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Brexit: who has said what about transition

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Summary

The European Council adopted new Guidelines for the Brexit negotiations in December 2017 and new Negotiating Directives in January 2018. These supplement the earlier Guidelines and Negotiating Directives of April-May 2017 but do not replace them. They cover negotiations on the planned transition or implementation period. New Directives are expected to be adopted in March 2018 on the framework for the UK's future relations with the EU.

Since the adoption of the new negotiating directives, the EU and the UK negotiators have expressed their positions on the transition or implementation period in speeches, interviews, letters and draft texts, for example.

This paper outlines what the actors on the EU and UK sides have been saying about the scope of and conditions for a transition period, in which the UK will no longer be an EU Member State but will apply and adhere to the EU acquis *as if it were* a Member State.

For detailed analysis of the legal and political implications of the negotiating directives, the Commission's draft legal text and the Government's draft text for discussion, see Commons Briefing Paper 8234, [Brexit: Council Directives for Negotiations on Transition](#), updated 23 February 2018.

1. Background

1.1 Phase one guidelines and directives

The EU set out its general position on transitional arrangements at the start of the negotiations in April 2017 in [European Council guidelines](#).

Transitional arrangements would “provide for bridges towards the foreseeable framework for the future relationship in the light of the progress made”. They would be “clearly defined, limited in time, and subject to effective enforcement mechanisms”. In May 2017 the Council adopted [negotiating directives](#) which expanded on the guidelines and provided more detail about the first phase of the Brexit negotiations.

The first phase of the negotiations formally ended in December 2017 with the European Council (EU27) agreeing that “sufficient progress” had been made to move on to phase two.

1.2 European Parliament resolution

The European Parliament does not formally participate in the negotiations, but throughout the process it has adopted resolutions on Brexit. The EP’s opinions matter, because its approval of the final withdrawal agreement will be needed before the Council can conclude it. An [EP resolution](#) on 3 October 2017 insisted that the UK would have to continue to apply the EU *acquis* during a transition, under the “full jurisdiction” of the Court of Justice of the European Union (CJEU).

1.3 EU - UK Joint Report

In December 2017 the European Council approved the start of phase two of the Brexit negotiations under Article 50 of the Treaty on European Union (TEU). The UK-EU [Joint Report](#) agreed in early December 2017 called for “an agreement as early as possible in 2018 on transitional arrangements” and the Secretary of State for Exiting the EU, David Davis, was optimistic that the transition arrangements would be agreed “early on, given that each side’s positions are well known”.¹ He has also predicted that the talks would deliver “the same public thunder and lightning” we saw during Phase 1”.²

¹ David Davis, Telegraph, 1 January 2018, [How we will deliver the best Brexit in 2018](#)

² Ibid. Politico, 16 December provided an [FAQ](#) on phase 2.

2. The EU begins phase two

2.1 New guidelines and negotiating directives

The European Council (EU27) adopted new [guidelines](#) for phase 2 on 15 December 2017 (the April 2017 guidelines will continue to apply in phase two), and on 20 December 2017 the Commission issued a [Recommendation for a Council Decision](#) to supplement the May 2017 Council Decision authorising the opening of negotiations. The [Annex](#) to the Council Decision contained draft negotiating directives for the second phase.

The Commission's [new negotiating directives](#) were adopted on 29 January 2018 by the General Affairs (Article 50) Council. The Council noted the importance of translating the commitments in the December 2017 Joint Report into 'legal text', and the Commission published an amendable [draft legal text](#) on transition on 7 February. It only partially reflects the January 2018 negotiation directives on the transition period. It is a Commission proposal and not yet the official position of the Council, which may amend it.

The January negotiating directives reiterated the core principles agreed in [April](#) and [May](#) 2017, which will apply to the withdrawal agreement and any transitional arrangements. They set out a set of conditions which "should" apply, implying that there is room for negotiation, and two which "must" apply: any transitional arrangements must be "clearly defined and precisely limited in time" and they "must also be subject to effective enforcement mechanisms".

2.2 EU meetings and preparatory work

The negotiations in phase two will be conducted on a continuous basis. They will span the Bulgarian and Austrian EU presidencies in 2018.

Technical meetings

Diplomats in the Council's COREPER II committee held technical meetings in mid-January on governance, the Irish border and other separation issues (e.g. customs, data protection, intellectual property and goods on the market)³ which were not settled last December.

Seventh negotiating round

The seventh round of negotiations, the first in phase two, took place between 6 and 9 February 2018 in Brussels. It followed an informal meeting between Michel Barnier, the EU Chief Negotiator, and David Davis, UK Secretary of State for Exiting the European Union, on 5 February in London. The focus was on three issues: the transition period, the Ireland/Northern Ireland border and governance of the withdrawal agreement.

The ad hoc Working Party on Article 50 met on 7, 14 and 20 February.

³ See [programme](#) of technical meetings, 16 January 2018

On 27 February Michel Barnier will inform the EU27 about the state of play in the Brexit negotiations. He is expected to focus on translating into legal text the commitments in the December joint report, completing work on other withdrawal issues and discussions on the transition period.⁴ Ministers will also begin preparations for the March European Council (Article 50) at which the EU27 are expected to adopt additional guidelines on the framework for the EU's future relationship with the UK.

2.3 New Commission publications

Miscellaneous papers

In January the Commission's Brexit Taskforce published miscellaneous papers in the form of slides for internal EU27 preparatory discussions on the framework for the future relationship. Future relations will not be discussed in detail until at least March, but these set out EU principles in 12 areas: [Governance](#), 15 January; [Aviation](#), 17 January; [Fisheries](#), 17 January; [Governance](#), 19 January; [Police & judicial cooperation in criminal matters](#), 24 January; [Security, Defence and Foreign Policy](#), 24 January; ['Level Playing Field'](#), 31 January; [Services](#), 6 February; [International agreements and trade policy](#), 6 February; [Transport](#), 21 February; [Regulatory issues](#), 21 February; [Mobility](#), 21 February.

Draft legal texts

The Commission said it would publish "legal texts" formalising what the negotiators had agreed in the Joint Report on a transition period and phase 1. On 7 February the Commission published, as a position paper, a [draft Legal Text](#) on transition. Further EU draft legal texts, on the phase one agreement and "regulatory alignment" for example, are expected by the end of February.

⁴ See General Affairs Council (Article 50) [website](#).

3. The UK begins phase two

The EU has complained about not knowing what the UK Government's position is on a range of Brexit issues, including fundamental matters such as the kind of Brexit it wants, and how it envisages resolving the incompatibility between wanting to leave the Single Market and customs union and having frictionless trade and full participation in financial services arrangements.

3.1 Government proposals on transition/implementation

Prime Minister's Florence speech, September 2017

For many months the main source of information on the Government's position on Brexit and a transition period (which it calls an implementation period) has been the Prime Minister's [Florence speech](#) on 22 September 2017. Theresa May proposed a guaranteed "implementation period" of "around two years". This would be in the framework of "the existing structure of EU rules and regulations", although the UK would no longer be part of the EU institutions. Mutual access to markets "should continue on current terms". The UK would continue to take part in existing security measures. EU citizens would continue to be able to come to and live and work in the UK, but there would be a registration system. The Government could start negotiating trade deals with third countries during this period.

Since this speech, aspects of the Prime Minister's aspirations have been fine-tuned and in some cases redefined.

David Davis, Teesport, January 2018

On 26 January David Davis [addressed](#) PD Ports at Teesport about the transition/implementation period.⁵ In the face of mounting objections from hard line Brexiteers to a transition in which the UK would be bound by EU obligations for a further two years, Mr Davis explained why a transition period was needed and how he envisaged it would work. It would, he said, give the country time "to build new infrastructure, and set up new systems, to support our future partnership and allow for as free and frictionless trade as possible". He also said a transition period would and should not preclude the UK from signing independent trade agreements, which would enter into force after post-implementation.

The British Ports Association Chief Executive, Richard Ballantyne, [responded](#) to the speech on 26 January.

David Davis, oral evidence to parliamentary committees

Mr Davis gave [evidence](#) to the Exiting the EU Committee on 24 January for its report on progress of the UK's negotiations on EU withdrawal,

"I am relaxed about transition, because my primary concern is about the future relationship. That is what matters".

David Davis to
Committee on Exiting
the EU, 24 January 2018

⁵ [Implementation Period – A bridge to the future partnership between the UK & EU](#), 26 January 2018

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and to the [Lords EU Committee](#) on 29 January for its report on scrutiny of the Brexit negotiations.

More speeches are announced

Amid EU and other Member State calls for more clarity on the UK's Brexit position, the Government announced a series of speeches in the coming weeks.

The Foreign Secretary Boris Johnson spoke on 14 February on [Uniting for a Great Brexit](#); the Prime Minister made a speech about Brexit and security cooperation at the [Munich Security Conference](#) on 17 February 2018 and David Davis on the [Foundations of the Future Economic Partnership](#) on 20 February.

Government papers

On 8 February the Government published a [Technical note on international agreements](#), and on 21 February the Government responded to the Commission's legal text on transition in a [Draft text for discussion: implementation period](#). For comment on these draft texts, see Commons Briefing Paper 8234, [Brexit: Council Directives for Negotiations on Transition](#), updated 23 February 2018, and Professor Steve Peers, [Annotation of the proposed Withdrawal Agreement, version 2: The Empire 2.0 Strikes Back?](#) EU Law Analysis, 21 February 2018.

David Davis told the Committee on Exiting the EU on 24 January that there would "not necessarily be a White Paper on phase two", but on 5 February the Immigration Minister Caroline Nokes [announced](#) that the Government would publish an immigration white paper "in the coming months, when the time is right".

4. Table summarising EU and UK positions

The following table outlines what the EU has said this year on the transition or implementation period, alongside what the Government has said.⁶

Subject	EU position: new negotiating guidelines and directives; draft transition agreement; speeches	UK position: speeches, evidence sessions, draft texts; parliamentary questions and debates
<i>Future EU-UK relations</i>	(4) In the second phase an “overall understanding on the framework for the future relationship” of the EU and UK should be reached. The European Council will adopt additional guidelines on this framework in March 2018.	HMG agrees that transitional arrangements could be settled by the March 2018 European Council meeting.
<i>Gibraltar</i>	(5) Reference to need for respect for paragraphs 4 and 24 of the April 2017 guidelines as regards Gibraltar. These stated that no agreement between the EU and the UK could apply to Gibraltar without the agreement of Spain and the UK.	HMG believes the territorial scope of the withdrawal agreement, including transitional arrangements, extends to Gibraltar, because under Article 50 the UK and its Overseas Territories are one entity. HMG insists it will not accept a transitional deal that treats Gibraltar differently from the rest of the UK. PM said on 20 December: “We and the EU have been clear that Gibraltar is covered by the withdrawal agreement and our article 50 exit negotiations. Just to confirm what I said on Monday, as we negotiate this, we will be negotiating to ensure the relationships are there for Gibraltar as well. We are not going to exclude Gibraltar from our negotiations for either the implementation period or the future agreement”.

⁶ In the interests of brevity, except in direct quotations, David Davis has been abbreviated to DD, Michel Barnier to MB, the Prime Minister to PM, and Her Majesty’s Government to HMG.

Subject	EU position: new negotiating guidelines and directives; draft transition agreement; speeches	UK position: speeches, evidence sessions, draft texts; parliamentary questions and debates
		<p>DExEU Minister Robin Walker said on 21 December that the UK and the EU were in agreement on the status of Gibraltar in the transition period.</p> <p>Gibraltar Government position is that any transitional period which largely extends the current UK-EU relationship until the end of 2020 should also extend the existing relationship of Gibraltar with the EU until that time. Gibraltar Chief Minister Fabian Picardo believes Gibraltar can choose elements of a Brexit agreement and avoid those it considers detrimental. He told The Independent that a clause in Gibraltar's Constitution gives it the right to choose its own terms for matters such as trade tariffs and regulations.</p> <p>The Spanish Government wants a "reasonable" outcome on Gibraltar in the Brexit talks. But Prime Minister Rajoy insists that under para. 24 of April 2017 Guidelines, Spain must reach agreement with UK before any transitional arrangements can apply to Gibraltar.</p>
<p><i>Ireland/Northern Ireland border; regulatory alignment</i></p>	<p>(6) Detailed arrangements implementing the principles and commitments on the Ireland/Northern Ireland border "should continue in a distinct strand".</p> <p>Joint Report agreed in December stated that if there were no agreed solutions, the UK would "maintain full alignment with those rules of the Internal Market and the Customs Union which, now or in the future, support</p>	<p>December 2017 Joint Report referred to "full alignment". DD told Brexit Committee: "it essentially relates to the north/south agreements. In particular, there are about six of those under the North/South Ministerial Council. They include agriculture, education, environment, health, transport and tourism. Of those, three are key here. Agriculture is big. Environment tends to relate to waterways in this context.</p>

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	<p>North-South cooperation, the all island economy and the protection of the 1998 Agreement”.</p>	<p>Transport tends to relate to road and rail. The point of full alignment, as I explained in the House on more than one occasion, is that we intend to get outcome alignment, not harmonisation”.</p> <p>DD: “Whatever happens, we will be able to meet the alignment. One aspect of the alignment, which will be UK national, is how it is agreed because if, as I said in the House, it is a question of mutual recognition or a question of equivalent outcomes, we will have agreement on what the equivalent outcomes are. That is an international thing; it is not just a Northern Ireland thing. It will have to be UK to EU even under those circumstances” (Q771). “Of course, we are not taking responsibility for the Republic of Ireland economy, but we are trying to make sure that there are no unnecessary frictions” (Q773).</p>
<p><i>UK Sovereign Base Areas, Cyprus</i></p>	<p>(7) “appropriate arrangements” should be determined for the UK’s Sovereign Base Areas in Cyprus, in accordance with Protocol No 3 to Cyprus’s Act of Accession.</p>	<p>No recent HMG comment.</p> <p>In a written statement on 14 December 2017 the most recent Overseas Territories Joint Ministerial Council FCO Minister, Sir Alan Duncan said: “We continued our dialogue on the implications for the Overseas Territories of Brexit, and reiterated our objective to achieve a deal in the negotiations that works for all parts of the UK family. We will seek to ensure the security and economic sustainability of the Overseas Territories is preserved and, where possible, strengthened post Brexit”.</p>

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Subject	EU position: new negotiating guidelines and directives; draft transition agreement; speeches	UK position: speeches, evidence sessions, draft texts; parliamentary questions and debates
<i>Outstanding matters from phase 1</i>	<p>(8) Matters not settled in phase 1, such as governance of the withdrawal agreement, intellectual property rights, ongoing public procurement procedures, customs-related matters, protection of personal data and use of information obtained or processed before exit day.</p> <p>Reports at the end of January maintained the UK was dragging its feet in several phase 1 issues still outstanding.⁷</p>	
<i>Citizens' rights</i>	<p>(9) Citizens' rights provisions in the withdrawal agreement should apply as from the end of the transition period.</p> <p>Citizens in the EU or UK who move during the transition period should keep the citizens' rights agreed.</p>	<p>DD in Teesport: "people will of course be able to travel between the UK and EU to live and work".</p> <p>But PM has rejected the EU proposal to extend the citizens' rights agreement, which guarantees the status of EU citizens in the UK and vice versa, until the proposed end of the transition period in December 2020. PM said, "I'm clear there's a difference between those people who came prior to us leaving and those who will come when they know the UK is no longer a member of the EU".⁸</p> <p>"During the period, when people from the EU move to the UK freely, we will have a registration system in place.</p> <p>It will have no bearing on people's ability to work or visit.</p> <p>But the system will allow us to better plan for our future public</p>

⁷ See, e.g. [Guardian, 29 January 2018](#).

⁸ Theresa May, speech at the inaugural meeting of the UK-China CEO Council at the Great Hall of the People in Beijing, China January 31, 2018

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		<p>services, and prepare for our future immigration system”.</p> <p>Other aspects of citizens’ rights could be tackled bilaterally, for example, voting in local elections (DD to Brexit Committee, Q 761, 24/1).</p> <p>DD: “we view the position of British citizens abroad and EU citizens here—3.7 million is now the latest number—as a moral responsibility. At least I see it that way” (Q765). “There is never going to be a circumstance where we are going to be deporting people, unless they commit serious crimes or become a threat to the state” (Q765).</p> <p>For detailed information on the citizens’ rights agreement in the Joint Report, see Common Briefing Paper 8183, Brexit: 'sufficient progress' to move to phase 2, 18 December 2017.</p>
<i>EU rights and benefits</i>	(10 – core principle) as a non-EU state, the UK cannot have the same rights and enjoy the same benefits as a Member State.	
<i>Single Market</i>	(10 – core principle) the four freedoms of the Single Market are indivisible.	HMG has said it does not want the UK to stay in the Single Market after Brexit, but agreed in the Joint Report to continue to apply all Single Market legislation during transition.
<i>EU institutions</i>	(10 – core principle) EU preserves its autonomy in decision-making and the competence of the CJEU. Draft Article X + 5 of Commission draft legal text (supervision and enforcement) specifies that during	HMG core principle was that after Brexit CJEU jurisdiction in UK would end. Later, HMG conceded that CJEU case law would still be relevant, depending on whether

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	<p>transition, the EU institutions, bodies and agencies shall maintain their powers in relation to the UK and natural and legal persons living in the UK, and in particular, the CJEU “shall have jurisdiction as provided for in the Treaties”. A footnote adds: “In addition, the Governance and Dispute Settlement Part of the Withdrawal Agreement should provide for a mechanism allowing the Union to suspend certain benefits deriving for the United Kingdom from participation in the internal market where it considers that referring the matter to the Court of Justice of the European Union would not bring in appropriate time the necessary remedies”.</p>	<p>the EU law had been adopted before exit day or afterwards.</p> <p>DD in Teesport: There will be “a strictly time-limited role for the European Court of Justice” during transition.</p> <p>Robin Walker told Lords Constitution Committee on 13 December that the European Withdrawal and Implementation Bill would provide for this role for the CJEU during transition. “That would be by agreement and as a result of the implementation period, not by default in UK law”.</p> <p>HMG draft discussion text, 21 February, deletes specific reference to CJEU and proposes a new system of adjudication. The Explanatory note proposes a Joint Committee, “should be given certain functions concerned with ensuring the proper functioning of the Period, including protecting the rights and interests of both parties”. A footnote sets out its possible functions:</p> <ul style="list-style-type: none"> “(a) determining whether new acts are within the scope of this Part; (b) determining whether any further adaptations to new acts are necessary; (c) resolving any other issues concerning the proper functioning of this Part”. <p>HMG also proposed “an article of good faith should be included in the Withdrawal Agreement in general”.</p>

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<i>Level playing field</i>	(10 – core principle) agreement and transitional arrangements must be based on a balance of rights and obligations, and ensure a level playing field.	DD in Teesport: “This will be a relationship where respect flows both ways — as we move from being a member of the European Union to its closest partner”.
<i>No ‘cherry-picking’</i>	(10 – core principle) The integrity of the Single Market will be preserved, excluding a sectoral approach.	DD in Teesport: “Both sides must continue to follow the same, stable set of laws and rules. Without compromising the integrity of the single market, and the customs union to which we will maintain access on current terms. Maintaining the same regulations across all sectors of the economy — from agriculture to aviation, transport to financial services, as part of a new international treaty”.
<i>Conditions for transition</i>	<p>(11) Transitional arrangements will “provide for bridges towards the foreseeable framework for the future relationship” and must be “clearly defined”, “precisely limited in time” and “subject to effective enforcement mechanisms”.</p> <p>The WA will contain only the <u>framework</u> for future relations in a “political declaration” (political declarations are not legally binding).</p>	<p>Chancellor Philip Hammond suggested in Davos that “full details” of the future EU-UK relationship would probably not be set out clearly and in full by the time Parliament votes on the withdrawal agreement, “But we would expect the high level shape of the future relationship to be emerging by that time”.⁹</p> <p>DD believes negotiating a “substantive trade deal” is possible in the time available. He told Brexit Committee on 24/1 he did not expect the future arrangement will be ongoing into the transition period – only “detailed issues to be resolved”.</p> <p>“(Q 707) There may be fine detail that I am not worried about. It would be unwise, in my view, apart from that it practically does not meet the requirements of a</p>

⁹ [Sky News, 25 January 2018](#)

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		<p>transition period, to get sucked into doing a negotiation that is substantive or major during the transition period itself. Why? The balance of power in the negotiation alters and the aim then, on the part of the Commission, will be to spin out the negotiation”.</p> <p>DD in Teesport: “We also agree on the need for this period to have a strict time limit, guided by how long it will take us all to prepare and implement the new processes” .</p>
<i>EU acquis</i>	<p>(13) Transitional arrangements will cover the whole of the EU acquis, including Euratom.</p> <p>Any changes to the acquis will automatically apply to and in the UK. In the Area of Freedom, Security and Justice, the UK’s opt-in and opt-out will apply, but it will not be able to opt into new AFSJ measures other than those amending, replacing or building upon measures it is already bound by.</p> <p>The February legal text defines EU law as: (i) the TEU, TFEU and the Euratom Treaty, as amended or supplemented, and the Treaties of Accession; (ii) general principles of EU law; (iii) acts adopted by EU institutions, bodies, offices or agencies; (iv) international agreements to which EU and/or Euratom is party; (v) agreements between Member States entered into in their capacity as EU/Euratom Member States; (vi) decisions and agreements of Member State governments</p>	<p>DD Teesport: “we agree on the need to base this period on the existing structure of rules and regulations. Including, crucially, on continued access to each other’s markets on current terms”. [...] “both sides must continue to follow the same, stable set of laws and rules.</p> <p>Without compromising the integrity of the single market, and the customs union to which we will maintain access on current terms.</p> <p>Maintaining the same regulations across all sectors of the economy — from agriculture to aviation, transport to financial services, as part of a new international treaty” .</p> <p>In its draft discussion text of 21 February, HMG broadly agreed with Commission legal text on its opt-in. But UK proposes that it should be allowed to opt in to new measures if agreed with the EU. The PM also spoke about continuing JHA cooperation (with</p>

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	meeting within the European Council or the Council.	reference to the European Arrest Warrant and European Investigation Order, Europol, Schengen Information System and passenger name data) in her Munich Security Conference speech on 17 February 2018.
<i>Transition is part of withdrawal agreement</i>	<p>(5) and (13) The transitional arrangements will be part of the withdrawal agreement. This means they can be agreed by the EU Council (except the UK) by a super qualified majority (20 of the EU27 governments) and the European Parliament, and will not need ratification by individual Member States (or their parliaments).</p> <p>The Part on Common Provisions will also contain an article to the effect that the provisions of the Agreement referring to concepts or provisions of Union law in their implementation and application are interpreted in conformity with the relevant decisions of the Court of Justice of the European Union given before the end of the transition period. Furthermore, a specific article of the Part on Common Provisions will clarify that where a provision of Union law is amended, supplemented or replaced during the transition period, the reference to this provision of Union law is to be read as referring to the amended, supplemented or successor provision, provided that the change takes effect before the end of the transition period".</p> <p>It clarifies that UK opt-out and opt-in arrangements will prevail</p>	<p>DD in Teesport: "the implementation period should be delivered as a part of the Withdrawal Agreement, to be adopted under Article 50".</p> <p>In the UK the Withdrawal and Implementation Bill announced by HMG on 13 November will implement any withdrawal agreement and transitional arrangements, if Parliament votes in favour of the package in a 'take-it-or-leave-it vote beforehand.</p>

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	<p>and certain other exclusions will apply:</p> <ul style="list-style-type: none"> - Provisions for an EU citizens' initiative (Article 11.4 TEU) and the procedures for this (Article 24 TFEU) - EU citizens' right to vote and stand for election in EP elections (Article 22 TFEU).¹⁰ <p>The Commission's February draft legal text confirms the retention of the UK's existing opt-outs from the single currency, Schengen, Justice and Home Affairs law and enhanced cooperation, except where the UK opted into EU laws in these areas before Brexit day.</p>	
<p><i>UK is not a Member State during transition</i></p>	<p>(13) The UK will be outside the EU – not a Member State – during the transition period.</p> <p>The <i>acquis</i> and all existing EU regulatory, budgetary, supervisory, judiciary and enforcement instruments and structures will apply to and in the UK during the transition period, including changes to EU laws, "as if it were a Member State". The competence of all EU institutions will be preserved in relation to the UK, including the competence of the CJEU.</p> <p>Asked what the UK could do if decisions taken by the EU during the transition are not acceptable to the UK, MB said: "The UK has asked us for this and our positive response, at this time, is, 'We say</p>	<p>DD in Teesport: "it should see the UK outside of the European Union, no longer a Member State".</p> <p>The transition period will be the so-called 'stand-in-place' or 'standstill' transition, which will prevent a cliff edge scenario on 30 March 2019. Its duration will be strictly time limited, guided by how long it will take both sides to prepare and implement new processes, but "around two years".</p> <p>DD Teesport: "it's only by being outside the EU but continuing with the existing structures of rules and regulation that we can meet the requirements for a</p>

¹⁰ Professor Steve Peers notes in his EU Law Analysis blog, [Annotation of the proposed Withdrawal Agreement, version 2: The Empire 2.0 Strikes Back?](#) 21 February 2018: "There is a need for a transitional clause to deal with the situation of those EU27 citizens who were elected to local government in the UK (and vice versa) before Brexit day".

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	<p>that all of the <i>acquis</i>, the economic status quo, the European policies, will be maintained between 30 March 2019 and 31 December 2020.’ During that period the decisions will apply. And the UK must acknowledge and accept these rules of the game from the outset.</p> <p>Otherwise we would be moving towards something which we did fear for the future, divergence and a type of single market <i>a la carte</i>, which is not possible, certainly not during transition period, which the UK has requested”.</p> <p>Commission’s February legal text: “the detailed provisions relating to the financial settlement aspects of the transition will be covered under the Financial Provisions of the Withdrawal Agreement”.</p>	<p>smooth, orderly and successful exit”.</p> <p>In keeping with the existing structure of EU rules that will allow a strictly time-limited role for the European Court of Justice during that period”.</p> <p>“I do not really care what the outcome is, so long as, first, it does not require us to meet some of the other treaty duties. We are happy to accept ECJ oversight for that period. There will be questions about what happens with subsequent laws, which we will have to deal with. It will be bespoke” (Q779, Brexit Com).</p> <p>Jacob Rees-Mogg suggested this would make the UK a “vassal state” (Q792) at least for a two-year period (Q797). DD disagreed because the situation would be for a “short time only” (Q793).</p> <p>DD told Brexit Committee he expected to make payments to the EU budget “during the course of the transition or the implementation period” (Q805). Asked if HMG would “be prepared to walk away from any financial obligations in the result of unsuccessful negotiations”, DD replied: “That is the natural outcome of the Prime Minister’s comment” (no deal is better than a bad deal). But he thought it “highly likely, extraordinarily likely, that we will achieve the outcome we are seeking of a free trade deal [...] the Prime Minister made it plain that all the financial undertakings are conditional on us doing that” (Q813).</p>

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		<p>HMG draft text on implementation period, 21 February, explanatory note on Article X: “the Period’s duration should be determined simply by how long it will take to prepare and implement the new processes and new systems that will underpin the future partnership”.</p> <p>HMG’s open-ended approach prompted the European Scrutiny Committee (ESC) to ask HMG for urgent clarification about the financial implications for UK taxpayers of the transition period not ending in 2020 (PM told Liaison Committee on 20 December the transition could last well into 2021). ESC was concerned that if extended beyond end 2020, under the EU terms for transition, UK will remain contributor to EU budget “as if it were” still a Member State, but would have no vote over EU budget or funding decisions. ESC notes on its website: “The longer the transition, the more the UK would have to contribute to EU spending commitments which it cannot block or influence once it ceases to be a Member State”. HMG estimates financial contribution to EU budget until end 2020 will cost between £35 and £39 billion. “The additional costs of staying a contributor to the EU budget afterwards are impossible to quantify at present, but could run into billions of pounds if the transition lasts well into 2021”.</p> <p>See also European Scrutiny Committee consideration of Draft EU budget for 2018, 19/12/17,</p>

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		with recommendation for debate in European Committee B.
<i>Direct effect and supremacy of EU law</i>	<p>(14) Direct effect and the primacy of EU law “should be preserved” in the UK. This means courts can disapply domestic law where this is incompatible with EU law during the transition</p> <p>Paragraph X + 1 (3) of the February legal text states: “During the transition period, the Union law applicable pursuant to paragraph 1 shall deploy in respect of and in the United Kingdom the same legal effects as those which it deploys within the Union and shall be interpreted and applied in accordance with the same methods and general principles as those applicable within the Union”.</p>	<p>The supremacy of EU law would be preserved for the purposes of retained EU law under the European Union (Withdrawal) Bill. But this Bill does not cover transition. The EU Withdrawal and Implementation Bill that HMG has promised will have to include mechanisms for dealing with transition.</p>
<i>EU external agreements</i>	<p>(15) During transition the UK should remain bound by the obligations stemming from EU only or mixed EU and Member State agreements.¹¹</p> <p>UK will not participate in any bodies set up by those agreements.</p> <p>MB said, 29 January: “we cannot ensure in the Article 50 Agreement that the UK keeps the benefits from these international agreements. Our partners around the world may have their own views on this, for instance the 70 countries covered by trade deals”.¹²</p>	<p>Robin Walker answered a PQ on Brexit and external agreements on 22 December: “The UK will seek to maintain the relationships and cooperation it currently enjoys with non-EU partners and international organisations as it exits the EU. Our priority is to ensure continuity, and we recognise the need to promote stability for business and individuals. [...] the Department for Exiting the European Union, in conjunction with other Departments, is working with our international partners to identify the full range of international agreements that will be impacted</p>

¹¹ Mixed agreements are where both the EU and the Member States ratify an agreement because it contains elements of EU exclusive competence and Member State competence.

¹² Press statement by Michel Barnier following the General Affairs Council (Article 50) on the adoption of negotiating directives on transitional arrangements.

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	<p>Article x + 1(6) of the legal text states that the exception to the UK being included as if it were a Member State will apply “in an information exchange, procedure or programme and where such participation would grant access to sensitive information that a third country or natural or legal person residing or established in a third country is not to have knowledge of”. The Telegraph reported 17 February that this could mean the UK Armed Forces being blocked from using the military applications of the EU’s Galileo satellite network.</p>	<p>by our exit from the EU, including mixed agreements. The Government’s EU exit legislative programme is designed to cater for the full range of negotiated and non-negotiated outcomes, including for international agreements”.</p>
<i>Single Market and Customs Union</i>	(16) UK should continue to participate in the Customs Union and Single Market during transition.	<p>DD: UK will not formally be in either: “but we would have arrangements that mimic it” (evidence to Brexit Committee, 24/1/18)</p> <p>DD Teesport: “maintaining access to each other’s markets on current terms means that we will replicate the effects of the EU customs union during the implementation period including new rights and obligations of trading arrangements entered into by the European Union. But participating in a customs union should not and will not preclude us from formally negotiating — and indeed signing — independent trade agreements. Although, of course, they would not enter into force until the implementation period has ended”. DD told Lords EU Committee on 29 January that the UK would have to abide by the principle of “sincere cooperation” during transition.</p>

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		<p>UK will not seek a customs union with EU after the transition period, but will seek a “minimalist customs arrangement” with EU (DD to Lords EU Committee, 29 January).</p>
<i>EU trade policy</i>	<p>(16) The UK should continue to apply EU trade policy, collect customs tariff duties and carry out border checks vis-à-vis other third countries.</p>	<p>DD Teesport: “The existing international agreements we are party to should continue to apply during this period. They are an important part of the existing EU structure of rules and regulations, to which we will remain a part during the implementation period [...] a simple step forward is for all parties, all parties, to agree that the United Kingdom will continue to be party to these agreements while we continue to work on ensuring they maintain their effects in perpetuity”.</p>
<i>UK and trade agreements</i>	<p>There would be no automatic roll-over of EU trade deals during the transition period.</p> <p>(16) The UK “may not become bound by international agreements entered into in its own capacity in the fields of competence of Union law, unless authorised to do so by the Union”. This authorisation will be “the responsibility of the Council in accordance with the relevant procedures under the Treaties”.¹³</p> <p>The February draft legal text amends this to read in X+3(4) “During the transition period, the United Kingdom may not become bound by international agreements entered into in its own capacity in the areas of exclusive competence of the Union, unless authorised to do so by the Union”. It also states that “In accordance with the principle of sincere cooperation”, the UK should not during the transition</p>	<p>Letter to business leaders from DD, Philip Hammond and Greg Clark, 26 January: “Our intention is to mimic the breadth of our current arrangements, from goods to agriculture to financial services, meaning that every business, small or large, will be able to go on trading with the EU as it does today until it’s time to make any changes necessary for the future partnership. We also plan to work together with the EU to ensure the UK remains covered by those international agreements, including free trade agreements, to which it is currently a party by virtue of our EU membership”.</p> <p>DD told Brexit Committee on 24 January: “There may be argument over the issue of doing outside negotiations. [...] In truth, we</p>

¹³ [Council Decision](#) supplementing Council Decision of 22 May 2017, 29 January 2018

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	<p>period do anything “which is likely to be prejudicial to the Union’s interests in the framework of any international organisation, agency, conference or forum” in which the UK a party in its own right.</p> <p>MB said on 29 January: “As part of the transition, the UK will remain bound by the obligations stemming from all existing EU international agreements, for instance on trade and aviation. This is crucial for the good functioning of the Single Market and the Customs Union. And we can agree on this in the Article 50 Agreement between the EU and the UK.</p> <p>But we cannot ensure in the Article 50 Agreement that the UK keeps the benefits from these international agreements. Our partners around the world may have their own views on this, for instance the 70 countries covered by trade deals”.</p> <p>At press conference on 9 February, MB said the UK Technical Note on International Trade Agreements confirmed the EU’s own legal analysis: when the UK leaves the EU, it will also leave around 750 international agreements in all areas. He concluded that in the withdrawal agreement there could be an agreement on obligations stemming from the agreements, but regarding benefits during transition, the third countries directly concerned would want to have their say as well.</p>	<p>have tried to devise our approach so that it visibly does no harm to the European Union in any way whatsoever, but there are people within the Union who want to restrict any advantage for us, so you may well see arguments there”.</p> <p>DD Teesport: EU-UK agreement on future relations cannot be agreed until UK is outside the EU, and this will need “the appropriate legal ratification, which would itself take time” . “This will need to happen during the implementation period”.</p> <p>HMG policy is not to extend the Article 50 negotiating period (see also: Steve Baker to Lords Constitutional Committee, 13 December 2017: “It is our policy not to extend the period” .</p> <p>In Teesport speech DD rejected argument for extending Article 50 negotiations instead of having a transition period. This would “create a new uncertainty about whether and when we would actually leave the Union” and “it’s only by being outside the EU but continuing with the existing structures of rules and regulation that we can meet the requirements for a smooth, orderly and successful exit” .</p> <p>“So, since the terms of trade between the UK and EU will not have changed, a simple step forward is for all parties, all parties, to agree that the United Kingdom will continue to be party to these agreements while we continue to work on ensuring</p>

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		<p>they maintain their effects in perpetuity”.</p> <p>HMG Technical Note on International Agreements, 8 February, sets out UK position on EU external agreements: “the UK position is that the existing agreements are capable of operating and continuing to function both as between the EU and the UK and between the EU/UK and the third country or countries in question for the duration of the implementation period. From the perspective of each third country the agreements would continue to operate as they do now”. So, during transition, the UK would be “treated in the same way as EU Member States for the purposes of these agreements” and all parties would agree that references in them to “European Union” or “EU Member State” included the UK.</p> <p>MB could not guarantee the UK would receive benefits of existing EU external agreements, but UK seeks “the agreement of relevant third countries” to ensure that both rights and obligations continue to apply to the UK in EU only as well as mixed agreements.</p> <p>UK draft discussion text removes reference to UK adhering to principle of sincere cooperation because “the duty of sincere cooperation applies throughout the Period in general, including in relation to international agreements”.</p>
<i>Competence of CJEU</i>	(17) Extending the application of EU <i>acquis</i> involves adhering to	See UK position at para. 10 (above)

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	existing EU regulatory, budgetary, supervisory, judiciary and enforcement instruments and structures, including the competence of the CJEU.	
<i>U institutions</i>	<p>(18) The UK will not participate in, nominate or elect members of EU institutions – so no seat on the Council, no MEPs and no judge in the CJEU – or other bodies or agencies; neither will the UK participate in their governance or decision-making.</p> <p>Legal text of 7 February includes in proposed Article X+2(4) a derogation allowing some limited participation of the UK in EU bodies as an exception.</p> <p>It also states in X+2(2) that during the transition period the UK Parliament “shall not be considered to be a national parliament” and in X+2(3) “the Bank of England shall not be considered to be a national central bank”. It adds in X+2(5) that the UK “shall not act as leading authority for risk assessments, examinations, approvals and authorisation procedures provided for in Union law”. It also omits the sentence in the negotiating directives about EU institutions, bodies and agencies conducting “all supervision and control proceedings foreseen by Union law”. But it adds, controversially, in a footnote: “the Governance</p>	<p>DD in Teesport: “we will still make our voice heard”.</p> <p>“we will have to agree a way of resolving concerns if laws are deemed to run contrary to our interests and we have not had our say and we will agree an appropriate process for this temporary period [...] It’s very, very important. If there are new laws that affect us, we have the means to resolve any issues during that period”.</p> <p>“we must discuss how regulators and agencies can best provide continuity and clarity for businesses during this period in a way that benefits everyone”.</p> <p>Some EU Agencies have provision for third country participation, some do not.¹⁴ While it is clear that UK may seek to participate in activities of an agency where its founding legislation provides, HMG has indicated that UK may still be able to participate if an international agreement (such as the withdrawal agreement) makes provision for this - even in the absence of such provision in founding legislation of the agency.¹⁵</p>

¹⁴ See Section 2.4 of Commons Briefing Paper [EU Agencies and post-Brexit options](#) includes a list of EU agencies and the provisions for third country participation in each.

¹⁵ [Letter of 1 December 2017](#) from Nick Hurd to Sir William Cash: “However, we note that a third country agreement concluded by the EU may provide for an EU measure, or provisions within such a measure, to apply to that third country, with or without modifications or adaptations, even where the EU measure being applied does not

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	<p>and Dispute Settlement Part of the Withdrawal Agreement should provide for a mechanism allowing the Union to suspend certain benefits deriving for the United Kingdom from participation in the internal market where it considers that referring the matter to the Court of Justice of the European Union would not bring in appropriate time the necessary remedies".</p> <p>In a press conference on 9 February MB confirmed that if differences persisted, "a transition is not a given" [...]. If these disagreements were to persist, there will undoubtedly be a problem".</p>	<p>The power to suspend benefits under the transition agreement was widely interpreted as the EU wanting to punish UK non-compliance. DD said he was "surprised" at MB's comments. He was reported as saying he did not think it was "in good faith to publish a document with frankly discourteous language and implying that they could arbitrarily terminate in effect the implementation period".¹⁶ Professor Peers thought it would be "highly legally and politically problematic", "legally and politically questionable", "poorly thought out and justified, not only breaching the Commission's obligations as EU negotiator but also spreading ill will in the negotiations".¹⁷</p>
<p><i>UK participation in expert groups and standing committees</i></p>	<p>(19) The UK could be invited to attend, without voting rights, meetings of standing committees, Commission experts groups, agencies, offices or bodies if the discussion concerns acts to be addressed to the UK or where the EU thinks the UK's presence is necessary for the <i>acquis</i> to apply effectively during the transition period. (20) The withdrawal agreement will define when this will be allowed.</p> <p>The February draft legal text confirms the two conditions for</p>	<p>The UK draft text for discussion stipulates that the UK should be able to participate in committees and expert groups if just one of the conditions is fulfilled, and removes the condition that UK participation should be "in the interest of the Union".</p>

itself expressly provide for participation by non-Member States. For example, the 2013 Eurodac Regulation does not on its face provide for or permit direct access by a third country to the Eurodac system. Nevertheless, Norway applies that regulation and has access to the system it governs, under that country's agreement with the EU of 19 January 2001 [OJ L 093 , 03/04/2001 P. 40 – 47]".

¹⁶ [BBC News, 8 February 2018](#)

¹⁷ EU Law Analysis, 8 February 2018

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	UK participation in expert groups and committees.	
<i>Fishing quotas</i>	<p>(21) There will be specific procedural arrangements for the fixing and allocation of fishing opportunities (total allowable catches) during the transition period.</p> <p>The February draft legal text states in Article X+4 that during transition, the Commission will consult the UK if applicable during the decision-making process in the Council and in international negotiations.</p>	<p>The Environment Secretary, Michael Gove, who in July 2017 said Brexit meant the UK would “take back control” of fishing policy,¹⁸ wants the UK to be exempt from the EU’s Common Fisheries Policy during the transition period.</p> <p>HMG text on implementation calls for more than just “consultation”: “[1] ...for any period prior to the end of the Period, the EU and the United Kingdom shall agree the fishing opportunities related to the United Kingdom prior to the decision-making process within the Council. [2] The modalities relating to the above shall be agreed between the Parties”.</p>
<i>Duration of transition</i>	<p>(22) Transitional arrangements should apply as from the date of entry into force of the Withdrawal Agreement and should not last beyond 31 December 2020 (21 months from Brexit).</p> <p>This fits in with the end of the current multi-annual EU budget cycle (the new one will start on 1 January 2021)</p> <p>The legal text on transition of 7 February confirms the start and end of the transition period: “There shall be a transition period, which shall start on the date of entry into force of this Agreement and end on 31 December 2020”.</p>	<p>HMG has said the implementation period will be “around two years”.</p> <p>DD is “relaxed” about this and said it could be between 21 and 27 months: “two years looks about right from a practical point of view”, but it “might be more sensible to go for the subsequent March, because that fits exactly with the grace period that we have agreed for European Union citizens, so it would avoid any clumsy interregnums” (evidence to Brexit Committee 24/1/18).</p> <p>Asked by J R-M about the UK accepting new EU legislation during transition, DD said “The average time to put a regulation</p>

¹⁸ The Government also said it would leave the 1964 London Fisheries Convention. See [Government press release](#), 2 July 2017

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		<p>into effect in the European Union is 22 months. The proposal we have with the European Union at the moment is that we leave over 21 months. In other words, there will be nothing that we did not have a say in" (Q801).</p>
<i>CFSP</i>	<p>The Common Foreign and Security policy is not covered by the negotiating directives, but Article X+1[2] of Commission legal text states that where the EU and UK need to coordinate, "including on sanctions policy, or representation in international organisations or conferences", the UK "may be consulted by the Commission or the High Representative of the Union for Foreign Affairs and Security Policy, as the case may be, on a case-by-case basis".</p> <p>The Commission February legal text states that "the Financial Provisions of the Withdrawal Agreement should also cover the financing, during the transition period, of the relevant Common Foreign and Security Policy and Common Security and Defence Policy agencies or operations on the basis of the same contribution key as before the withdrawal date".</p>	<p>In Article X+3(5) (Specific arrangements relating to the Union's external action), HMG proposes that as coordination with EU will be needed, including on sanctions policy, the Commission or High Representative <u>should</u> (not 'may') consult the UK.</p>

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