



ADVISORY
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The Long Goodbye: EU takes initial step in responding to UK's notice under Article 50

Today the European Council, comprising the heads of state of the remaining 27 European Union Member States (the "EU27"), made their first move in what will undoubtedly be the long and complex process of disentangling the UK from its 44 year relationship with the EU. The long-anticipated and much discussed "Dear John" letter from the desk of Theresa May was hand-delivered by Sir Tim Barrow, the UK's Permanent Representative to the EU, to President of the European Council Donald Tusk on 29 March, thereby firing the official starting gun on the negotiation process that will determine the terms on which the UK will withdraw from the EU.

Now the draft guidelines for Brexit negotiations for the EU27 have been delivered by Donald Tusk to the European Council, who will meet at the end of April to formally discuss this negotiation strategy for the first time.

In his [remarks to the Council](#) when presenting the draft guidelines this morning, Tusk set out four main elements of his proposal which, he said, will be treated as fundamental and will form the "first phase" of negotiations. Tusk was clear that, despite the UK's hope that future relationships would be dealt with in conjunction with the withdrawal, the framework for how the UK and EU will interact post-withdrawal will be on the table "once, and only once we have achieved sufficient progress on the withdrawal". What constitutes "sufficient progress" will be judged by the EU27.

Tusk's four main principles are:

- » first, to minimise the uncertainty and disruption caused by Brexit for the citizens, business and Member States of the EU. Tusk described this as "damage control" which will involve settlement of the status of EU citizens living, working and studying in the EU. The aim will be to achieve reciprocal, enforceable and non-discriminatory guarantees;
- » second, to prevent a legal vacuum for companies arising from the fact that, after Brexit, EU laws will no longer apply to the UK;
- » third, to ensure that all financial commitments that the UK has made as a Member State are honoured. The concern is that the financial obligations made by the EU at a time when the UK was/is still a member and financial contributor should be met. The intention is that one cumulative single figure representing the UK's final 'bill' will be reached;
- » fourth, the Council will treat the support of the peace process in Northern Ireland and the avoidance of a hard border as crucially important. It will be necessary to come up with "flexible and creative solutions" to address this issue.

Tusk acknowledged that these will be "difficult, complex and sometimes even confrontational" negotiations but that the EU is not seeking to punish the UK for the decision to leave, but rather work towards the common interest of establishing a close partnership with strong ties post-withdrawal.

How we got here

The first legislative provision resulting from the outcome of the Brexit Referendum of June 23 last year, the [European Union \(Notification of Withdrawal\) Act 2017](#), entered into force on 16 March. This act empowered the UK Prime Minister to serve the Article 50 notice confirming to the European Council that the UK intends to leave the EU and the European Atomic Energy Community. Theresa May's letter outlined that the UK wishes to negotiate the terms of its future trade deal with the EU in tandem with negotiating the terms of its withdrawal and (despite previous public declarations to the contrary) that a "no deal" outcome is not desired and the UK does not wish to default to trading with the



EU on WTO terms. The letter also outlined certain principles for Brexit negotiations, including constructive and respectful engagement, putting citizens first, minimising disruption by agreeing on implementation periods, prioritising arrangements for an open trading environment and, crucially for Ireland, maintaining the Common Travel Area between Ireland and UK.

Certain of these principles echo the position of Michel Barnier, the European Council's lead negotiator, who has stated that a no-deal scenario would have "*severe consequences for our people and our economies*" and is not where the EU wants to end up.

In presentations to the European Parliament, Barnier has stressed that the EU's principles for negotiation include: the four freedoms must be indivisible, any transitional agreement must be limited in time; EU membership must remain the most advantageous status; any new relationship must be based on a level playing field and respect for the rules of competition; the balance of rights and obligations agreed with non-EU countries must be taken into account and close cooperation is desirable in the field of defence and security.

While the UK is seeking to negotiate its future trade arrangements in parallel with the negotiation on withdrawal, the EU's position is that discussions on withdrawal and those on future relationships (including trade) should be mutually exclusive, and indeed may not even commence until withdrawal has actually happened.

On 31 March, the UK Government published its [White Paper on the Great Repeal Bill](#) setting out the proposals for a functioning statute book once the UK has exited the EU. Under this Bill, the [European Communities Act 1972](#) will cease to apply and the existing body of EU law will effectively be converted into UK law – so all EU laws and regulations will be retained in the UK in the immediate aftermath of Brexit. Existing EU case law will also continue to apply in UK courts, and that existing EU case law will take precedence over existing UK case law. Furthermore, the Bill permits a bypass of parliament in certain instances through the use of secondary legislation and statutory instruments to facilitate necessary changes to law that arise under time pressures. Statutory instruments can be used by ministers to make minor time sensitive and technical changes to law, without first seeking the approval of parliament.

What's next?

The EU27 heads of state will meet in the European Council on 29 April to discuss the triggering of Article 50 and the EU's negotiating strategy. These negotiations will be carried out by the European Council representing national interests of the remaining Member States. Such national interests may not always be entirely aligned, with different Member States likely to have divergent priorities driven by economic, political and national security interests – Ireland's concerns around trade relationships and border controls being only one example.

National political affairs during the period of negotiation may also have an impact, at least on timing and likely also on policy, with French Presidential Elections and a German General Election both happening in the course of this year.

A further flashpoint may well be the final bill that the UK will be required to pay to meet its existing financial commitments to the EU – commitments that, in timing terms, may extend past the date that the UK actually leaves. The EU and UK seem to have very different expectations of what the numbers will look like and there is likely to be much consternation around what the final figure of this bill will be.

Endgame...?

Article 50 sets out the process for a Member State to leave the EU and provides for a two year negotiation period to agree a deal on withdrawal. Any withdrawal deal reached between the UK and the EU will need to be ratified by parliament in the UK and will require approval of a qualified majority of 72% of the EU27 representing 65% of the population. The EU Treaties should cease to apply to the UK from the date of entry into force of that withdrawal agreement. If no such agreement is reached within the two-year timeframe, an option exists to extend that negotiation period with the unanimous approval of the EU27.

The final agreement on the future framework - which the European Parliament states will be the subject of a second, separate agreement - will require unanimous approval by the EU27 as well as European Parliament approval, voting by a simple majority. Although discussions in the public sphere have largely focussed on trade, this agreement should also set out conditions on a variety of other issues including defence, the fight against terrorism, the environment, research and education.

In the event that no withdrawal agreement is reached and no extension period agreed, then the UK will automatically leave the EU after the two-year negotiation period. If the UK does "crash out" of the EU in this manner, trade with the EU will be conducted under WTO rules – an outcome that Theresa May is looking to avoid and a worst-case scenario for Ireland given that the UK are our largest trading partner.

The hope in Ireland will be that the progress on withdrawal negotiations will be sufficient enough to facilitate the commencement of talks on future relationships sooner rather than later and that our acknowledged special position vis-à-vis the geographic and economic links with the UK can be settled in the least disruptive manner possible.



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