



THE BREXIT NEGOTIATIONS

3 OCTOBER 2017

DEVELOPMENTS IN SEPTEMBER

The Commission has continued to produce position papers for the first phase of the negotiations – on the orderly transition. A complete list of Commission position papers issued up to the end of September is contained in the Annex with a brief summary, and we will update this list in future notes. No position papers have been issued by the Commission on the framework for the future relationship or the transition as the Commission is not currently authorised to discuss the future relationship with the UK.

To recall, the current EU negotiating directives¹ only cover the first phase² whose purpose is to:

- Provide as much clarity and legal certainty as possible to citizens, businesses, stakeholders and international partners on the immediate effects of the United Kingdom's withdrawal from the Union;
- Settle the disentanglement of the United Kingdom from the Union and from all the rights and obligations the United Kingdom derives from commitments undertaken as a Member State.

Reflections are nonetheless ongoing in the services and agencies of the Union about the content and nature of the future relationship and the transition. There are also technical discussion taking place with the UK.

For example, in respect of financial services, on 20 September 2017 the Commission adopted a package of proposals designed to strengthen the European Supervisory Agencies³ ("ESAs") and promote "regulatory convergence" and discourage "regulatory arbitrage".⁴ Although the official announcements from the Commission do not mention Brexit, it is clear that the prospect of the UK becoming a third country has influenced the formation of policy. Particularly noteworthy are the opinions⁵ from ESMA expressing concern about lax control and resulting

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BREXIT BLOG

¹ Available at http://www.consilium.europa.eu/en/meetings/gac/2017/05/Directives-for-the-negotiation-xt21016-ad01re02_en17_pdf/

² The negotiations will only be able to move on to discuss the future relationship in a second phase following an agreement by consensus in the European Council that "sufficient progress" has been reached on the orderly withdrawal.

³ The European Banking Authority ("EBA"), the European Insurance and Occupational Pensions Authority ("EIOPA") and the European Securities and Markets Authority ("ESMA").

⁴ For details of the proposals see fact sheet at http://europa.eu/rapid/press-release_MEMO-17-3322_en.htm.

⁵ See ESMA "opinion on general principles to support supervisory convergence in the context of the United Kingdom withdrawing from the European Union" of 31 May 2017 (ESMA42-110-433) and ESMA opinion of 13 July 2017 on "supervisory convergence in the area of investment management in the context of the United Kingdom withdrawing from the European Union" (ESMA34-45-344) available at <https://www.esma.europa.eu/sites/default/files/library/esma34-45->

regulatory arbitrage regarding the delegation of investment activities to entities in third countries (i.e. post-Brexit UK).

There is an emerging consensus in the UK that there should be a transitional period following Brexit in which something resembling the status quo should be maintained not only as regards trade but also other fields of cooperation (a "standstill transition"). The idea behind the standstill transition is to avoid two "cliff-edges" for the economy – one on Brexit and another when the future relationship starts to apply. It is recognised that the UK will have to comply with the evolving body of EU rules during a standstill transition but no longer have a say in EU rule-making.

It is worthy of note that the day before Mrs May gave her Florence speech⁶ the chief EU negotiator, Mr Barnier, also gave a speech in Rome expressing his view on the current situation as regards Brexit in anticipation of Mrs May's speech.⁷ Interestingly, while Mr Barnier stressed that a transition was conditional on an Article 50 agreement being reached, he did not repeat his previous line that it was conditional on, and that its content would be determined by, an agreement on the framework for a future relationship.

We therefore think that it is useful to briefly discuss issues arising from the relationship between the future relationship and the possible nature and content of transitional arrangements.

THE FUTURE RELATIONSHIP

One thing that is clear from all the documents coming out of Brussels is that the future relationship between the UK and the EU will not be defined in the Article 50 agreement. As stated in the negotiating directives, Article 50 provides an "exceptional competence... of a one-off nature and strictly for the purposes of arranging the withdrawal from the Union."

The future relationship between the UK will have to be defined in an agreement, or more likely several agreements, with different legal bases. These will take time to negotiate and conclude. While it is conceivable that these agreements could be concluded at the same time as Brexit, this is becoming increasingly unlikely as the clock ticks. Indeed, the demand that the past be resolved before any discussion of the future is possible may be recognition of this fact and seeks to avoid having the terms of withdrawal tied to the detailed agreement on the future relationship.

The most comprehensive form of agreement between the EU and a third country is an association agreement pursuant to Article 217 TFEU, the legal basis that was used for the conclusion of the EEA Agreement and more recently the Agreement with the Ukraine. An alternative would be a Free Trade Agreement under Article 207 TFEU, together with other agreements on a series of other matters such as transport (Article 91 TFEU), environmental matters (Article 191 TFEU), energy (Article 194 TFEU), external security (Article 37 TEU), data protection (Article 16 TFEU) – to mention only some of the agreements that may be needed.

Whatever the form of the future relationship it will have one unique and important feature. As Mr Barnier noted in his speech, it "will be less about building convergence, and more about controlling future divergence."

Article 50 envisages that the framework for the future relationship (i.e. its nature and scope) is to be taken into account for the purpose of agreeing transitional arrangements. This suggests that it should be agreed in some form prior to Brexit and different views have been expressed as to the extent that the framework determines what kind of transitional arrangements are possible. It seems to be accepted that the framework for future relations would not need to be a legally-binding instrument but could take the form of a letter of intent or agreed conclusions of the European Council.

THE TRANSITIONAL ARRANGEMENTS

The best guidance that exists at present as to what the EU considers possible or acceptable as transitional arrangements is contained in paragraph 19 of the existing negotiating directives which states:

344_opinion_to_support_supervisory_convergence_in_the_area_of_investment_management_in_the_context_of_the_united_kingdom_with_rawing_from_the_european_union.pdf.

⁶ Available at: <https://www.gov.uk/government/speeches/pms-florence-speech-a-new-era-of-cooperation-and-partnership-between-the-uk-and-the-eu>

⁷ Available at http://europa.eu/rapid/press-release_SPEECH-17-3404_en.htm.

"In this context, to the extent necessary and legally possible, matters that should be subject to transitional arrangements (i.e. bridges towards the foreseeable framework for the future relationship) and which are in the interest of the Union, will be included in those future sets of negotiating directives in the light of the progress made. Any such transitional arrangements must be clearly defined, limited in time, and subject to effective enforcement mechanisms. Should a time-limited prolongation of Union acquis be considered, this would require existing Union regulatory, budgetary, supervisory, judiciary and enforcement instruments and structures to apply."

A "time-limited prolongation of Union acquis" is effectively the "standstill transition" proposed by Mrs May in her speech on 22 September during which "access to one another's markets should continue on current terms".⁸ In his speech the previous day, Mr Barnier chose to stress and repeat the last condition in his mandate – that it would require recourse to existing Union regulatory, budgetary, supervisory, judiciary and enforcement instruments and structures."

There are a number of features in paragraph 19 of the existing negotiating directives:

Bridges towards the foreseeable framework for the future relationship

The negotiating directives define the transitional arrangements as being "bridges towards the foreseeable framework for the future relationship." One may expect therefore that transitional arrangements should facilitate the adaptation of the UK and the EU to the UK's new position as a third country and reduce the disruption to legal relationships that it will produce. A standstill transition arguably does not do so if it merely postpones the necessary adaptation. One might therefore expect it to provide for partial termination and gradual withdrawal of the UK from EU policies.

Necessity and the interest of the Union

The EU stresses the need for transitional arrangements to be necessary for and in the interests of the Union. Gradual withdrawal by the UK from EU policies will therefore have to be controlled by both parties and will not be solely at the option of the UK. Somewhat contradictorily, the EU also refers to the need for it to be able to terminate UK participation in EU policies as a sanction for non-compliance or as a reaction to lack of progress in the negotiations on the future relationship.

Legal possibility

The negotiating directives recognise that there are legal limits to what can be done by way of transitional arrangements in the Article 50 agreement. One obvious limitation is that the Article 50 agreement will be an international agreement that can override secondary EU law but it will not be able to change the treaties (in contrast to accession treaties that can and do change the treaties). Other limitations arise from the empowerment provided by Article 50 itself. The measures must be transitional (that is time-bound), limited and specific.

Specificity and time limitation

It would appear that the EU considers that the need for transitional arrangements must be identified in each case and that they should be carefully defined and time-limited. There is an obvious tension between this and the desire to avoid "pick-and-choose". One question for the standstill transition is whether the standstill covers all policies or only some and indeed whether the standstill is the same in all areas.

Mrs May's Florence speech referred to an "implementation period" of "around two years" but varying according to subject depending on "how long it will take to prepare and implement the new processes and new systems that will underpin that future partnership." Mrs May also recognised the need for the period to be "strictly time-limited". In any event, the EU is likely to insist on a specific sunset date for each transitional arrangement so as to avoid it continuing indefinitely, for example because no successor regime is agreed. The EU is also likely to insist on a possibility of unilateral termination by the EU in case of regulatory divergence as contained for example in the EEA Agreement.

⁸ Although Mrs May called this an "implementation period".

Managing the transition

The negotiating directives specify that the prolongation of the acquis or a standstill transition would require "existing Union regulatory, budgetary, supervisory, judiciary and enforcement instruments and structures to apply."

Exactly what this means in each sector is likely to require careful consideration and negotiation. A general prolongation of the acquis is likely to have unintended consequences for the EU and in any event is unlikely to be acceptable to the UK

Enforcement

After withdrawal EU law will no longer apply in the UK. That is an inevitable consequence of withdrawal and is expressly stated in Article 50(3) TEU. Arguably therefore, the Article 50 agreement cannot make EU law apply in the UK. All it can do is create an international law obligation for the UK to apply equivalent rules to the EU and for the EU to apply certain treatment to the UK.

The objection is often heard in Brussels that having and maintaining the same rules in the UK as in the EU – and even an obligation not to change those rules without the agreement of the other party – is not enough to ensure regulatory equivalence if supervision and enforcement mechanisms differ. That is why the current negotiating guidelines, although generally silent on the transition, do state that a prolongation of the acquis would require existing Union regulatory, budgetary, supervisory, judiciary and enforcement instruments and structures to apply.

The UK however, appears to have made ending the "direct jurisdiction" of the European Court of Justice a redline and Mrs May repeated that this was unacceptable in her Florence speech.

It will be difficult to reconcile these conflicting positions. Both sides will no doubt need to retreat.

One possible avenue could be for the EU Article 50 agreement to provide that it is to be "directly applicable" in the UK. We note that Mrs May raised in her Florence speech the prospect of direct effect in the UK for the protections of citizens' rights. Might this then be generalised for or other parts of the Article 50 agreement? Direct effect clauses are to say the least not customary in UK treaty practice. They are also currently unpopular in the EU, as evidenced in their absence from all the free trade agreements. However, the main excuse that the EU gives for excluding direct effect is the lack of reciprocity. If the UK is prepared to give direct effect to the Article 50 agreement in the UK, it may well be that the EU will do the same. This would have an additional advantage for the EU in that it would avoid having to make a large number of adaptations to its existing legislation.

ANNEX - NEGOTIATING DOCUMENTS ON ARTICLE 50 WITH THE UK

<p>Position paper on Intellectual property rights (including geographical indications) – 21 September 2017</p> <p>Position paper transmitted to EU27 on Intellectual property rights (including geographical indications) – 7 September 2017</p>	<p>The Withdrawal Agreement should ensure that: (a) the protection enjoyed in the United Kingdom on the basis of Union law by both UK and EU 27 holders of intellectual property rights having unitary character within the Union before the withdrawal date is not undermined by the withdrawal of the United Kingdom from the European Union; (b) procedure-related rights (e.g. right of priority) in relation to an application for an intellectual property right having unitary character within the Union still pending on the withdrawal date are not lost when applying for an equivalent intellectual property right in the United Kingdom; (c) applications for supplementary protection certificates or for the extension of their duration in the United Kingdom on-going before the withdrawal date are completed in accordance with the conditions set out in Union law; (d) databases protected in the EU27 and the UK before the withdrawal date continue to enjoy protection after that date and (e) exhaustion before the withdrawal date within the Union of the rights conferred by intellectual property rights is not affected by the withdrawal of the United Kingdom from the European Union.</p>
<p>Position paper on Customs related matters needed for an orderly withdrawal of the UK from the Union – 21 September 2017</p> <p>Position paper transmitted to EU27 on Customs related matters needed for an orderly withdrawal of the UK from the Union – 7 September 2017</p>	<p>The Withdrawal Agreement should determine the customs status (Union and non-Union goods) of goods that enter, leave or transit the customs and tax territory of the Union, the United Kingdom or the EU27, where the movement starts before and ends on or after the withdrawal date, and the legal provisions applicable to them. It should also set out the appropriate treatment in relation to VAT and excise duties and licencing requirements in those circumstances.</p> <p>Furthermore, principles have to be agreed on administrative cooperation procedures ongoing at the withdrawal date as well as cooperation procedures launched after the withdrawal date and relating to facts which occurred prior to that date.</p>
<p>Position paper on the Use of Data and Protection of Information Obtained or Processed before the withdrawal date – 21 September 2017</p> <p>Position paper transmitted to EU27 on the Use of Data and Protection of Information Obtained or Processed before the Withdrawal Date – 7 September 2017</p>	<p>The United Kingdom or entities in the United Kingdom may keep and continue to use data or information received/processed in the United Kingdom before the withdrawal date only if the conditions set out in this paper are fulfilled. Otherwise such data or information (including any copies thereof) should be erased or destroyed.</p> <p>The principles set out in this paper should also apply to personal data, data or information which was received /processed by the United Kingdom or entities in the United Kingdom after the withdrawal date pursuant to the Withdrawal Agreement.</p> <p>This paper addresses three main concerns: the protection of personal data, the protection of EU classified information and national classified information exchanged in the interests of the EU, and other restrictions of use and access to data and information obtained before the withdrawal date.</p>
<p>Position paper on On-going Public Procurement Procedures – 21 September 2017</p> <p>Position paper transmitted to EU27 on Public Procurement – 7 September 2017</p>	<p>The Withdrawal Agreement should ensure that administrative procedures in the area of public procurement on-going on the withdrawal date continue to be carried out in accordance with the relevant provisions of Union law until their completion, and in accordance with the principle of non-discrimination.</p>
<p>Guiding principles transmitted to EU27 for the Dialogue on Ireland/Northern Ireland – 7 September 2017</p>	<p>This paper aims to clarify as well as to outline the unique position of and the special circumstances confronting the island of Ireland.</p> <p>The first issue discussed is regarding the protection of the gains of the peace</p>

	<p>process and of the Good Friday Agreement ('Belfast Agreement') in all its parts. The second matter addressed is the maintenance of existing bilateral agreements and arrangements between the United Kingdom and Ireland including the Common Travel Area. More specifically the paper points out the issues arising from Ireland's unique geographic situation, including the aim of avoiding a hard border between Ireland and Northern Ireland.</p>
<p>Position paper on Issues relating to the Functioning of the Union Institutions, Agencies and Bodies – 13 July 2017</p> <p>Position paper transmitted to EU27 on Issues relating to the Functioning of the Union Institutions, Agencies and Bodies – 29 June 2017</p>	<p>The Agreement should provide that the United Kingdom continues to ensure, within its jurisdiction, as regards Union institutions, agencies and bodies as well as regards their members, officials and other servants an equivalent level of protection as enjoyed before the withdrawal date.</p> <p>The Agreement should provide that the United Kingdom ensures, within its jurisdiction, the continued compliance with the obligations incurred before the withdrawal date by members of the institutions, agencies and bodies under Union law imposing an obligation of secrecy.</p> <p>Finally, the Agreement should also cover the management of access to documents requests and of EU classified information.</p>
<p>Position paper on Goods placed on the Market under Union law before the withdrawal date – 13 July 2017</p> <p>Position paper transmitted to EU27 on Goods placed on the Market under Union law before the withdrawal date – 29 June 2017</p>	<p>The Withdrawal Agreement should ensure that a good which has been lawfully placed on the single market before the withdrawal date can continue to be made available on the market of the United Kingdom and on the single market after the withdrawal date. This means that a good lawfully placed on the market before the withdrawal date and still in the distribution chain in the United Kingdom or in the single market after the withdrawal date can in principle continue to be made available if it complies with Union product rules applicable on the withdrawal date.</p>
<p>Position paper on nuclear materials and safeguard equipment (Euratom) – 13 July 2017</p> <p>Position paper transmitted to EU27 on nuclear materials and safeguard equipment (Euratom) – 29 June 2017</p>	<p>On the date of withdrawal, the Treaties, including the Treaty establishing the European Atomic Energy Community (the "Treaty" and the "Community"), cease to apply to the United Kingdom.</p> <p>Given that the Treaty will cease to apply in the United Kingdom, it appears appropriate that the Withdrawal Agreement set out arrangements for the transfer of the ownership of special fissile materials and Community property located in the United Kingdom used for the purposes of providing safeguards to the United Kingdom, respecting the Community's obligations under international agreements.</p> <p>The Withdrawal Agreement should also provide that the United Kingdom assume all rights and obligations associated with the ownership of materials or property transferred and should regulate other questions related to material and property under the Treaty, in particular safeguards obligations.</p>
<p>Position paper on Ongoing Police and Judicial Cooperation in Criminal matters – 13 July 2017</p> <p>Position paper transmitted to EU27 on Ongoing Police and Judicial Cooperation in Criminal matters – 29 June 2017</p>	<p>The Withdrawal Agreement should allow for the orderly completion of ongoing procedures based on a number of instruments listed in this Position Paper in the area of police and judicial cooperation in criminal matters.</p> <p>Furthermore, this document elaborates on what is to be done with information, including (personal) data that has been obtained before the withdrawal date from other Member States or Union institutions and bodies on the basis of Union law on police and judicial cooperation in criminal matters.</p>
<p>Position paper on Governance – 13 July 2017</p> <p>Position paper transmitted to EU27 on Governance – 29 June 2017</p>	<p>The Withdrawal Agreement should establish institutional arrangements to ensure the effective management, implementation and enforcement of the Agreement. It should include appropriate dispute settlement mechanisms regarding the application and interpretation of the Withdrawal Agreement. The Withdrawal Agreement should respect the Union's autonomy and its legal order, including the role of the Court of Justice of the European Union as regards in particular the interpretation and application of Union law.</p>

<p>Position paper on Judicial Cooperation in Civil and Commercial matters – 13 July 2017</p> <p>Position paper transmitted to EU27 on Judicial Cooperation in Civil and Commercial Matters – 29 June 2017</p>	<p>The Withdrawal Agreement should ensure that the relevant provisions of Union law on jurisdiction, recognition and enforcement applicable on the withdrawal date continue to govern judicial proceedings and procedures in civil and commercial matters pending on the withdrawal date.</p> <p>The relevant provisions of Union law applicable on the withdrawal date should continue to apply to choices of forum and choices of law made prior the withdrawal date. Judicial cooperation procedures that are ongoing on the withdrawal date should continue to be governed by the relevant provisions of Union law applicable on the withdrawal date.</p>
<p>Position paper on Ongoing Union Judicial and Administrative Procedures – 13 July 2017</p> <p>Position paper transmitted to EU27 on Ongoing Union Judicial and Administrative Procedures – 29 June 2017</p>	<p>The Withdrawal Agreement should provide for arrangements relating to proceedings before the Court of Justice involving the United Kingdom, and/or United Kingdom residents/legal persons. It should provide arrangements for administrative procedures before Union institutions, bodies, offices and agencies concerning the United Kingdom, and/or United Kingdom residents/legal persons, which are ongoing on the withdrawal date. Finally, the Agreement should cover arrangements relating to judicial proceedings and administrative procedures initiated after the withdrawal date and relating to facts that occurred before the withdrawal date.</p>
<p>Position paper transmitted to the UK: essential principles on citizens' rights – 12 June 2017</p> <p>Position paper transmitted to the EU27: essential principles on citizens' rights – 29 May 2017</p>	<p>The Withdrawal Agreement should protect the rights of EU27 citizens, UK nationals and their family members who, at the date of entry into force of the Withdrawal Agreement, have enjoyed rights relating to free movement under Union law, as well as rights which are in the process of being obtained and the rights the enjoyment of which will intervene at a later date (for example pension rights).</p>
<p>Position paper transmitted to the UK: essential principles on the financial settlement – 12 June 2017</p> <p>Position paper transmitted to the EU27: essential principles on the financial settlement – 29 May 2017</p>	<p>There should be a single financial settlement related to:</p> <ul style="list-style-type: none"> • The Union budget; • The termination of the membership of the United Kingdom of all bodies or institutions established by the Treaties; • The participation of the United Kingdom in specific funds and facilities related to the Union policies. <p>This single financial settlement should be based on the principle that the United Kingdom must honour its share of the financing of all the obligations undertaken while it was a member of the Union. The United Kingdom obligations should be fixed as a percentage of the EU obligations calculated at the date of withdrawal in accordance with a methodology to be agreed in the first phase of the negotiations.</p> <p>On this basis, the United Kingdom should continue to benefit from all programmes as before the withdrawal until their closure under the condition that it respects the applicable Union legal rules.</p>

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