

Brexit negotiation guidelines reveal ‘some distance’ between EU and UK Brexit strategies

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The European Council has set out its guidelines for its negotiations with the UK over Brexit. The guidelines, which have been agreed by the EU27, set out a ‘phased approach’ to negotiations which prioritise progress on citizens’ rights, finances and the border issue in Ireland. The Council believes the future relationship between the EU and UK should not be debated until clarity on those three issues is achieved. Legal experts believe there is ‘some distance’ between the negotiating positions of the two parties, and the EU’s wish to conduct transparent negotiations differs from that of Theresa May. Lawyers have also said the ease at which the ‘divorce settlement’ is agreed will set the tone for the rest of negotiations.

The European Council has said Article 50 negotiations will be conducted in transparency and as a single package. The EU will approach the negotiations with unified positions, and to avoiding undercutting its position Member States have agreed that there will be no separate negotiations between individual countries and the UK.

Under its ‘phased approach’ the Council has said its first phased will aim to:

- provide as much clarity and legal certainty as possible to citizens and businesses on the immediate effects of the UK’s withdrawal from the EU
- settle the disentanglement of the UK from the EU and from all the rights and obligations the UK derives from its commitments as a Member State

The second phase of negotiations will look to identify the framework for a future relationship between the UK and the EU.

To the extent ‘necessary’ and ‘legally possible’, the negotiations may also look to establish a ‘transitional arrangement’ with the UK to provide for bridges towards the foreseeable framework for the future relationship in the light of the progress made.

‘Some distance’ between negotiating positions

University of Leicester professor, Adam Cygan, has said there appears to be ‘some distance’ at this stage, between the expectations of the UK government and the EU 27. Cygan said the key difference is the concept of phased negotiations: ‘This means that agreement on a future relationship between the EU and the UK can, according to the EU, only be finalised and concluded once the United Kingdom has become a third country’.

In practice, Cygan noted, this will involve transitional arrangements which the UK government would appear to be less keen on as this would be likely to continue the jurisdiction of the Court of Justice of the European Union.

Cygan added that another sticking point may be the Council's push for transparent negotiations, in contrast to the views of Theresa May who has stated that she will 'not provide a running commentary' on the progress of the negotiations.

Citizens' rights

EU Council President Donald Tusk has said his first priority is securing the rights of EU citizens living in the UK and British citizens living in the EU. He stated that the Council wanted 'real guarantees' for people to live, work and study in the UK, with reciprocal rights for the British.

Tusk stated: 'The Commission has prepared a full list of rights and benefits that we want to guarantee for those affected by Brexit. In order to achieve sufficient progress, we need a serious British response.'

Barrister at Doughty Street chambers, Abigail Bright, believes the UK government is unlikely to resist the EU's assertion that citizens' rights will be the first priority for negotiations. Bright has said: 'Strategically, for both sides, this issue invites earliest clarity. Neither party stands to benefit—financially, socially or in terms of reputation, from uncertainty remaining about whether there will be reciprocal guarantees to safeguard the status and rights of EU and UK citizens, and their families, at the date of withdrawal.'

Bright added: 'The guidelines demonstrate that the UK government will be expected to prioritise, and bump up the negotiating agenda, this discrete issue.'

EU-UK divorce settlement

Covington associate Bart Van Vooren notes that from an EU perspective the withdrawal agreement, dubbed the 'divorce settlement', should encompass:

- a financial arrangement
- an arrangement for citizens
- an institutional arrangement to oversee a longer term orderly withdrawal

The guidelines ask that there should be an arrangement where court proceedings can be initiated after the UK's departure for facts that have occurred before the withdrawal date. Van Vooren has questioned whether this will mean:

- UK courts will be able to refer preliminary references to the Court of Justice, in case the facts before them pre-date the exit
- it should be possible to hold the UK liable for violation of EU law occurring before that date
- it only relates to initiating actions before the EU General Court

Stuart Thomson, head of public affairs, government and infrastructure at Bircham Dyson Bell LLP, believes the speed at which the divorce settlement is agreed will provide a good indication of how the negotiations as a whole will go. He said: 'A swift agreement on the basis for the settlement, even if the final figures come later, will build goodwill on both sides.'

Thomson argues both sides have much to lose and has said: 'If the UK decides to walk away then others could claim that their international obligations are worth nothing and this may, in turn, put future trade deals at risk. The EU needs the UK's money to balance its books.'

Source: Press release: European Council (Article 50) guidelines following the United Kingdom's notification under Article 50 TEU



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