



THE VIEW FROM BRUSSELS

THE BREXIT NEGOTIATIONS – DEVELOPMENTS IN NOVEMBER & DECEMBER

There were no new formal position papers from the EU during November while the rest of the EU waited for the UK to improve its offers in order to achieve "sufficient progress" in the first phase of the negotiations and allow negotiations to move to the second phase involving discussion on the future relationship and the transition. After what appeared to be a capitulation by the UK on accepting responsibility for a share of EU liabilities, the focus turned to the Irish border as the main obstacle to a move to the second phase of the negotiations.

The dramatic suspension of the conclusion of phase 1 due to the last minute opposition from the UK Democratic Unionist Party caused consternation and bewilderment in Brussels. The final [solution](#) involving the maintenance of the text on "full alignment" of Northern Ireland with EU internal market and customs union rules but the addition of a paragraph guaranteeing "no new regulatory barriers ... between Northern Ireland and the rest of the United Kingdom" is taken as rendering what has been termed a "soft Brexit" much more likely. Even though these are only fall-backs that apply in the absence of agreed solutions, they will inevitably influence the negotiation to come.

In Brussels one hears renewed expressions of hope that the irreconcilable redlines and promises may lead to Brexit not ever happening. However, there are also voices expressing the view that the EU must rid itself of the cherry-picking trouble-maker and not allow a withdrawal of the notification. (In this respect views in Brussels are as diverse as in London!)

The talks now move to the second phase and on 15 December the European Council in Article 50 formation adopted [guidelines](#) on the basis of which the Commission should recommend and the Council approve a negotiating authorisation covering the next phase. This will now be the negotiation of *status quo* transition where EU rules and supervision continue to apply without UK involvement in decision-making. The European Council postponed the adoption of guidelines relating to the future relationship until its March meeting and called on the UK to clarify its position.

Preparatory discussions on the future relationship are continuing however and we discuss in section 2 below certain indications as to the type of relationship that the EU could envisage.

There have also been further developments in other preparations for Brexit – outside of the Article 50 process. We discuss these developments in section 3 below and indicate what else may be needed.

PREPARATORY DISCUSSIONS ON THE FUTURE RELATIONSHIP

Consideration of the shape of the future relationship between the EU and the UK and the transitional arrangements has started in the Council. It takes account of declared UK positions and in particular that it wishes to leave the Customs Union and the Single Market.

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BREXIT BLOG

The guidelines on the future relationship will have to be based on a common understanding amongst the EU-27 as to the **scope** of the future relationship (goods, services, investment, public procurement but also non-trade issues such as police, security and foreign policy cooperation), as well as the **type and depth** of the relationship (association or trade and cooperation including regulatory cooperation). It will also have to be considered what type of provisions on ensuring a **level playing field** (e.g. in competition, state aids, tax, environmental and health measures) will be required and what institutional and enforcement structure to put in place.

The guidelines on the transitional arrangements will in addition have to consider the delicate issue of duration and whether any departures from the *status quo* can be agreed. It will also raise other delicate issues such as whether the preservation of the *status quo* can cover international agreements of the EU and governance.

Agreeing a common position on these second phase issues and maintaining a common position amongst the 27 during the negotiations is likely to be more difficult than for the phase 1 issues.

Another indication of the thinking in Brussels on the future relationship can be found in the [speech](#) by the chief negotiator, Michel Barnier on 20 November at the Centre for European Reform in Brussels. Particularly noteworthy is the apparent direct response to the recent proposal from [UK Finance](#) for a model for a future trade framework for banking and capital markets services. This proposal is aimed at maintaining a maximum degree of free trade in financial services by preserving the existing mutual recognition developed over three decades, including a complex system for developing new rules and adjudicating disputes. Although developed by the financial services industry with its own interests in mind, it also claims to be a model for arrangements in other sectors.

Mr Barnier responded in his speech that:

On financial services, UK voices suggest that Brexit does not mean Brexit – Brexit means Brexit, everywhere.

They say there would be no changes in market access for UK-established firms.

They say joint UK-EU Rules would be decided in a new "symmetrical process" between the EU and the UK, and outside of the jurisdiction of the European Court of Justice.

This would contradict the April European Council guidelines, which stress the autonomy of EU decision-making, the integrity of our legal order and of the Single Market.

The legal consequence of Brexit is that UK financial service providers lose their EU passport. This passport allows them to offer their services to a market of 500 million consumers and 22 million businesses.

Phase 2 is also advancing through indirect messaging.

It seems that the need to preserve the "integrity of the Single Market" will be a major guiding principle for the EU in the forthcoming negotiations. So also will be the need for the future relationship, at least if it is to be "ambitious", to ensure a "level playing field". As Mr Barnier stated in his speech:

"There will be no ambitious partnership without common ground in fair competition, state aid, tax dumping, food safety, social and environmental standards.

The UK has chosen to leave the EU. Does it want to stay close to the European model or does it want to gradually move away from it?"

Since the UK apparently does want an "ambitious" future relationship we must expect discussions on rules and cooperation in the fields of competition, state aids, tax, environmental protection and public health to be part of the negotiation when they formally commence.

OTHER PREPARATIONS FOR BREXIT

Brexit will require more than simply an Article 50 Agreement. Many other preparations will be required in addition – from changes in regulations in administrative arrangements at both EU and Member State level to the notification of the change to international partners and the possible renegotiation of international commitments. While the UK is advancing with its EU (Withdrawal) Bill in Parliament, the work in the EU seems much less organised. Even though Mr Barnier regularly warns that preparations for Brexit are the responsibility of everyone, visits to the websites of Commission Directorate Generals reveal little in the way of preparation and the official Task Force website deals with the Article 50 negotiations and so does not report other preparations. We review a number of instances of preparatory work that have been reported, in order to provide an idea of the range of consequences for which it is necessary to prepare and of the thinking that is going on.

The EU Emission Trading Scheme

The EU has taken advantage of an ongoing legislative amendment to the Emission Trading Scheme Directive, involving a partial suspension to the provisions requiring the surrender of allowances for emissions of greenhouse gases in aviation, to provide a basis for adjusting the number of all allowances available for surrender to take

account of Brexit. The approach adopted has been to give the Commission power to instruct the Central Administrator of the system to refuse to accept allowances issued by the UK after 1 January 2018 if the UK should have obligations that are "lapsing" (see press release [here](#)). The UK is apparently examining alternatives (see UK [consultation](#), now closed).

Justice and Home Affairs

The Commission has published a "[notice to stakeholders](#)" warning that after Brexit a number of instruments relating to jurisdiction in civil, commercial and family law and providing for recognition and enforcement of judgments in the EU will cease to apply to the UK following Brexit. So also will instruments providing for judicial cooperation in the taking of evidence for example and specific regulations like the European payment order and small claims order procedures. Proposals have been made for the Article 50 Agreement to provide for some of these instruments to continue to apply to cases pending on Brexit day but for new cases (even those that are based on facts arising before Brexit day) these instruments will no longer be available. So far, no-one has proposed their continuation beyond pending cases. Of course other international agreements unaffected by Brexit will continue to apply. The Law Society, TheCityUK and the press have all called for solutions to avoid negative impacts on cross-border trade and the position of Britain as "the world's jurisdiction of choice".

Trade

As noted last month, the Commission and the UK sent a joint letter to the WTO with a proposal to split their WTO-bound tariff rate quotas which was immediately rejected as inadequate by seven other Members. Similar issues arise with all the bilateral agreements of the EU. The UK is engaged in preparatory discussions with the EU's trade partners to "replicate" or "roll-over" the terms of these agreements for the UK after Brexit. However the EU will also need to take action. At the very least, the trade partners need to be formally notified of the change and may be expected to seek compensation from the EU for the change in the balance of market access that results. The EU, on the other hand, may seek reductions in the tariff rate quotas and in some cases in the financial assistance that it accords to these countries to take account of the additional tariff rate quotas and financial assistance from the UK.

Agencies

Substantial and rather sudden progress was achieved in relocating the two UK-based agencies. The European Medicines Agency is to be relocated in Amsterdam and the European Banking Authority in Paris (see press release [here](#)).

Financial services

The EU is preparing to adapt to the departure of the UK by reviewing its regulation of financial services. It is considered problematic that such a significant volume of financial services would then be conducted outside the EU and not subject to regulatory supervision within the EU. For example, the Commission has [proposed](#) to amend the ESMA Regulation so that the clearing of Euro-denominated securities be brought under the control of ESMA. However this is meeting opposition from some Member States who are insisting that Member State regulatory authorities remain competent.

Aviation

The Commission has prepared a presentation to Member States on the consequences of Brexit for aviation that has been leaked and given rise to widespread comment. Amongst the most quoted extracts are:

"UK red lines mean exit from the Single Market," this means that "[a]ll rights, obligations and benefits derived cease. No traffic rights — end of market access, ownership & control rules — third country restrictions kick in; end of mutual recognition of certificates; end of participation in European Aviation Safety Agency (EASA)."

The UK has reacted by stating that it will seek to stay in EASA, even though this will involve submitting to the jurisdiction of the Court of Justice of the European Union.

Nuclear

Work is ongoing to prepare for the consequences of Brexit for the nuclear industry. The UK included notice to leave the separate Euratom Treaty in its Article 50 notification. This will have significant consequences for the industry. While these will be principally for the UK to solve, the Commission is also considering what action it can take to mitigate them. (For more background see [here](#) and [here](#)).

Commission services and agencies have been instructed to prepare for a hard Brexit (without an agreement). Even if this is considered a remote possibility, the fact that it exists requires the consequences to be addressed. Doing so can also help to identify issues that need to be addressed in the Article 50 Agreement, if possible. As Mr Barnier continues to warn, preparations for Brexit are the responsibility of all – so not just of the Commission and the UK government but also of individuals, businesses agencies and Member State administrations.

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