

**First assessment by the Brexit Steering Group of three UK position papers on (i) privileges and immunities, on (ii) nuclear materials and safeguard issues and on (iii) ongoing Union judicial and administrative proceedings**

**General remarks**

- Quite a lot of the content of these papers read not as position papers at all, in that they do not put forward a position, but more as discussion papers simply raising issues that will need to be sorted out.
- In a number of places they challenge the sequencing arrangements of the negotiations by trying to make the case that withdrawal issues cannot be done in isolation of negotiations on the future relationship.

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**(i) Position Paper by the United Kingdom on privileges and immunities**

**General:**

- As compared to the corresponding EU position paper, UK proposals are narrower in scope.
- They do not include any elements in relation to the need to ensure professional secrecy, to access to documents, or to the treatment of classified information.
- Contrary to the EU position paper, UK does not seek to preserve the same level of protection as before withdrawal for residual EU activities.

**Positive:**

- Acknowledgement of the need for specific and time-limited arrangements for privileges and immunities in relation to the phasing out of EU operations in the UK.

**Possible problematic issues:**

- They include elements on the future relationship, breaking the phased approach to negotiations. This comes together with the statement that both divorce and new relations aspects are inextricably linked – without providing, however, any solid reasoning to justify this assertion. Strict sequencing of negotiations should be maintained and future immunities and privileges discussed only when future relations are discussed.
- UK seems to be willing to set-up a new system for privileges and immunities for the phasing-out of EU operations: they refer to functional needs, a case by case analysis of those needs and specify that arrangements will be limited to those explicitly mentioned in the withdrawal agreement (which excludes any cross-the-board continuation of such protections). A simpler solution would consist in the temporary preservation of the status quo, also bearing in mind that current privileges and immunities are already those necessary for the performance of EU's tasks according to Protocol 7 of the TFEU.

**Possible remaining uncertainties:**

- A specific reference to EIB operations, but “only as part of an overall settlement”
- The specification that it should be reciprocal, which may not make much sense in this context

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- Reference to activities which EU does not "wish" to continue anymore (whereas it may not only be about "wishes", just the direct consequences of UK's decision to withdraw).

## **(ii) Position Paper by the United Kingdom on Nuclear materials and safeguard issues**

### General:

- Still looks partly at a future agreement and lists a number of future components throughout, with the aim of "ensuring close cooperation in the future".
- Addresses the elements of nuclear safeguards arrangements.
- Calls for "early resolution" for providing legal certainty on issues related to nuclear material.
- Recognition that Article 50 applies to Euratom Treaty and that Treaties of EU and Euratom are legally joined.

### Positive:

- Priority on nuclear safeguard arrangements and legal certainty.
- Commitment to being responsible Nuclear Weapons State and on non-proliferation.
- Commitment to put in place a UK safeguard regime that is commensurate with international obligations, through IAEA. Done through:
  - Voluntary Offer Agreement with IAEA;
  - Taking responsibility for meeting safeguard obligations, as agreed with IAEA;
  - Agree Nuclear Cooperation Agreements and non-Euratom States that will underline the commitment to uphold safeguards.

### Possible problematic issues:

- **Safeguard Equipment:** Point 10 states that it is important to agree on future ownership and liabilities for safeguards equipment that is currently owned by Euratom and located in UK, while the Commission position states that the ownership should be transferred to the UK, for which Community should be reimbursed. The value for such property or equipment should be the value assigned in the consolidated accounts of the EU. Point 11 clarifies that only "further considerations" will be given to the possibility of taking ownership and liabilities, based on a "common understanding of the fair value and liabilities of the equipment concerned, and interactions with the EU budget".
- **Ownership of fissile material:** Point 14 states that the ownership should be transferred to "the persons or undertakings with the right of use and consumption of the material," and that it should apply "whether these are established in the U.K., EU or non-EU states." Meaning no differentiation depending on location and no transfer to UK or deposition to other bodies mentioned, as is the case in the Commission's position. We must ensure that existing rights to use and consumption must not be affected, and that we can require that the material will be deposited with the Euratom Supply Agency or any other place which is, or can be, supervised by the Commission
- **Validity of contracts:** By demanding that all Euratom contracts, which can run for many years, "will remain valid and not require any further approvals", the UK position assumes a transitional or future relationship.

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Possible remaining uncertainties:

- Lack of timetables (setting up safeguard regime)
- Lack of details on taking on ownership and liabilities
- No specific mention of medical radioisotopes ('hot topic' in the UK at the moment, but these also not specifically mentioned in Commission paper)
- Still relatively vague under commitments on nuclear material; further reassurance should be given that all material is handled in accordance with international treaties and conventions and that those materials are not diverted from their intended uses.

**(iii) Position Paper by the United Kingdom on ongoing Union Judicial and Administrative proceedings**

General:

- The two position papers have the same title but are different in scope.
- The UK paper seems to go beyond the regulation of pending cases to address in general the role of the CJEU. The day the UK leaves the EU the jurisdiction of the CJEU will (in general) end.
- The EU position is that CJEU remains competent for all cases related to EU law.

Possible problematic issues:

- Analyzing the paper "a contrario", the result is that in general terms the Court will not have jurisdiction even as regards the "small number of cases which are pending at the CJEU on the date we leave". Despite this the UK paper says that "the approach in respect of pending cases should be without prejudice to any specific discussions, agreements, or arrangements in respect of other areas of negotiations, including on citizens rights and the future partnership between the UK and the EU".
- Concerning "pending cases" stricto sensu, the biggest problem is linked to the UK position that the CJEU should not be allowed to rule on UK cases which were not before the Court on the day the UK leaves the EU. This would apply even where the facts of the case occurred before withdrawal. The EU believes, as expressed clearly in its position paper, that the Court should remain competent to adjudicate in proceedings relating to facts that occurred before the withdrawal date, even if they are initiated after that date.
- Moreover, the EU paper extends the jurisdiction of the CJEU to the infringement procedures relating to facts that occurred before the withdrawal date, instituted by the Commission or a MS after the withdrawal date.
- Finally, the EU position extends to those cases the applicability of Article 299 TFEU (interesting enough the UK paper does not mention at all Article 299 and the role of the Court under the Treaty in the forced execution of pecuniary obligations).
- As regards "non-pending" cases, according to the UK position paper, the guarantee expressed in paragraph 14 is not enough.
- The rather restrictive position of the UK is made worse by paragraph 6 "definition of pending", which seems to limit even further the competence of the Court according to the different stages of the proceeding.

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- Another position that is problematic is that the UK puts into discussion the jurisdiction of the EU for pending cases which aim at incentivizing compliance with the EU law “when the EU law will no longer apply to the UK”.
- Reference to the proceedings instituted pursuant to an arbitration clause contained in a contract concluded by or on behalf of the Union involving the UK (Article 272) is missing in the list of types of cases (paragraph 3);
- Many of the above comments are applicable, mutatis mutandis, to the part of the paper related to administrative procedures.
- Moreover on administrative procedures (paragraphs 15-17), the UK position is not very clear: UK simply says that (a) a single approach might be inappropriate and wants to have a different approach for each type of procedure (paragraph 18); and that (b) this is, in any case, linked with the decision to be taken on the form of the future relationship between the EU and UK. We believe that it would make sense to follow here the same approach as for judicial proceedings: the EU institutions would remain competent to conduct administrative procedures pending on the withdrawal date and also the ones initiated afterwards, if related to facts that occurred before the withdrawal date.
- Paragraph 19 should be underlined, as it links the discussions on ongoing administrative procedure to future relations.

Possible remaining uncertainties:

- The UK seems to put in question the jurisdiction of the ECJ on pending cases after withdrawal if there were no UK judge on the Court (paragraph 8).
- The UK paper lists the “type” of cases in detail, while the EU paper is far more general (to be possibly more inclusive)