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NOTE

From: General Secretariat of the Council

To: Delegations

Subject: ANNEX to the Draft COUNCIL DECISION supplementing the Council Decision of 22 May 2017 authorising the opening of the negotiations with the United Kingdom of Great Britain and Northern Ireland for an agreement setting out the arrangements for its withdrawal from the European Union

- Supplementary directives for the negotiation of an agreement with the United Kingdom of Great Britain and Northern Ireland setting out the arrangements for its withdrawal from the European Union

Supplementary directives for the negotiation of an agreement with the United Kingdom of Great Britain and Northern Ireland setting out the arrangements for its withdrawal from the European Union

1. In line with the European Council guidelines of 29 April 2017 and the Council negotiating directives of 22 May 2017, the first phase of the negotiations focused on the rights of citizens, the financial settlement, the issues relating to the island of Ireland, other separation issues, and the governance of the Withdrawal Agreement.
2. Noting the progress made so far, on 20 October 2017, the European Council called for work to continue with a view to consolidating the convergence achieved and pursuing negotiations in order to be able to move to the second phase of the negotiations as soon as possible. The European Council thus invited the Council together with the Union negotiator to start internal preparatory discussions, including on possible transitional arrangements.
3. Based on:
 - the recommendation made by the Commission Communication on the state of progress of the negotiations with the United Kingdom under Article 50 of the Treaty on European Union of 8 December 2017¹,

¹ COM(2017) 784 final.

- the Joint Report from the negotiators of the European Union and the United Kingdom Government on progress during phase 1 of negotiations under Article 50 TEU on the United Kingdom's orderly withdrawal from the European Union of 8 December 2017, on which the Commission's recommendation is based,

the European Council, on 15 December 2017, welcomed the progress achieved during the first phase of the negotiations and decided that it was sufficient to move to the second phase related to transition and the framework for the future relationship.

4. The European Council also made clear that negotiations in the second phase could only progress as long as all commitments undertaken during the first phase were respected in full and translated faithfully in legal terms as quickly as possible. During the second phase of the negotiations, an overall understanding on the framework for the future relationship of the Union with the United Kingdom should also be reached. For that purpose, the European Council decided that it would adopt additional guidelines on this framework in March 2018 and called for further clarity on the United Kingdom's position on the framework for the future relationship.
5. The present set of negotiating directives supplements the first set of negotiating directives adopted on 22 May 2017. The European Council guidelines of 29 April 2017 as well as the general principles and the procedural arrangements for the conduct of the negotiations established in the Council negotiating directives of 22 May 2017 continue to apply in their entirety to this phase of the negotiations, including as regards the territorial scope of the withdrawal agreement, including its provisions on transitional arrangements, and of the future framework; these negotiating directives should therefore, as the first set of the negotiating directives, fully respect paragraphs 4 and 24 of the European Council guidelines of 29 April 2017, notably as regards Gibraltar.
6. During the second phase of the negotiations, in view of the unique circumstances and specific nature of issues related to the island of Ireland, the work on detailed arrangements required to give effect to the principles and commitments set out in the Joint Report should continue in a distinct strand.

- 6.a Since the arrangements applicable to relations between the Union and the Sovereign Base Areas in Cyprus will continue to be defined within the context of the Republic of Cyprus' membership of the Union, appropriate arrangements should be determined during the negotiations as necessary, to achieve the objectives set out in Protocol 3 to the Act of Accession of the Republic of Cyprus to the Union².

I. ISSUES RELATED TO THE ORDERLY WITHDRAWAL OF THE UNITED KINGDOM FROM THE EUROPEAN UNION

7. In line with the European Council guidelines of 15 December 2017 and with the negotiating directives annexed to the Council Decision of 22 May 2017 as supplemented by these negotiating directives, it is necessary to complete the work on all withdrawal issues, including those not yet addressed in the first phase. These include – without being confined to – issues such as the governance of the Withdrawal Agreement, intellectual property rights, ongoing public procurement procedures, customs-related matters needed for an orderly withdrawal from the Union, protection of personal data and use of information obtained or processed before the withdrawal date.
8. Negotiations in the second phase should furthermore translate into clear and unambiguous legal terms the results of the negotiations, including those obtained during the first phase, which should, where appropriate, be adapted in the light of the existence of the transitional arrangements referred to below. In particular, the provisions of the Citizens' rights part of the withdrawal agreement should apply as from the end of the transition period. The 'specified date' referred to in paragraph 8 of the Joint Report should consequently be defined as that of the end of the transition period.

² Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded - Protocol No 3 on the sovereign base areas of the United Kingdom of Great Britain and Northern Ireland in Cyprus, OJ L 236, 23.09.2003, p.940 -944.

II. TRANSITIONAL ARRANGEMENTS

9. The European Council guidelines of 29 April 2017 set out general core principles applying to any agreement with the United Kingdom as well as to any transitional arrangements:
- any agreement will have to be based on a balance of rights and obligations, and ensure a level playing field;
 - preserving the integrity of the Single Market excludes participation based on a sector-by-sector approach;
 - a non-member of the Union, that does not live up to the same obligations as a member, cannot have the same rights and enjoy the same benefits as a member;
 - the four freedoms of the Single Market are indivisible and there can be no "cherry picking";
 - the Union will preserve its autonomy as regards its decision-making as well as the role of the Court of Justice of the European Union. According to the European Council guidelines of 15 December 2017, this refers notably to the competence of the Court of Justice of the European Union.
10. In addition to these core principles, the European Council guidelines of 29 April 2017 set out specific conditions applicable to any possible transitional arrangements. To the extent necessary and legally possible, the negotiations may seek to determine transitional arrangements which are in the interest of the Union and, as appropriate, to provide for bridges towards the foreseeable framework for the future relationship in the light of the progress made. As reiterated by the European Council Guidelines of 15 December 2017, any such transitional arrangements must be clearly defined and precisely limited in time. They must also be subject to effective enforcement mechanisms.

11. These supplementary negotiating directives are based on and further develop the principles and conditions laid down in the European Council guidelines of 15 December 2017.
12. In line with those guidelines, which further specify and develop the core principles laid out in the European Council guidelines of 29 April 2017, any transitional arrangements provided for in the Withdrawal Agreement should cover the whole of the Union acquis, including Euratom matters. Notwithstanding paragraph 17 of these negotiating directives, the Union acquis should apply to and in the United Kingdom as if it were a Member State. Any changes to the Union acquis should automatically apply to and in the United Kingdom during the transition period. For acts adopted in the Area of Freedom, Security and Justice by which the United Kingdom is bound before its withdrawal, Articles 4a of Protocol (No 21) and 5 of Protocol (No 19) annexed to the Treaties, which allow the United Kingdom not to participate in an act amending a measure by which it is already bound, should continue to apply during the transition period including the possibility for the Union to determine that this non participation would make the relevant measure inoperable and therefore that the measure should cease to apply to the United Kingdom. The United Kingdom should however no longer be allowed to opt-in to measures in this Area other than those amending, replacing or building upon the above mentioned existing acts.
13. During the transition period, Union law covered by these transitional arrangements should deploy in the United Kingdom the same legal effects as those which it deploys within the Member States of the Union. This means, in particular, that the direct effect and primacy of Union law should be preserved.
14. During the transition period, and in line with the European Council guidelines of 29 April 2017, the United Kingdom should remain bound by the obligations stemming from the agreements concluded by the Union, or by Member States acting on its behalf, or by the Union and its Member States acting jointly, while the United Kingdom should however no longer participate in any bodies set up by those agreements.

15. In line with the European Council guidelines of 15 December 2017, any transitional arrangements require the United Kingdom's continued participation in the Customs Union and the Single Market (with all four freedoms) during the transition. The United Kingdom should take all necessary measures to preserve the integrity of the Single Market and of the Customs Union. The United Kingdom should continue to comply with the Union trade policy. It should also in particular ensure that its customs authorities continue to act in accordance with the mission of EU customs authorities including by collecting Common Customs Tariff duties and by performing all checks required under Union law at the border vis-à-vis other third countries. During the transition period, the United Kingdom 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.
16. In line with the European Council guidelines of 29 April 2017 and the first set of negotiating directives of 22 May 2017, any time-limited prolongation of the Union acquis requires existing Union regulatory, budgetary, supervisory, judiciary and enforcement instruments and structures to apply, including the competence of the Court of Justice of the European Union.
17. In relation to the application of the Union acquis to the United Kingdom, the Withdrawal Agreement should therefore, during the transition period, preserve the full competences of the Union institutions (in particular the full jurisdiction of the Court of Justice of the European Union), bodies, offices and agencies in relation to the United Kingdom and to United Kingdom natural or legal persons. In particular, Union institutions, bodies and agencies should conduct all supervision and control proceedings foreseen by Union law. In line with the European Council guidelines of 15 December 2017, the United Kingdom will however no longer participate in or nominate or elect members of the Union institutions, nor participate in the decision-making or the governance of the Union bodies, offices and agencies.

18. During the transition period, as a general rule, the UK will not attend meetings of committees referred to in Article 3 (2) of Regulation (EU) No 182/2011³ or Commission experts groups and other similar entities or of the agencies, offices or bodies where Member States are represented. Exceptionally on a case-by-case basis, the United Kingdom could be invited to attend without voting rights such meetings provided that:
- the discussion concerns individual acts to be addressed to the United Kingdom or to United Kingdom natural or legal persons; or
 - the presence of the United Kingdom is necessary and in the interest of the Union, in particular for the effective implementation of the Union acquis during the transition period.
19. The Withdrawal Agreement should define the precise conditions and the clear framework under which such exceptional attendance should be allowed.
20. Specific consultations should also be foreseen with regard to the fixing of fishing opportunities (total allowable catches) during the transition period, in full respect of the Union acquis.
21. The transition period should apply as from the date of entry into force of the Withdrawal Agreement and should not last beyond 31 December 2020.
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³ Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers, OJ L 55, 28.2.2011, p. 13–18.