

Brexit: Update

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Withdrawal agreement and political declaration to be approved

On 14 November 2018, the European Commission and the United Kingdom (“**UK**”) agreed on the text of a draft agreement on the withdrawal of the UK from the European Union (“**EU**”) (“**Withdrawal Agreement**”). It establishes the terms of the UK’s exit and covers the following main areas:

- citizens' rights, protecting EU citizens in the UK and UK nationals in EU Member States;
- separation issues, ensuring a smooth winding down of current arrangements and providing for orderly withdrawal (e.g. allowing for the protection of existing intellectual property rights, the winding down of ongoing administrative and judicial procedures, and the use of data and information exchanged before the end of the transition period);
- a transition period until 31 December 2020, with one possible extension, during which the EU will treat the UK as if it were a Member State subject to certain exceptions (no voting rights);
- a financial settlement to ensure that the UK and the EU will honour financial obligations undertaken while the UK was a member of the EU;
- governance arrangements, including dispute settlement mechanisms;
- a legally operational backstop to avoid a hard border between Ireland and Northern Ireland.

The negotiators also agreed on a Political Declaration setting out the framework for the future relationship between the EU and the UK. The Political Declaration establishes general parameters of a future broad partnership across trade and economic cooperation, law enforcement and criminal justice, foreign policy, security and defence and wider areas of cooperation. It remains quite vague on many issues, including financial services in the post-Brexit era; these matters will only be negotiated after the UK formally leaves the EU.

The European Council endorsed the Withdrawal Agreement and approved the Political Declaration. The UK Parliament and the European Parliament must approve the Withdrawal Agreement.

UK can unilaterally revoke notification of its intention to withdraw

On 10 December 2018, the Court of Justice of the European Union (“**CJEU**”) rendered its highly anticipated judgment in Case C-621/18, *Wightman and others v Secretary of State for Exiting the European Union*. In an unusual full-court composition, the CJEU ruled that Article 50 of the Treaty on European Union (“**TEU**”) must be interpreted as meaning that the UK can unilaterally revoke the notification of its intention to withdraw from the EU, such a revocation reflecting a sovereign decision to retain its status as a Member State of the EU.

Examining the wording of Article 50 TEU, the CJEU considered that, in the absence of an express provision governing revocation of the notification of the intention to withdraw, that revocation is subject to the rules laid down in Article 50(1) TEU for the withdrawal itself, with the result that it may be decided unilaterally, in accordance with the constitutional requirements of the Member State concerned. The CJEU rejected arguments according to which the right to revoke is subject to the unanimous approval of the remaining Member States since such an approval would transform a unilateral sovereign right into a conditional right and would be incompatible with the principle that a Member State cannot be forced to leave the EU against its will.

The CJEU formulated certain conditions. The possibility to revoke exists as long as a withdrawal agreement concluded between the EU and the UK has not entered into force or, if no such agreement has been concluded, as long as the two-year period from the date of the notification of the intention to withdraw from the EU, and any possible extension, has not expired. The revocation must be decided following a democratic process in accordance with national constitutional requirements. This unequivocal and unconditional decision must be communicated in writing to the European Council.

Any such revocation would confirm the EU membership of the UK under terms that are unchanged as regards its status as a Member State and would bring the withdrawal procedure to an end.

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The information contained herein is not intended to be a comprehensive study or to provide legal advice and should not be treated as a substitute for specific legal advice concerning particular situations.

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