explain how lives will change. Unacceptable!

Guy Verhofstadt reportedly also wrote to David Davis on 14 November, highlighting the proposals to apply tougher criminality checks on EU citizens and the risk of deportations as also unacceptable to the European Parliament.¹⁰

¹⁰ The Independent, '[Brexit: David Davis told Brussels will not accept deportation of EU immigrants](#)', 14 November 2017

External stakeholders

The campaign group The3million (a group representing the interests of EU citizens living in the UK) has published a [detailed response](#) to the technical note. It maintains that the proposed “settled status” offers inferior rights and protections to the “permanent residence” rights guaranteed under EU free movement law. Amongst other things, it has expressed scepticism about whether the Government will be able to establish an entirely new system for processing applications within the stated timescale, and has strong concerns about whether the proposed pragmatic and flexible approach to decision-making will be borne out in practice.

It is [counter-proposing](#) a “registered residence rights” scheme which would enable EU citizens to keep all of their existing rights.

Progress in round six: statements by Michel Barnier and David Davis

A statement issued by the EP’s Brexit Steering Group issued just before the sixth round of talks began [maintained](#) that “major issues” on citizens’ rights remained outstanding:

We don’t recognise reports suggesting that a deal on citizens’ rights is almost finalised. There are still major issues that have to be resolved.

In the [10 November press conference](#), Michel Barnier suggested that some progress was being made, and he welcomed the UK’s detailed proposals on the process for applying for status which provided “useful clarifications that are a good basis for further work”. However, he highlighted the same outstanding issues as at the end of the fifth round of negotiations: family reunion rights; the right to export social security benefits; and the role of the European Court of justice in guaranteeing consistent application of case law in the UK and in the EU.

[David Davis’ closing remarks](#) conveyed a sense of momentum to the discussions:

We have continued to make progress on Citizen’s Rights. We are now seeking political solutions to the last outstanding issues on both sides.

Mr Davis gave an insight into some of the remaining sticking points and some potential ways forward:

This week, we have discussed options for resolving issues ranging from family reunification to the export of benefits.

For example, we have been clear that we are willing to consider what further reassurance we can give to existing families - even if they are not currently living together in the UK

There are a few areas where our citizens need to see further progress and movement from the European Union.

14 Brexit: the November negotiations

On the mutual recognition of professional qualifications, the European Union's approach remains more narrow than we would like.

We believe it is only right that people holding qualifications or in the process of acquiring them should be allowed to continue or begin their careers as they do now.

We want to protect their livelihoods in line with our broader approach that people should be able to continue living their lives as they do now.

On voting rights, we are disappointed that the EU has been unwilling so far to include this in the scope of the Withdrawal Agreement. As citizens may lose a right which they currently enjoy.

However, if it does fall out of scope, we will discuss this issue bilaterally with Member States.

He also addressed the issue of how citizens would be able to enforce their rights in the UK and the influence of the Court of Justice of the European Union (CJEU) post-Brexit:

Finally, this week we have sought to give further clarity on our commitment to incorporate the agreement on Citizen's Rights into UK law.

This will ensure that EU citizens in the UK can directly enforce their rights in UK courts – providing certainty and clarity in the long term.

We have made clear that, over time, our courts can take account of the rulings of the European Court of Justice in this area, to help ensure consistent interpretation.

But let me be clear, while we share the same aims, it remains a key priority for the United Kingdom, as we leave the European Union, to preserve the sovereignty of its courts.

Some stakeholders had been questioning precisely how the UK Government intended to incorporate the Withdrawal Agreement into UK law. In a [statement to the House on 13 November](#) Mr Davis confirmed that the Government intends to enshrine the Withdrawal Agreement in domestic primary legislation, through a "Withdrawal Agreement and Implementation Bill" (see also section 3.3 below).

2.3 Financial settlement

Negotiations up to November

In June 2017 the European Commission [published a paper](#) that sets out its position on the financial settlement (the settlement).¹¹ The

¹¹ European Commission. [Position paper transmitted to the UK: essential principles on the financial settlement](#), 12 June 2017. The paper is summarised in section 2 of Commons Library Briefing [Brexit: the exit bill](#), updated 13 November 2017. The

Commission's paper fleshed out the European Council's wishes regarding the settlement as were laid out in its [negotiating directives](#) – Michel Barnier's mandate for negotiations.¹²

The UK has not published a formal response to the Commission's position paper and has not set out a detailed view on the settlement. The UK Government has offered to make payments sufficient so that no Member State is made financially worse off by the UK's withdrawal in 2019 or 2020. The UK Prime Minister, Theresa May, has also pledged that "the UK will honour its commitments made during the period of our membership".¹³ However, in negotiations the UK has been unable to identify which commitments it is willing to honour.

In the press conference at the end of October's negotiations David Davis said that the UK were not in a position to agree specific commitments and that "this can only come later":

In line with the process agreed at our last round of talks, we have undertaken a rigorous examination of the technical detail where we need to reach a shared view.

This is not a process of agreeing specific commitments - we have been clear this can only come later.

But it is an important step, so that when the time comes we will be able to reach a political agreement quickly and simply.¹⁴

David Davis' comments echo his previously expressed view that a conclusion on the settlement will only be reached alongside talks on the future EU-UK relationship.¹⁵

In general, negotiations on the settlement have been technical, focusing on a detailed line-by-line, and at times legal, analysis of the EU's position on which financial commitments should be included in the settlement.

At the end of October's negotiations Michel Barnier said that talks on the settlement were 'at a deadlock' with the UK unable to clarify which financial commitments it agrees should be in the settlement.¹⁶

briefing also discusses the UK's position and provides commentary on how negotiations have unfolded.

¹² The Council of the European Union, [Negotiating directives for Article 50 negotiations](#), 22 May 2017

¹³ [PM's Florence speech: a new era of cooperation and partnership between the UK and the EU](#), 22 September 2017

¹⁴ [David Davis' closing remarks at the end of the fifth round of EU exit negotiations in Brussels](#), 12 October 2017

¹⁵ [David Davis' opening remarks at the start of the fourth round of EU exit negotiations](#), 25 September 2017

¹⁶ European Commission Press Release, [Press statement by Michel Barnier following the fifth round of Article 50 negotiations with the United Kingdom](#), 12 October 2017

October European Council

Following its October meeting the Council adopted conclusions on the exit negotiations.¹⁷ On the settlement, the European Council concluded that the UK had not yet turned its pledge to honour its financial commitments into “a firm and concrete commitment”.

In general, the European Council was not able to say that ‘sufficient progress’ has been reached in the first phase of negotiations.

The November round

Negotiations again focused on technical aspects of the settlement. In the press conference at the end of the negotiations, David Davis reported that “we have made substantial technical progress across all the issues that will need to be addressed”.¹⁸ Michel Barnier echoed this view, saying that November’s negotiation had been about “deepening, clarification and technical work”.¹⁹

In general, Mr Davis said that the negotiations had drawn out areas where further political and technical discussions is required – presumably including areas of the settlement. Mr Davis’ view is that political discussions will enable progress to be made.

Mr Barnier was clear that for ‘sufficient progress’ to be made the UK needs to specify which financial commitments it is prepared to include in the settlement. He re-iterated his view, expressed throughout the first-phase of negotiations, that “this is an essential condition to reach sufficient progress in December”.

In the press conference Q&A, Michel Barnier confirmed press reports that he requires clarifications on outstanding issues from the UK within two weeks in order to move negotiations onto the second phase in December.²⁰

Must the Government pay to leave the EU?

In her [letter](#) to Donald Tusk on 29 March 2017 giving notice of the UK’s intention to leave the EU, Theresa May said the Brexit negotiations should determine a “fair settlement” of the UK’s obligations as a “departing member state, in accordance with the law and in the spirit of the United Kingdom’s continuing partnership with the EU”. The [2017 Conservative election manifesto](#) made the same pledge: “We will determine a fair settlement of the UK’s rights and obligations as a departing member state, in accordance with the law and in the spirit of the UK’s continuing partnership with the EU”.

¹⁷ European Council, [European Council \(Art. 50\) meeting \(20 October 2017\)](#) - Conclusions, 20 October 2017

¹⁸ [David Davis' closing remarks after EU exit negotiations on 9-10 November](#), 10 November 2017

¹⁹ European Commission, [Speech by Michel Barnier following the sixth round of Article 50 negotiations with the United Kingdom](#), 10 November 2017

²⁰ European Commission Audiovisual services, [Press conference on the state of play of Article 50 negotiations with the United Kingdom](#), 10 November 2017

While the Government appears to acknowledge a moral, if not a legal, obligation to pay the EU a share of its existing and in some cases ongoing commitments, many believe the UK has no obligation to pay anything to the EU on Brexit.

Baroness Kennedy raised this issue in an [evidence session](#) with David Davis in the Lords on 31 October (on the Scrutiny of Brexit negotiations):

... one of the things that seems very puzzling to me is that you do not make clear to the general public what this financial settlement involves and why it might be—you say it is not a legal requirement—a moral requirement that we fulfil certain things. The general public have no idea, and the way that this is often presented in the media is not corrected by you or others—for example, when they say, “Why should we give them anything at all? They are just blackmailing us”, and so forth. You are in the prime position to correct that by saying, “Listen. It would be quite wrong of us to step away and expect the rest of Europe to pick up the tab on pensions for people who are British Members of the European Parliament”. Why should French taxpayers pay the pension of Nigel Farage? I personally resent paying it myself, never mind the French”.

David Davis told the Committee that this matter had to be settled in the interests of the public:

What is going on here is something of a tussle, of course, as in many negotiations, but I put this to you: what would be acceptable to the British public? If the British public are suddenly told that—I am not going to pick a number—some enormous number is going to be paid over to the EU and we do not have a deal, they might take a slightly different view than if we find ourselves with a trade deal and a deep and special partnership, which is what we want to do. This reflects the fact that we see this as more of a political obligation than a legal one, and we are convinced that it is not a legal obligation, most of it, at least not of the size that the EU is talking about. That is the logic behind it. I am not going to do the financial negotiation through this Committee or indeed any another committee, other than the one that is negotiating the payment. That is the backdrop to it.

What might the Government pay?

The Government is reported to be considering raising its ‘offer’ (no formal Government offer has actually been made in the negotiations) from around £20 billion to around £40 billion (or €40 billion – accounts vary). This figure has been criticised by hard-line Brexiteers who regard any payment as unjustified and by other leavers who regard it as excessive.²¹

²¹ The former Conservative vice chairman, Robert Halfon, for example, [warned](#) of a massive public backlash if the Government agreed to such a high payment, BBC Radio 4’s Westminster Hour on 19 November.

Theresa May is expected to reveal a new 'offer' at a meeting with Donald Tusk on 24 November.

2.4 The Ireland – Northern Ireland border

Introduction

At the end of the last negotiation round it appeared that discussions on the Irish border were progressing well. The remaining significant issues were expected to be resolved as part of the negotiations on future relations.

However, around the time of the November negotiations disagreements emerged between the UK and the EU over how to prevent a hard border on the island of Ireland.

This new dynamic seems largely attributable to the Irish Government requiring a commitment from the UK to no "regulatory divergence" on the island. Without this they would not agree for negotiations to be advanced to the next phase on future relations. This approach was reflected in a European Commission document on the negotiations leaked to the Financial Times. The newspaper reported:

The European Commission on Wednesday circulated an update on negotiations, seen by the Financial Times, which concludes that the avoidance of "regulatory divergence" on the island of Ireland is "essential" to protect the peace process.

"It consequently seems essential for the UK to commit to ensuring that a hard border on the island of Ireland is avoided, including by ensuring no emergence of regulatory divergence from those rules of the internal market and the customs union," the paper states.

The commission adds that the regulatory arrangements "are (or may be in the future) necessary for meaningful North-South co-operation, the all-island economy and the protection of the Good Friday Agreement".²²

Michel Barnier did not reference this all-Island approach in his comments to the press at the end of latest negotiating round:

We will continue our dialogue on Ireland and Northern Ireland.

We have to ensure a common reading, the same reading, of the conditions, consequences and implications of Brexit on the Good Friday Agreement and the Common Travel Area.

This should lead us to identify the technical and regulatory solutions necessary to prevent a hard border, while preserving the integrity of the Single Market.

²² ['Keep Northern Ireland in customs union, says EU'](#), Financial Times, 9 November 2017

As David and I told you last time, the unique situation on the island of Ireland requires specific solutions.²³

However, David Davis was keen to emphasise that beyond the progress made during this negotiating round, any solution to preventing a hard border could not lead to internal borders within the UK:

On Northern Ireland we have continued to have good, technical discussions.

We have drafted joint principles on the continuation of the Common Travel Area and associated rights.

We have continued to explore how best we preserve North-South cooperation.

And we are drafting joint principles and commitments which will guide the solutions drawn up in the second phase.

We have also had frank discussions about some of the big challenges around the border.

We remain firmly committed to avoiding any physical infrastructure and we have been clear about that this week.

These discussions will of course continue in the run-up to the December Council but let's be under no illusion.

We will only be able to conclude them finally in the context of the future relationship.

We respect the European Union desire to protect the legal order of the single market and Customs Union.

But that cannot come at cost to the constitutional and economic integrity of the United Kingdom.

As I have said before, we recognise the need for specific solutions for the unique circumstances of Northern Ireland.

But let me be clear.

This cannot amount to creating a new border inside our United Kingdom.

Now in this process, we are resolutely committed to upholding the Belfast/Good Friday Agreement, in all its parts.

We need to approach the challenging issues that arise as part of this process in a spirit of pragmatism, creativity and with a high degree of political sensitivity.

We owe it to the people of Northern Ireland and of Ireland to do so.²⁴ (Our emphasis)

²³ European Commission, '[Speech by Michel Barnier following the sixth round of Article 50 negotiations with the United Kingdom](#)', 10 November 2017

²⁴ Department for Exiting the European Union, 'David Davis' closing remarks after EU exit negotiations on 9-10 November', 10 November 2017.

James Brokenshire, the Northern Ireland Secretary, had made similar commitments earlier that week during a [visit to Brussels](#). Mr Brokenshire was quoted as saying:

We will leave the EU in 2019 as one United Kingdom. We need to ensure that nothing is done that undermines the integrity of the UK single market.

I find it difficult to imagine how Northern Ireland could somehow remain in while the rest of the country leaves. I find it impossible.²⁵

The Irish dimension

The Irish Government's insistence on getting clear assurances from the UK Government before allowing the talks to progress are in part a recognition that the run-up to the European Council meeting in December is the point of "maximum leverage for Ireland before other member states turn their attention elsewhere".²⁶

The Taoiseach's approach is also informed by his own domestic political considerations. Mr Varadkar leads a minority government, and has not yet secured his own electoral mandate, having taken over as leader of the ruling Fine Gael party in June.

The Financial Times argues that he "cannot be seen as a pushover in highly sensitive talks that will determine Ireland's relations with Britain and Europe for decades to come".²⁷

They also quote Brian Hayes, an MEP from Mr Varadkar's party, as saying:

What will define his premiership? At the top of the pile is Brexit in terms of what the government negotiates. This is so important to Ireland, getting a good outcome for him is absolutely crucial.

[...] He [Varadkar] has made it clear that he doesn't want to use the veto, but at another level he has made sure that there cannot be sufficient progress in the talks, until there is much more clarity from the British on the Irish-specific issues.²⁸

Some commentators have questioned Mr Varadkar's "high stakes" approach, arguing that the Irish border is not a vital national interest for the other EU countries, as it is for Ireland, and they may attach a greater importance to advancing talks with the UK.²⁹

However, the Irish Foreign Minister Simon Coveney was clear in an interview with the Evening Standard that whatever pressure Ireland

²⁵ ['Keep Northern Ireland in customs union, says EU'](#), Financial Times, 9 November 2017

²⁶ Ibid

²⁷ ['Brexit: Battle over Irish border threatens EU-UK trade talks'](#), Financial Times, 23 November 2017

²⁸ Ibid

²⁹ ['Dan O'Brien: When stakes are this high, threatening UK with a veto may not be the best bet'](#), Irish Independent, 19 November 2017

might face to advance the talks, they must receive the assurances they require on the border first:

Anybody who thinks that just because the financial settlement issue gets resolved ... that somehow Ireland will have a hand put on the shoulder and be told: 'Look, it's time to move on.' Well, we're not going to move on.

This is a much bigger issue than trade. This is about division on the island of Ireland. I will not be an Irish foreign minister that presides over a negotiation which is not prioritising peace on the island of Ireland ... We're not willing to move on without more assurance on the border.³⁰

He went onto say:

We've no interest in making life even more difficult for a British government. Anybody in London, or anywhere else in Britain, who underestimates the politics of this or the strength of feeling in Ireland, I think, is making a mistake.³¹

Irish officials involved in the Brexit negotiations have emphasised that their government's approach has been consistent throughout the talks and that their determination to preserve a common trading area across the island of Ireland should not have come as a surprise to the UK Government. The Irish Times reports:

Senior Department of Foreign Affairs official Rory Montgomery said "the British surprise" to the recent EU paper indicating that the North may have to stay within the European Union single market and customs union post-Brexit showed UK politicians had missed the Irish messages about the importance of the Border.

"If I were frank, I would say that maybe British politicians haven't necessarily been as careful in listening to these messages as they should have been," said Mr Montgomery, whose official title is second secretary general at the department with responsibility for official-level co-ordination on Brexit talks.³²

Though Mr Montgomery was also keen to emphasise that the negotiations are continuing cordially:

Since the leaking of the paper two weeks ago, there had been "very good dialogue" between the sides. "I think now the message has got through that these are serious issues from an Irish point of view,"...

Whether this approach from the Irish Government should have been anticipated or not, it has attracted strong criticism from Arlene Foster

³⁰ [Ireland warns Theresa May that increased £40 billion Brexit deal 'can't buy you trade talks'](#), Evening Standard, 22 November 2017.

³¹ Ibid

³² ['UK politicians missed Irish message on Border, Brexit negotiator says'](#), Irish Times, 22 November 2017

the leader of the Democratic Unionist Party. In a statement before a meeting with the Prime Minister on 20 November, Ms Foster said:

The people of Northern Ireland delivered peace and stability. Yes, they were supported beyond these shores but to suggest that exiting the EU will bring violence onto our streets is downright careless.

Northern Ireland will exit the EU on the same terms as the rest of the United Kingdom. We will not countenance a border in the Irish Sea. I welcome the Prime Minister's commitment on this point. The GB market is not only critical for Northern Ireland but for the Republic of Ireland. We want to see a sensible arrangement that can work for all concerned. The democratic wishes of the British people must be implemented.

Those in Dublin and Brussels, recklessly trying to use Northern Ireland for their own objectives, should cease. The Prime Minister should warn Brussels that Northern Ireland must not be used as blackmail.³³

It seems that officials for both sides are working hard to accommodate these different positions, with the Financial Times reporting:

Diplomats are working on compromise language that refers to the need to maintain north-south regulatory convergence within the context of future EU-UK relations. The talks, however, remain extremely difficult, with trust waning between Dublin and London.³⁴

Future negotiations and the December European Council meeting

Despite these obstacles the Guardian reported on 22 November that the UK Government was confident that the unresolved differences on the Irish border question would not prevent the UK and the EU-27 from concluding the first phase on the negotiations before the end of the year:

Senior UK officials remain confident that Northern Ireland will not prove an insurmountable sticking point at the next EU council in December.

Whitehall sources said the UK would not countenance giving in to requests for Northern Ireland to stay in the customs union or single market – but that ministers believed some language could be agreed with the EU to guarantee no return to a hard border.

[...] Theresa May's spokesman said the prime minister had been "engaged with the taoiseach throughout this process". He said: "We are working hard to try and find that unique solution that we need to the situation on the border. We're in a negotiation but, as

³³ Democratic Unionist Party, '[DUP Leader comments following meeting with Prime Minister](#)', 21 November 2017

³⁴ '[EU and UK aim to strike Brexit divorce deal within 3 weeks](#)', Financial Times, 17 November 2017

I say, we think we're making good progress, we think it's in the interests of the UK and also of the EU27 to move these talks on, and that's what we're aiming to do as we get towards the December council."³⁵

Since these comments were made, however, it has been reported that Leo Varadkar's minority government might be forced to hold a snap general election. This is due to ongoing claims of misconduct against the Deputy Prime Minister Frances Fitzgerald, who may face a motion of no confidence that has been tabled by opposition parties.

The Irish Times reports that Mr Varadkar's Fine Gael party's preferred timing is to hold an election in January 2018, but they do not want the Prime Minister to be a 'lame duck' during the December European Council meeting. Further action to shore up the Government before an election in the New Year might therefore be needed.³⁶

Impact studies

On 23 November the European Parliament's Constitutional Affairs Committee published three impact assessments looking at Brexit and the Irish border question. One focuses on the Good Friday Agreement and how it can be upheld³⁷, the second on legal, political and economic considerations and the effect of a future trade agreement³⁸, and the third on how technology can help avoid a hard border.³⁹

The second of these studies, in its executive summary, argues that if the UK does not change its current policy on its future trading relationship with the EU, a visible border is unavoidable:

A "visible" border between the two parts of Ireland will certainly be unavoidable, however politically unwelcome it may be, if there is no trade agreement between the EU and the UK, if the UK adopts a cheap food policy, or if the UK lowers phytosanitary standards or other quality standards for agricultural or industrial products. If an economic border is needed for any of these reasons, it cannot be avoided by electronic surveillance methods. Since it seems likely that the UK will wish to be free to choose its future policies in these respects, a "visible" border will come into existence unless the UK is willing to adopt a free trade area

³⁵ ['UK confident Irish border will not stop progress of Brexit talks'](#), The Guardian, 21 November 2017

³⁶ ['Ireland on verge of election as Taoiseach refuses to sack Frances Fitzgerald'](#), Irish Times, 23 November 2017

³⁷ European Parliament, [UK withdrawal \('Brexit'\) and the Good Friday Agreement](#), accessed 24 November 2017

³⁸ European Parliament, [Brexit and Ireland Legal, Political and Economic Considerations](#), accessed 24 November 2017

³⁹ European Parliament, [Smart Border 2.0 Avoiding a hard border on the island of Ireland for Customs control and the free movement of persons](#), accessed 24 November 2017

24 Brexit: the November negotiations

solution, such as the European Economic Area or something like it, at least for Northern Ireland.⁴⁰

⁴⁰ European Parliament, '[Brexit and Ireland Legal, Political and Economic Considerations](#)', p 5, accessed 24 November 2017.

3. Other developments

3.1 Internal EU discussions begin

The 27 other EU Member States [decided](#) in the European Council (Article 50) on 20 October that at its December session it would “reassess the state of progress in the negotiations with a view to determining whether sufficient progress” had been made in the priority areas in phase one to move on to phase two. According to the [terms of reference](#) for the negotiations, phase two will be about the future UK-EU relationship and possible transitional arrangements. Further guidelines will need to be adopted, as the current guidelines are for phase one only. “Against this background”, the European Council [invited](#) the Council (Article 50) and the Union negotiator (Michel Barnier and his team) to start “internal preparatory discussions”.

EU-27 Ambassadors began internal discussion on 25 October, looking at the scope and length of transitional arrangements, and whether the Single Market freedoms will be applied during an interim transition period. They also discussed future UK-EU bilateral relations, and whether to aim for one comprehensive agreement or separate agreements in areas such as trade, defence and security.⁴¹ Another source said Ambassadors also agreed to look into what to do if negotiations do not go according to plan.⁴²

On 8 November the EU-27 Ambassadors discussed internal deadlines ahead of the December European Council summit and on 20 November they took stock of progress in the negotiations.

The EU has emphasised that the UK will not be able to ‘cherry pick’ areas of EU law and policy that it wants to keep or reject in the future, so it is unlikely that anything short of full acceptance of the EU *acquis*⁴³ – but with no institutional representation or influence - will be acceptable during a transitional period.

David Davis envisages a continued relationship with some EU institutions and agencies. He said in his [speech](#) to the *Süddeutsche Zeitung* Economic Summit in Berlin on 16 November that during a time-limited transition (implementation) period of about two years:

... access to the UK and European markets would continue on current terms. Keeping both the rights of a European Union member and the obligations of one, such as the role of the European Court of Justice.

⁴¹ Open Europe, 8 November 2017

⁴² [Reuters, 25 October 2017](#)

⁴³ The EU *acquis* is the whole body of EU law, Treaty obligations and Court of Justice case law.

That also means staying in all the EU regulators and agencies during that limited period ...

3.2 Exit day

Government amendment

On 9 November 2017, Theresa May announced that the Government would table amendments to the EUW Bill to fix 'exit day' for all purposes of the Bill at 11:00 pm GMT on 29 March 2019.⁴⁴ In a Telegraph article David Davis added:

Our amendment makes it crystal clear that the UK is leaving the EU at 11pm on 29 March 2019. We've listened to members of the public and Parliament and have made this change to remove any confusion or concern about what 'exit day' means.⁴⁵

These amendments⁴⁶ are due to be debated on the last day of the Commons Committee stage (20 December 2017).

When will the UK actually leave the EU?

The day that the UK will actually leave the EU is of course determined by Article 50(3) TEU, which sets three possibilities for when the EU Treaties will cease to apply:

- the date of entry into force of the withdrawal agreement or,
- "failing that", two years after the notification of withdrawal, unless
- the European Council and the UK unanimously decide to extend the two-year period.

Both sides are aiming for 29 March 2019, two years after the UK's notification of intention to withdraw.

Domestic concept of 'exit day'

The EUW Bill creates a connected domestic concept of 'exit day' which determines things like:

- when the European Communities Act 1972 is repealed (clause 1)
- the point at which a snapshot of EU law is taken and transposed into UK law (clauses 2-4), and
- when the Henry VIII powers granted to Ministers in the Bill will expire (clauses 7-9).

⁴⁴ Midnight in Brussels/Central European Time, including Gibraltar

⁴⁵ Telegraph, 10 November 2017

⁴⁶ See amendments 381, 382 and 383, available on the '[Bill documents](#)' webpage

The Lords Constitution Committee described this concept as “pivotal to the operation of the Bill”, because many parts of the Bill cannot be operationally effective until exit day arrives.⁴⁷

The Bill currently allows the Government to determine exit day, and to choose different days for different purposes – perhaps originally intended to facilitate a transitional period. However, the Government has now announced separate legislation for an implementation period (see below), which could amend the EUW Bill. Other possibilities include using the clause 9 powers to amend the Bill, or bringing different provisions of the Bill into force on different dates.

What if the UK leaves the EU on a different date?

If the Government amendments passed, but it appeared that the UK would in fact be leaving the UK on a date other than 29 March 2019 (for instance because a withdrawal agreement would enter into force on a different date, or because there was unanimous agreement to extend the two-year period to wait for a CJEU case on Article 50), the EUW Act might have to be amended. Otherwise there is a risk that the UK would be in breach of the EU Treaties.

For example, if clause 1 of the Bill was already in force at that point, the ECA would be repealed on 29 March 2019 but the EU Treaties would still apply to the UK under international law.

3.3 New ‘Withdrawal Agreement and Implementation’ Bill

New Bill announced

On 13 November 2017, in his statement to the Commons following the November negotiations, David Davis announced that there would be a new ‘Withdrawal Agreement and Implementation Bill’ once the text of the agreement was finalised:

It is clear that we need to take further steps to provide clarity and certainty—both in the negotiations and at home—regarding the implementation of any agreement into UK law. I can now confirm that, once we have reached an agreement, we will bring forward a specific piece of primary legislation to implement that agreement. It will be known as the withdrawal agreement and implementation Bill. This confirms that the major policies set out in the withdrawal agreement will be directly implemented into UK law by primary legislation, and not by secondary legislation under the withdrawal Bill. It also means that Parliament will be given time to debate, scrutinise and vote on the final agreement we strike with the European Union. The agreement will hold only if Parliament approves it.

⁴⁷ House of Lords Constitution Committee, [European Union \(Withdrawal\) Bill: interim report](#), HL19 2017-19, 7 September 2017, paras 18-21

We expect the proposed Bill to cover the contents of the withdrawal agreement, which will include issues such as an agreement on citizens' rights, any financial settlement and the details of an implementation period agreed between both sides. Of course, we do not yet know the exact details of the Bill and are unlikely to do so until the negotiations are near completion.⁴⁸

Why is the Bill needed?

The two main reasons for this new Bill are:

- 1 To incorporate the withdrawal agreement into UK law by primary legislation rather than secondary. David Davis said "this is as near as we can come to direct effect",⁴⁹ which is a particular issue in the negotiations on citizens' rights.⁵⁰
- 2 To deal separately with the complexities of legislating for an 'implementation period'.⁵¹ The Brexit Minister Steve Baker told the Brexit Committee that the EUW Bill was to deliver a "functioning statute book" rather than to "implement the implementation period".⁵²

It has also been argued that primary legislation would be needed to give legal effect to the withdrawal agreement given the fundamental changes in the law and legal rights that would result and as a means to prevent legal challenges to the agreement.⁵³

The Brexit Committee says that the Government should now "justify the purpose of clause 9" of the EUW Bill, which contains powers to implement the withdrawal agreement by secondary legislation potentially before the new Bill is considered by Parliament.⁵⁴

What about the other votes relating to the withdrawal agreement?

Mr Davis also stated that the new Bill would be in addition to the promised parliamentary vote on a motion on the final deal. The three main opportunities for votes relating to the withdrawal all have different purposes:

- The vote on a motion would come first, "as soon as possible after the deal is agreed, and ... we still intend and expect such a vote on the final deal to happen before the European Parliament votes

⁴⁸ [HC Deb 13 November 2017 c37](#)

⁴⁹ [HC Deb 13 November 2017 c39](#)

⁵⁰ Commons Exiting the EU Committee, [European Union \(Withdrawal\) Bill](#), HC 373 of 2017-19, 17 November 2017, paras 86-91

⁵¹ See for example Piet Eeckhout and Oliver Patel, '[Brexit Transitional Arrangements: Legal and Political Considerations](#)', UCL Brexit Insights, November 2017; Kenneth Armstrong et al, [Implementing Transition: How Would it Work?](#), 13 October 2017

⁵² Q187

⁵³ Commons Exiting the EU Committee, [European Union \(Withdrawal\) Bill](#), HC 373 of 2017-19, 17 November 2017, para 83

⁵⁴ Commons Exiting the EU Committee, [European Union \(Withdrawal\) Bill](#), HC 373 of 2017-19, 17 November 2017, para 85

on it".⁵⁵ It would be a yes/no vote on whether to approve the whole substance of the unsigned withdrawal agreement. If this vote happened well before 29 March 2019 a 'no' vote could potentially lead to further negotiations, but the Government has said it would instead mean leaving the EU with no withdrawal agreement.

- If that motion was passed, the new Bill would then follow. The purpose of this Bill would be to implement the withdrawal agreement(s), so any votes on it would be about *how* rather than *whether*. There would be limits as to how much the Bill could be amended while still meeting the Government's obligations under the agreement.
- The withdrawal agreement would also be subject to the treaty procedures of the Constitutional Reform and Governance Act 2010, which allow a Commons vote against ratifying a treaty to delay ratification (but do not require a debate, vote or parliamentary approval before the government can ratify). Again this would be a yes/no vote, but a 'no' vote could not lead to renegotiating the agreement as it would already have been signed.

Other Brexit-related bills

The [Queen's Speech](#) in June 2017 announced seven Brexit-related bills, four of which have now been published and/or debated.

Nuclear safeguards

[Nuclear Safeguards Bill 2017-19](#) and [Explanatory Notes](#)

International sanctions

[Sanctions and Anti-Money Laundering Bill \[HL\] 2017-19](#) and [Explanatory Notes](#)

Customs

[Taxation \(Cross-border Trade\) Bill 2017-19](#) and [Explanatory Notes](#)

White Paper, [Customs Bill: legislating for the UK's future customs, VAT and excise regimes](#)

Trade

[Trade Bill](#), [Explanatory Notes](#) and [Trade Bill factsheet](#)

The three Brexit bills mentioned in the Queen's Speech which have not yet been published will be on immigration, agriculture and fisheries.

⁵⁵ [HC Deb 13 November 2017 c37](#)

3.4 EU Agencies in the UK are given new homes

The process for deciding which EU cities will, after Brexit, host the two UK-based EU Agencies, the European Medicines Agency (EMA) and the European Banking Authority (EBA), concluded with votes of the EU-27 on 20 November. The EMA will move to Amsterdam and the EBA to Paris.⁵⁶ A Commission press release [noted](#) “The relocation of these two Agencies is a direct consequence – and the first visible result – of the United Kingdom's decision to leave the European Union”.⁵⁷

The Commission outlined how the two Agencies will be relocated:

Next steps: the Commission will now prepare the necessary legal work by making legislative proposals to amend the founding Regulations for the two Agencies. These proposals will be strictly limited to the issue of relocation. The Commission and Council have agreed to give priority to the handling of these legislative proposals. This is to ensure that the Agencies remain operational throughout this process. The Commission will be following the relocation process closely and will assist the Agencies, where relevant and within the scope of its competences, on matters related to the EU budget, rules on public procurement and staffing issues, amongst others.

Politico reported on 21 November that Amsterdam has “committed to having EMA’s conference facilities ready by April 2019”.

3.5 UK autumn budget – new Brexit money

In his [autumn budget report](#) on 22 November Chancellor Philip Hammond announced that to prepare for leaving the EU and ensure a smooth transition the Government was setting aside an additional £3 billion:

1.52 The Budget sets aside a further £3 billion to ensure that the government can continue to prepare effectively for EU exit. £1.5 billion of additional funding will be made available in each of 2018-19 and 2019-20.

1.53 Departmental allocations for preparing for EU exit in 2018-19 will be agreed in early 2018. Ahead of these allocations, government departments will continue to refine their 2018-19 plans with the support of HM Treasury and the Department for Exiting the European Union. Details of additional departmental funding will be set out as part of the 2018-19 Supplementary Estimates process in the usual way. Departmental allocations for

⁵⁶ See [EUObserver, 20 November 2017](#)

⁵⁷ For further information on UK medicines regulation after Brexit, see Commons Briefing Paper 8148, [Brexit and medicines regulation](#) 20 November 2017.

2019-20 will be agreed later in 2018-19, when there is more certainty on the status of our future relationship with the EU.

This will be on top of the £700 million already set aside for Brexit preparations, and the Chancellor said he stood "ready to allocate further sums if and when needed".⁵⁸

⁵⁸ [HC Deb 22 November 2017 c 631](#)

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