

## Commentary on the European Council's Draft Guidelines Following the UK's Notification under Article 50 TEU

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Under [Article 50\(2\) TEU](#) 'A Member State which decides to withdraw [from the EU] shall notify the European Council of its intention.' As the Heads of States or Government of the 27 Member States and the Presidents of the European Council and the European Commission [stated](#) on 29 June 2016 (EU27 Statement) following the results of the referendum of 23 June 2016 the withdrawal negotiations with the UK could not start before such notification had taken place. Following the [UK's notification](#) of withdrawal from the European Union sent on 29 March 2017 by Prime Minister Theresa May, the European Council has drafted [guidelines](#) in line with Article 50(2) TEU. These will have to be adopted by a European Council in a EU27 format (without the UK). To this end President Tusk called in a [press briefing](#) on 21 March 2017 for such a meeting to be held on 29 April 2017 to adopt those Guidelines.

According to the draft Guidelines themselves, these are designed to 'define the framework for [the] negotiations [...] and set out the overall positions and principles that the Union will pursue throughout the negotiation.' (introduction) However it is important to note that the European Council reserves the right to 'update these guidelines in the course of the negotiations as necessary.' (introduction). Once adopted, the Guidelines are not written in stone but it is unclear what will warrant such update given that they are already broad enough. The Guidelines will also be supplemented by negotiating directives in accordance with the procedure under Article 218(3) TFEU (para 2).

The draft Guidelines start by restating the purpose of the European integration process (introduction). In this light, the overall objectives of the Union are threefold: to preserve the interests of (1) the European Union, (2) the Member States and (3) the citizens and businesses (introduction).

The first priority of the European Union is to minimise the uncertainty created by the UK's decision to leave the Union for EU and UK citizens and businesses as well as Member States (introduction and paras 3 and 9). As noted by Michel Barnier, the chief negotiator, in his [speech](#) on 'The Conditions for Reaching an Agreement in the Negotiations with the United Kingdom' of 22 March 2017, 'Brexit will have significant human, economic, financial, legal and political consequences'. To that effect the emphasis is once again put on a 'phased approach giving priority to an orderly withdrawal.' (introduction)

Naturally, the draft Guidelines reiterate the principle of unity of the EU27 ('in these negotiations the Union will act as one' (introduction)) which was firmly laid down in Barnier's [press conference](#) of 6 December and [speech](#) of 22 March 2017.

The draft Guidelines are thus structured in six parts: 'Core Principles', 'A Phased Approach to Negotiations', 'Agreement on Arrangements for an Orderly Withdrawal', 'Preliminary and Preparatory Discussions on a Framework for the Union – United Kingdom Future Relationship', 'Principle of Sincere Cooperation' and 'Procedural Arrangements for Negotiations under Article 50'.

### Principles Governing the Negotiations

The draft Guidelines spell out the core principles that will dictate the course and direction of negotiations. Many of these principles were already set out in press releases and conferences by Barnier and the EU27 statement. These principles should not come as a surprise to the United Kingdom. They are:

- to keep the UK as a close partner in the future (para 1; see also EU27 Statement);
- to come to an agreement with the UK that will be based on a balance of rights and obligations (para 1; see also EU27 Statement and Barnier's press conference of 6 December 2016) and will ensure a level-playing field in order to prevent regulatory, social and environmental dumping on the part of the UK (see Barnier's Speech of 22 March 2017);
- to preserve the integrity of the Single Market, thus excluding a participation of the UK on a sector-by-sector basis. As recognised by the UK government in the notification letter, access to the Single Market implies the recognition of the indivisibility of the four freedoms and the impossibility to engage in 'cherry picking'. As a result the UK, as a third country, cannot enjoy the same rights and benefits as EU Member States do (para 1; See also EU27 Statement, Barnier's press conference of 6 December 2016 and Barnier's Speech of 22 March 2017);
- the negotiations will be conducted as a single package in the sense that no single item can be settled separately and that an agreement can only be reached until every item has been agreed (para 2);
- in order to preserve the unity of the EU27 separate negotiations between the UK and individual Member States are not allowed (para 2). This principle however may not prevent informal contacts initiated by the UK to talk separately to EU Member States.

### **A Phased Approach Toward an Orderly Withdrawal and Future Relations Agreement**

In pursuance of the first priority of the EU to reduce uncertainty and minimise disruption, the European Council has set out a two-phased negotiation process under Article 50 TEU: Phase 1 on the negotiations on the withdrawal and phase 2 on the preliminary and preparatory discussions on a framework for future relations and transitional arrangements (paras 3-5). The negotiations will officially end on 29 March 2019 unless an extension of the two-year timeframe is agreed upon by the European Council and the UK. A third phase outside Article 50 TEU will consist in the negotiations on future relations with the UK as a third country (implicitly in para 4).

The first phase will start as soon as the draft Guidelines are adopted by the European Council on 29 April 2017. It aims primarily to 'settling the disentanglement of the United Kingdom from the Union' and from its rights and obligations arising from its membership of the EU, and to provide a framework of clarity and legal certainty for all those affected by the UK's decision to withdraw (para 3).

The second phase will begin 'as soon as sufficient progress has been made in the first phase' towards the withdrawal agreement (para 4). In other words, whilst the two phases might not start at the same time they surely will overlap and thus at some point in the negotiations will run in parallel (see Select Committee on the European Union, [Report on Brexit: Parliamentary Scrutiny](#), para 22). Indeed, as stipulated in Article 50 TEU the withdrawal agreement must take account of the framework of the future UK-EU relationship. This wording clearly suggests that the framework of the future relationship has to be established when withdrawal takes place (see also [Oral Evidence](#) by Sir David Edward before Select Committee on the European Union, page 2) and ideally, although unlikely, from the start of the negotiations as this would facilitate the drafting of the withdrawal agreement (European Parliament Committee on Constitutional Affairs, [Brexit and the European Union: General Institutional and Legal Considerations](#), page 18).

The second phase of the talks aim to achieve ‘an overall understanding on the framework for the future relationship’ (para 4), ie it will spell out the general principles and positions that will guide the post-withdrawal agreement between the UK and the EU (see Lord Kerr as cited in Report on Brexit: Parliamentary Scrutiny, para 40). It is unclear which legal form this framework will take. As stated in the Report on Brexit: Parliamentary Scrutiny ‘[t]he framework may or may not be enshrined in a legally binding treaty.’ (para 22). However the term ‘overall understanding’ suggests that it is more likely to be regarded as a non-legally binding Memorandum of Understanding or Accord expressing a convergence of will towards an intended common line of action as a basis for a future agreement. Such a framework for a future relationship would nonetheless be based on mutual respect and carry a significant moral and political weight without entailing rights and obligations under international law.

As pointed out in paragraph 5 and as already suggested by Barnier in his press conference of 6 December 2016, transitional arrangements that would act as ‘bridges towards the foreseeable framework for the future relationship’ might be envisaged. Several conditions must then be satisfied. First, these arrangements would be considered only when and as far as necessary and legally possible (that is compatible with EU law). Second, they must be foremost in the interest of the Union. Third, they must be ‘clearly defined, limited in time, and subject to effective enforcement mechanisms’. This consolidates the view that EU membership remains the most advantageous status.

### **Key Points on the Withdrawal Agreement**

According to the draft Guidelines the withdrawal agreement will cover the following issues:

- the protection of the rights of EU and UK citizens and their family members who have exercised their right of free movement under EU law (para 8). It is no surprise that this is the first item being mentioned as the UK’s decision to leave the Union has created significant uncertainties for the lives of the citizens affected (see also introduction). The draft Guidelines stress that the agreement on the status and situations of EU and UK citizens and their families must offer reciprocal guarantees that are both enforceable and non-discriminatory.
- the protection of EU and UK businesses and other stakeholders (eg recipients of EU-funded programmes as listed in Barnier’s Speech of 22 March 2017) (para 9). Once the treaties cease to apply to the UK the predictability and certainty guaranteed under EU law will disappear in a legal vacuum.
- the UK’s financial commitments undertaken as Member State (para 10). Although very short this paragraph shows that the European Union regards this controversial issue very seriously and one that cannot be avoided. As Barnier pointed out: ‘Each country must honour its commitments to each other. Let me be clear: when a country leaves the Union, there is no punishment. There is no price to pay to leave. But we must settle the accounts. We will not ask the British to pay a single Euro for something they have not agreed to as a member.’ (Speech of 22 March 2017)
- the special cases of Northern Ireland and Cyprus (paras 11 and 12). The case of Northern Ireland is not just about an external border issue but one about peace and reconciliation as crystallised in the Good Friday Agreement that the European Union wishes to preserve (see also Barnier’s Press Conference of 6 December 2016). As noted in the draft Guidelines the special characteristic of the Northern Ireland issue warrants ‘flexible and imaginative solutions’ (para 11). As for Cyprus, agreement will be sought on the status of the Sovereign Base Areas of the UK (para 12).
- international agreements (para 13). As an EU Member State the UK has undertaken legal commitments by way of treaties with third countries and international organisations. Although the UK will no longer be a party to such agreements, the European Council has expressed in clear terms that it expects the UK to honour its

international commitments towards such entities. A possible common approach towards these third parties is favoured by the European Council.

- the location of the seats of EU agencies and facilities ie the European Banking Authority and the European Medicines Agency (para 14).
- enforcement procedures for pre-exit pending cases before the Court of Justice of the European Union and for pre-exit pending administrative procedures before the Commission and Union agencies involving the UK or any natural or legal person in the UK (para 15) . The draft Guidelines specify that practical arrangements must be found for both types of procedure to ensure legal certainty and equal treatment. With regard to court procedures, unsurprisingly, they recommend that the CJEU should remain competent. Also, similar arrangements should be agreed upon with regard to administrative or court proceedings initiated after the date of withdrawal for facts that occurred before it.
- dispute settlement mechanism regarding the application and interpretation of the withdrawal agreement (para 16). This requirement is no surprise since dispute settlement mechanisms have become a standard feature of all international agreements between the EU and third parties (eg [EEA Agreement](#) (Section 3) and [Free Trade Agreements with third countries](#)). Any such mechanism must be compatible with the EU legal order (including the role of the CJEU) and the principle of autonomy. It is very probable that the CJEU will thus be requested by a Member State, the Council, the Commission or the Parliament to provide an advisory opinion under [Article 218\(11\) TFEU](#) on the compatibility of the withdrawal agreement with the EU treaties (see Brexit and the European Union: General Institutional and Legal Considerations, page 11).

## **Key Points on the Framework for the Future Relationship between the Union and the UK**

Acknowledging the UK's desire to establish a close, special partnership with the EU while rejecting its participation to the Single Market, the draft Guidelines set out what the European Union is ready to offer to the UK stressing that such new relationship cannot offer in any respect the same benefits as Union membership (para 17). In response to and in contrast with point iii of the UK letter of notification the European Council makes it very clear that the terms of the future partnership cannot be agreed alongside those of the withdrawal agreement and that such an agreement can only be finalised and concluded after the UK has become a third country (para 18).

While in its notification letter the UK refers to a 'comprehensive agreement' involving both economic and security cooperation, the draft Guidelines refer first to a free trade agreement (para 19) to which partnership in other areas such as security and defence might be added (para 20). Conditions are however attached to a free trade agreement: first, it cannot undermine the integrity and proper functioning of the Single Market; second, it must include competition and state aid provisions so as to guarantee a level-playing field and safeguards against fiscal, social and environmental dumping measures.

As with any international agreement concluded by the EU, the future partnership between the UK and the EU will include enforcement and dispute settlement mechanisms (para 21).

Unsurprisingly, the most controversial item for the UK government is contained in paragraph 22 which provides that such future partnership agreement can only apply to the territory of Gibraltar under the condition that both the UK and Spain reach a separate agreement. However the inclusion of this paragraph in the draft Guidelines is logical from the point of view of the Union since it has the duty to protect the interests of its Member States. Far from giving a veto to Spain over a future EU-UK agreement which it has anyway as any EU

Member State, this clause only provides for the non-application of the agreement to Gibraltar but not to the other parts of the UK territory.

### **Principle of Sincere Cooperation**

It is reminded in the draft Guidelines that, as a withdrawing Member State, the UK remains a full Member State of the EU and, as such, is bound by the principle of sincere cooperation enshrined in [Article 4\(3\) TEU](#). Therefore until it leaves the EU, the UK must comply with its obligations under the treaties and refrain from acting contrary to the objectives of the Union. This means that the UK will naturally be involved in all ongoing EU business except for matters relating to the post-withdrawal situation and matters relating to further progress and cooperation between the EU27.