

BREXIT 'THE VIEW FROM BRUSSELS' - DEVELOPMENTS IN JANUARY

05 February 2018 | Europe
Legal Briefings

January was dominated by the strikingly public discussion of the content of the next supplement to the [negotiating guidelines](#) that the European Council finally adopted on 29 January. We discuss some features of these guidelines and their significance for the negotiations below. There was also much speculation as to the nature of the future relationship that the EU would be prepared to accept although of course the United Kingdom has not yet announced what it will ask for.

Behind the scenes, attention was turning to the consequences of a no-deal scenario and a flurry of "preparedness notices" has been issued. These are of interest not just for what they say about the EU view of the consequences of a no-deal scenario but also because they effectively constitute the starting point for negotiations on what is required for the transition and what arrangements could be contained in the future relationship. We discuss this phenomenon in below.

THE PHASE TWO GUIDELINES

Reports of the discussions in the Council and even drafts of the guidelines have circulated widely during the month. The two most interesting features on which we will comment are: the EU concept of the requirements for a standstill transition and the issues raised by third country agreements.

THE REQUIREMENTS FOR A STANDSTILL TRANSITION

A particularly interesting feature of the proposed transition period is in paragraph 14 of the guidelines, where the EU proposes to accept the UK request for a "standstill transition" in particularly clear terms as follows:

"During the transition period, Union law covered by these transitional arrangements should deploy in the United Kingdom the same legal effects as those which it deploys within the Member States of the Union. This means, in particular, that the direct effect and primacy of Union law should be preserved."

This is reinforced by demands that transitional arrangements should cover the whole of the Union *acquis* and that changes thereto should automatically apply to the United Kingdom during the transition (see para 13).

Presumably, the United Kingdom is expected to request in exchange that it be treated in the remaining Member States as if it were a Member State.

If accepted, this would leave no room for divergence during the transition. It would be more accurately described as a continuation period rather than a transition period – and still less an implementation period. Practically, the only change to the *status quo* would be that the United Kingdom will lose its right to influence and vote on new legislation. Further, the guidelines propose that the United Kingdom would only have observer rights in committees where: the discussion concerns individual acts to be addressed to the United Kingdom or to UK natural or legal persons; or the presence of the United Kingdom is necessary and in the interest of the Union, in particular for the effective implementation of the Union *acquis* during the transition period (see para 19).

Two contradictory views are expressed on this hard line position. First, that it is designed to ensure that the transition is short because it will be politically so uncomfortable for the United Kingdom. Second, that it will remove the need or incentive for the EU to negotiate a sufficiently attractive free trade agreement with the United Kingdom which will eventually (possibly after extending the transition) realise that re-applying for membership of a possibly reformed EU is the only economically sensible option.

ISSUES RAISED BY THIRD COUNTRY AGREEMENTS

The guidelines go on to confirm that, during the transition period, the United Kingdom should remain bound by the obligations stemming from EU agreements (whether EU-only or mixed) although it will no longer participate in any bodies set up by those agreements.

It is becoming clear to all that the roll-over of these agreements is more complex than at first thought by many. First, many of the provisions (especially those of a quantitative nature) require adaptation. However, the nature of the proposed transition means that while these third countries will benefit from access to the UK market during the transition, they may not have any legal obligation to accord the same treatment to the United Kingdom if their obligation is to accord that agreed treatment to Member States. For mixed agreements there may be cases where the United Kingdom will retain rights but since it will not be represented in the institutions of such agreements, the situation is likely to quickly become untenable.

The United Kingdom has until now accepted the [statements](#) of some in the Commission that it is not entitled to commence negotiations with third countries while it is still an EU Member State. This has always been a [debatable assertion](#) since such negotiations being about post-Brexit relations would not have interfered with the common commercial policy and could not have been considered to breach the principle of sincere cooperation if the new agreements entered into force once EU law obligations cease.

The guidelines soften this position for the period after Brexit and during the transition period since they merely specify (in para 15) that "[d]uring the transition period, the United Kingdom may not become bound by international agreements entered into in its own capacity in the fields of competence of Union law, unless authorised to do so by the Union." Negotiations and even the signing of agreements will not require "authorisation" from the EU during the transition although it remains to be seen how eager third countries will be to negotiate with the United Kingdom before they know what relationship it will have with the Union after the transition period.

THE PREPAREDNESS NOTICES

As noted last month, the Commission services have evidently received an instruction to prepare for a hard Brexit and to notify stakeholders of the consequences. They have issued a series of notices which tend to follow a common plan: the United Kingdom is withdrawing from the EU; there may be a transition agreement; the United Kingdom will become a "third country" for the purposes of EU law; here are the consequences; there is considerable uncertainty; it is the duty of all, including private parties, to prepare.

These notices are not published on the Article 50 Task Force website but elsewhere on EU websites (including those of agencies). We provide on the [UK/EU Papers page](#) of our [Brexit Notes Blog](#) a [list](#) of all those that we have found. Many more are expected and we will endeavour to keep the list updated. Also included in the list are some other documents that are not exactly preparedness notices but more like position papers (such as the rather ambitious paper on [fisheries](#) that proposes indefinite continuation of existing arrangements).

The notices provide valuable insights. They range from the extremely helpful and practical (such as the step-by step guidance of the [European Medicines Agency](#)) to the unhelpful (such as the [announcement](#) that "depending on the applicable national or international law rules, [UK] companies might not have a legal standing in the EU and shareholders might be personally liable for the debts of the company") and the highly restrictive (for example the papers on industrial products and insurance discussed below). The view on the legal consequences of Brexit tend to be expressed in definitive and certain terms even though the withdrawal of a Member State is not foreseen in EU legislation and the consequences are often far less clear than is stated. It may well be that these notices are laying down negotiating positions for the forthcoming negotiations. We discuss two examples of these notices below to illustrate the issues that are likely to arise.

THE NOTICE ON INDUSTRIAL PRODUCTS

The [notice to stakeholders](#) on the consequences of Brexit in the field of industrial products applies to a wide range of industrial products. There is an indicative list in the Annex of 41 pieces of EU legislation which are covered by the notice. The most important part of this notice appears to be the interpretation of EU law that is given as to the consequences of Brexit for conformity assessment procedures and Notified Bodies. Notified Bodies are bodies that Member States notify to the Commission as being responsible for [conformity assessment procedures](#). The designation of these bodies is a matter for "notifying authorities" designated by each Member State and while the Commission keeps a database (called NANDO) it has not been given any power of designation or de-designation. The notice takes the view that Notified Bodies must be established in the EU and that UK Notified Bodies will lose this status on the withdrawal date, be removed from the database and no longer be able to perform conformity assessment tasks. While it may make perfect sense for the Article 50 Agreement to specify this, it is not at all clear that this derives automatically from all the legislation.

The notice goes further and advances the view (at page 3) that "when the applicable conformity assessment procedure requires or provides for the possibility of third party intervention" certificates issued by UK Notified Bodies will no longer be valid for the purpose of placing products on the EU market.

It is by no means certain that this will be the proper interpretation of all the legislation referred to. Indeed, it appears to contradict the [Commission's Blue Guide](#) which states (at para 5.3.4) that "the suspension or withdrawal of a notification does not affect certificates issued by the notified body up to that point".

In many cases, conformity assessment consists in the approval of a prototype or even a design and the producer (who may be in a third country) self-certifies the conformity of the product with the approved type or design. Why should a certificate issued by a body governed by EU law at the time of issuance cease to be valid if the Notified Body loses its status? Does a marriage certificate cease to be valid when the officer signing it ceases to hold his office? Of course, there may well be consequences when a product is subject to active ongoing surveillance or reporting requirements that need to be governed by EU law. This is clearly the case for some products such as pharmaceuticals but is often not.

The notice advises stakeholders to seek the transfer of their files to Notified Bodies of the remaining 27 Member States. This is obviously a sensible precaution if feasible. It is striking that no advice is offered to EU-27 companies that may want to continue to market their products in the United Kingdom. The chaos that may arise makes clear how important it will be to secure an Article 50 Agreement.

THE INSURANCE NOTICE

Another example of a "hard line" notice is that issued by the European Insurance and Occupational Pensions Agency (EIOPA) on [the impact of Brexit on insurance contracts](#).

In the field of services, Union legislation not only fails to deal with the situation where the authorising authority is in a State that ceases to be a Member State (as for industrial products), they are also normally silent on the treatment to be accorded to services provided from third countries or from the establishments in the Union of third country service providers. Despite the fact that regulating this treatment falls within the exclusive competence of the Union by virtue of Article 207 TFEU, Member States have resisted including such rules in Union services legislation and the Commission has prioritised the completion of the internal market.

The notice issued by EIOPA takes the bold position (at para 2.5) that post-Brexit UK insurance undertakings would not be authorised anymore to carry out insurance activities with regard to cross-border insurance contracts by way of freedom of establishment or freedom to provide services and this includes insurance portfolios in run-off.

It goes on to say (at para 2.6) that without taking mitigating actions before the withdrawal, insurance undertakings will usually not be able to ensure the continuity of their services with regard to such cross-border insurance contracts, which may prevent them from fulfilling these contracts" and to recommend (at para 3.2) that these contracts be transferred to an EU27 undertaking or to branches of the UK undertaking established in each of the Member States of the policy holders.

The remarkable feature of this advice is not only that it does not flow clearly from EU legislation but that it completely disregards the WTO obligations of the EU and its Member States.¹

The EU has taken WTO commitments to allow the supply of a number of insurance services cross-border. A number of Member States have listed specific limitations to these commitments but many have not.

Even where limitations exist that allow Member States to insist on some form of commercial presence, there remains the issue of Most Favoured Nation treatment since Member States treat service providers in other Member States more favourably than those from third countries. There is of course an exception for economic integration agreements such as the EU but this is untested. On its face it only exempts measures required by regional integration agreements. However, as explained above, EU law does not generally require this less favourable treatment of third country service suppliers.

It is true that WTO Members remain free to derogate from their WTO commitments where justified for prudential reasons. However what prudential reason could justify refusing to allow an insurance company from fulfilling an existing insurance contract that was concluded in accordance with the regulatory regime of that Member merely because the geographic scope of that regulatory regime has been altered for the future?

In sum, the situation is far more complex than some of these notices pretend and an agreement appears indispensable.

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1. To avoid any possible confusion, WTO law is international law that is not directly applicable in the EU. In practice, therefore, arguments based on WTO obligations do not help insurers who are required to plan now to mitigate the likely loss of passporting rights post Brexit.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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