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The Brexit Negotiations (1): What is the EU's Opening Position?

The Brexit negotiations started yesterday. After months of speculation as to what will be their focus, it may be useful to recall the European Union's opening position (which we outline below) and the United Kingdom's opening position (which we will outline in another Alert later this week).

The main source for the EU position is a *decision adopted in May 2017* by the EU Council ("the Council"), representing the 27 Member States remaining in the EU (the "EU27"). This decision authorised the opening of Brexit negotiations by the EU with the UK and adopted "*negotiating directives*" (the "directives") for the European Commission ("EC") for the talks.¹ The directives provide that the withdrawal date is at the latest 30 March 2019 "at midnight (Brussels time)", unless the Council and the UK unanimously decide to extend this period.²

Main points in the decision:

First, the Council confirmed that negotiations will be held in *two phases*. The first phase will provide as much clarity and legal certainty as possible *on the immediate effects of Brexit*. The second phase will build an overall understanding *of the framework of the UK's future relationship with the EU*.³

The Council also stresses that the second phase will only start when the Council "decides that sufficient progress" has been made on the first phase. Then it will issue new negotiating directives. These directives therefore only concern the first phase of the negotiations.⁴

This structure is controversial, because the UK has stated that it would like *all aspects (including its future trade relationship) to be negotiated in parallel, leading to a single agreement*, covering both the UK's exit and its future partnership with the EU. However, the EU has said that it cannot do that and that such an approach would cause delay. It is understood that at least initially the negotiations will start with the EU approach.

In any event, it appears that, if headway can be made fast on what the EU sees as the priority withdrawal issues, then a good start could be made on the trade issues before March 2019, in the process setting the framework for any transitional arrangements. This may then help to alleviate the UK (and business) concerns of a regulatory gap between UK withdrawal and any new partnership arrangement. We will have to see what happens.

¹ EU Council, "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" ("The directives"), 22 May 2017, XT 21016/17 ADD 1 REV 2 BXT24, available at <http://www.consilium.europa.eu/en/press/press-releases/2017/05/22-brexit-negotiating-directives/>.

² Para. 8 of the directives.

³ The European Commission stated in its Explanatory Memorandum to its Recommendation for a Counsel Decision for the opening of Brexit negotiations that: "*An agreement on a future relationship between the Union and the United Kingdom can only be finalised and concluded once the United Kingdom has become a third country.*" See COM (217) 218 final, 3 May 2017 at p.2, https://ec.europa.eu/info/sites/info/files/recommendation-uk-eu-negotiations_3-may-2017_en.pdf.

⁴ Para. 19 of the directives.

Second, the EU appears to be planning on two (or possibly three) agreements:

- A *withdrawal agreement* (based on Art. 50 Treaty of European Union (“TEU”)).
- A *separate agreement governing the future relationship* between the EU and the UK after UK withdrawal (although the framework for that future relationship would be developed in the second phase of the withdrawal negotiations).
- With *transitional arrangements*, giving “bridges” between the two as required.

Third, the Council states that the following should be dealt with in the first phase:

- Citizen’s rights (the status of EU and UK nationals in respectively the UK and the EU27).
- The financial settlement for Brexit.
- Ireland (including the maintenance of Common Travel Area rights, no hard border between Eire and Northern Ireland and other specific agreements).
- Other areas where legal certainty is required, e.g. clarification of the position on goods in circulation on Brexit; and issues concerning administrative and judicial proceedings pending on withdrawal.

Fourth, as regards *citizen’s rights*, the Council states that the Agreement should safeguard citizens’ status and rights derived from EU law *at the withdrawal date*. Importantly this includes:

- Rights that individuals *will only enjoy at a later date*, such as rights related to old age pensions.
- Rights that are in the process of being obtained, *including the possibility to acquire them under current conditions after the withdrawal date* (e.g. the right of permanent residence after a continuous period of five years of legal residence which started before the withdrawal date).
- Rights protected are to be *for the lifetime* of those concerned.

This would be reciprocal, i.e. cover both EU27 citizens in the UK and UK citizens in the rest of the EU.⁵

The desire to deal with this as a priority is shared on both sides. However, the detail has still to be discussed and worked out. There are several complexities:

- Should the rights concerned only apply to those *who have a right of permanent residence in the other area* (the UK or the EU 27), or *others who will only obtain those rights after Brexit*?
 - Initial British ideas suggested perhaps the former, although since the Brexit Referendum there has been much discussion.
 - The Council’s position, also including those who have moved to the UK or the EU, but not yet acquired a right of permanent residence, is broader.
- There are also questions of scope, such as whether students or family members are covered.
- How should the rights concerned be protected after Brexit?
 - This is controversial, because the Council envisages that it should still be possible in this area for a UK court to refer a question concerning an EU national’s rights to the Court of Justice of the European Union (“CJEU”) after Brexit. Whereas the UK has stated that it wants the jurisdiction of the CJEU to stop after Brexit as regards the UK.⁶

⁵ Para. 20 of the directives.

⁶ Paras 41 and 42 of the directives.

- One could argue, for example, that such a reference system would be only a limited exception, designed to ensure reciprocity of rights for both EU and UK nationals. So, it should still be supported. However, one could also argue that such a solution could be achieved in another way for EU nationals in the UK, for example by English Courts taking into account CJEU case-law in this area.
- A further issue is that, after Brexit, there will be no UK members of the CJEU, since its members will only be drawn from the EU 27. One may argue therefore that the CJEU would not be “independent and impartial” vis-à-vis the UK and that, instead, there should be a specific panel drawn from UK and EU judges for these questions.
- Otherwise the Council envisages that the guarantees of citizen’s rights should be based on the principle of equal treatment among EU27 citizens and equal treatment of EU27 citizens as compared to UK citizens.

These are complex issues, which will need clarifying and careful discussion by the Brexit negotiators.

Fifth, as regards the *financial settlement* between the UK and the EU on Brexit, the Council sees this as relating to the EU budget, the termination of the membership of the UK of all EU bodies, and the participation of the UK in specific funds and facilities related to EU policies. There has been much speculation in the Press as to the amount involved, with some €60 billion most often quoted (although some Press reports took it as high as €100 billion).

According to the Council, there should be a “single financial settlement”, which should rely on two core principles.

- The UK “*must honour its share of the financing of all the obligations undertaken while it was a member*” of the EU.⁷ Issues include: The UK’s obligations as regards the EU Multi-annual Financing Fund until 2020, together with the UK’s position as regards the European Investment Bank, the European Development Fund, the European Central Bank and the Facility for Refugees in Turkey.
- The UK should fully cover the specific costs related to the withdrawal process, such as the relocation of EU bodies (such as the European Medicines Agency).⁸

Sixth, as regards *Ireland*, the Council emphasises its support for peace in the island of Ireland and the existing agreements concerning Eire and Northern Ireland, such as the Good Friday Agreement. Both sides appear to be committed to maintaining such relations, including no hard border between the two countries. The Council also notes that the (withdrawal) agreement should address issues such as the transit of goods to and from Ireland via the United Kingdom.⁹

Seventh, as regards *goods*, the Council states that the (withdrawal) agreement should ensure that any good lawfully placed on the EU Single Market on the basis of EU law *before* the withdrawal date can continue to be made available on the market, or put into service *after* that date both in the UK and in the EU, under the conditions set out in the relevant EU law applicable before the withdrawal.¹⁰

Eighth, the directives also address various issues relating to administrative or judicial proceedings pending on withdrawal. Notably, they provide that the (withdrawal) agreement should provide for the possibility to commence administrative procedures before EU institutions

⁷ Para. 25 of the directives.

⁸ Para. 26 of the directives.

⁹ Para. 14 of the directives.

¹⁰ Para. 31 of the directives.

and judicial proceedings before the CJEU concerning the UK (e.g. as regards State aid) *after the withdrawal date*, for facts that have occurred *before* the withdrawal date, including the possibility for the UK courts or tribunals to address questions to the CJEU.¹¹

Again, this appears controversial, since with Brexit, the UK wants to end CJEU jurisdiction over its affairs. One may argue that such an issue could be part of the “future relationship agreement” and subject to a different dispute resolution mechanism, not involving the CJEU.

Ninth, the Council states that it would like to engage “in constructive dialogue” with the UK on a possible common approach towards third country partners, international organisations and conventions in relation to the international commitments contracted before the withdrawal date, *by which the UK remains bound, “as well as on the method to ensure that the UK honours these commitments”*.¹²

This appears controversial insofar as the UK may consider that it is exclusively up to the UK to decide on its commitments after Brexit, given that it will have left the “EU” which entered into the commitments. So this needs further clarification. However, one may think that there might be a *common interest to agree* if, for example, this referred to shared understandings on carbon emission reductions and the UK and the EU were cooperating on other related energy and environmental issues.

Tenth, the directives provide that an alternative dispute settlement mechanism could be envisaged for provisions of the agreement “other than those relating to EU law”. However, the Council states that such a solution could only be envisaged “if it offers equivalent guarantees of independence and impartiality to the CJEU”.¹³

Three other important points to bear in mind:

First, in its earlier *Guidelines on the Brexit negotiations* in April 2017¹⁴ (much of which are similar to the EU Council decision), the Council stated *certain core principles would apply*. Notably¹⁵:

- The Council’s wish to have the UK as a close partner in the future.
- The withdrawal agreement will have to be based on a balance of rights and obligations, and ensure a level-playing field.
- Preserving the integrity of the EU Single Market excludes participation based on a sector-by-sector approach.
- A non-member of the Union, which does not have the same obligations as a member, cannot have the same rights and enjoy the same benefits as a member.
- Participation in the EU Single Market requires the acceptance of all four freedoms.
- Negotiations with the United Kingdom (on the withdrawal agreement) will be conducted as a single package. In accordance with the principle that nothing is agreed until everything is agreed, individual items cannot be settled separately.
- The withdrawal agreement will have to respect the autonomy of the EU as regards its decision-making as well as the role of the CJEU.

¹¹ Para. 35 of the directives. The directives also provide that the CJEU should remain competent for judicial proceedings pending before it.

¹² Para. 18 of the directives.

¹³ Para. 42 of the directives.

¹⁴ See, <http://www.consilium.europa.eu/en/press/press-releases/2017/04/29-euco-brexit-guidelines/>

¹⁵ See, p.3, para. 1.

Second, in its *Guidelines*, the Council stated¹⁶:

“Any free trade agreement should be balanced, ambitious and wide-ranging. It cannot, however, amount to participation in the Single Market or parts thereof, as this would undermine its integrity and proper functioning. It must ensure a level playing field, notably in terms of competition and state aid, and in this regard encompass safeguards against unfair competitive advantages through, inter alia, tax, social, environmental and regulatory measures and practices.”

Third, one should not forget that the *European Parliament* (“EP”) also has to approve any agreements between the UK and the EU. In April 2017, the EP also passed a *Resolution on the Brexit Negotiations*.¹⁷ Much of its contents is similar to the EU Council Guidelines and decision. However, one important point to note is that the EP reiterated the importance of the withdrawal agreement and any possible transitional arrangement(s) *entering into force well before the elections to the EP of May 2019.*¹⁸ This may explain in part the urgency expressed recently to start the negotiations this week and also EU insistence on two agreements, one on withdrawal, another on trade, on the view that to do both in the time available is not feasible.

¹⁶ See, para. 20.

¹⁷ See, <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2017-0102+0+DOC+XML+V0//EN>

¹⁸ See, point 3.

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