

BREXIT UPDATE

Article 50 Notification: What Next?



The UK Parliament's approval of the 'EU Withdrawal Bill' has set the process for Britain's withdrawal in motion. With Prime Minister Theresa May free to trigger Article 50, she announced the UK Government would be formally notifying the EU of its intention to withdraw its membership on Wednesday 29 March.

The preparations under way in the UK government stand in stark contrast to events last week in Rome. While EU countries were discussing ways to reinvigorate European integration – also recognising the existential threat posed by Brexit – the UK government was preparing the notification of its withdrawal. Mrs May did not attend this celebratory meeting.

Last month, the Brexit [Bill](#) sailed through the House of Commons, despite the opposition of some MPs in the major parties. The Government faced greater difficulties in getting the Bill through the House of Lords, ultimately having to accept a 'meaningful vote' for Parliament on the final deal and the obligation to secure the rights of EU citizens already present in the UK.¹

With that question settled, a host of others have been raised, namely what are the next steps, how long will Brexit negotiations take and what is the most likely outcome? On the eve of Article 50 being triggered, this briefing seeks to answer these questions, setting out the likeliest scenarios and offering preliminary analysis of their impact. Where relevant, we have also included some analysis of the potential effects on the cultural and creative industries.

Introduction

Britain and Brussels negotiators' first priority is to agree terms for this unprecedented divorce from the EU. It is a race against the clock, with the EU Treaty on European Union (TEU) stating that the membership will cease within two years of a withdrawal notification. Without smooth negotiations, a transition agreement will be needed to prevent damaging legal uncertainty when the two-year period lapses. May's government has hoped for parallel talks addressing the UK's remaining commitments, the status of EU and UK citizens on each other's territory and the future EU-UK relationship in tandem; however, top EU officials have warned that only once the terms of withdrawal are clear, namely Britain's financial contributions and the rights of EU citizens in the UK and UK citizens living in the EU, can negotiations turn to the form of association linking the UK and the EU.

Both the UK and the EU have indicated they seek a 'bold' and 'ambitious' agreement that goes beyond a comprehensive free-trade agreement such as the EU-Canada Comprehensive Economic and Trade Agreement (CETA). Such a deep and wide-ranging agreement would be in the interest of both parties, who would be able to trade at similar levels to the current situation while also maintaining cooperation and collaboration in a number of key areas, including security, the environment and telecommunications.

¹ <https://www.ft.com/content/ad21a732-fe6b-11e6-96f8-3700c5664d30>

Brexit can be considered both a threat and an opportunity for the creative and cultural industries on both sides of the Channel. Demand will remain high for English language content in all forms regardless of the outcome of Brexit. Equally, residents in the UK, including the substantial number of people originating from EU countries, will wish to maintain access to overseas content.

However, much will depend on the outcome of the negotiations. A deep and wide-ranging trade agreement taking into account both goods and services would benefit creative and cultural industries on both sides. If negotiations fail, there are major risks. The UK could lose its position as a hub for creative industries, with businesses seeking to locate elsewhere, facing key skills shortages and eventually significant losses of revenue and jobs. The EU would also lose access to a successful and innovative creative market in the creative and cultural sectors.

Many of the creative and cultural industry standards are set and agreed to outside of the EU framework. For example, EU countries, including the UK, are signatories to various conventions drafted by the Council of Europe and treaties administered by other international bodies, such as the World Intellectual Property Organization (WIPO) and the World Trade Organization (WTO). Many of these treaties were signed by the EU, with the UK as a member, so the UK may have to reaffirm its commitment to many of these international standards and bodies independently. As discussed below, restarting the UK's WTO membership could prove a lengthy and complicated process.

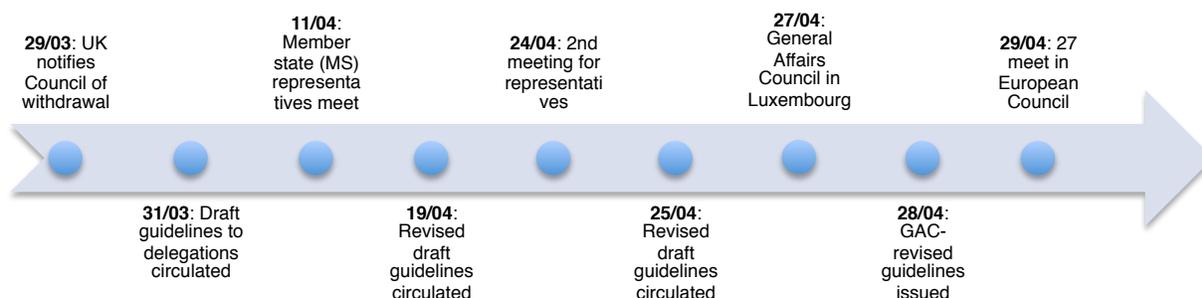
1. Notification Under Article 50: What Does It Mean?

By invoking Article 50, the UK is formally notifying the EU of its intention to withdraw its membership and triggering the start of the negotiation process. It should be noted that this is merely a notification of withdrawal, not withdrawal itself. The day after Mrs May sends the letter to the Council, the UK's legal status as an EU member state remains fundamentally unchanged, with the same rights and obligations continuing to apply to both the UK and the EU.

According to EU law, the EU treaties will cease to apply to the withdrawing state only after the entry into force of the withdrawal agreement or failing that, two years after the notification was sent to the Council. Therefore, the UK has a deadline of two years to negotiate an exit agreement before the treaties cease to apply and the UK becomes a 'third country' for the EU and takes on all the customs and civil controls that the status implies.

In reality, far less than two years is available for negotiation. Formal Brexit negotiations will not begin immediately following the notification of withdrawal. Instead, they may only begin from June onwards, about a year after Britain's vote to quit the bloc, as the European Council first needs to issue negotiating guidelines to the Commission.

EU leaders are due to adopt Council President Donald Tusk’s draft guidelines in late April. Once the guidelines are set, member states must then approve more detailed instructions and agree on a formal mandate for the European Commission. Talks are therefore not expected to begin in earnest before the summer.



The withdrawal agreement will need to be concluded by the Council by qualified majority and will then be sent to the European Parliament for its approval. Article 218 of the Treaty on the Functioning of the European Union (TFEU), which outlines the process for negotiating agreements with third countries, will provide the framework for establishing a new UK-EU partnership.

Until then, the UK remains an EU member, with a continued say in the legislative process, with voting rights in the Council, and EU funds, such as cohesion funds and agricultural support, will continue to be disbursed. Mrs May will continue to attend European Councils; however, EU leaders are unlikely to pay too much heed to her positions on topics, unless they involve the Brexit process. The UK prime minister will also not be invited to important strategic Councils on Brexit.

The UK will remain entitled to 73 Members in the European Parliament²; however, Richard Howitt, a senior UK MEP and Chair of the Parliamentary Labour Party, Britain’s current main opposition party, has already announced his resignation, in September last year. A number of UK MEPs chairing parliamentary committees have faced calls to resign from those positions.³

It is likely that the UK MEPs will see their influence gradually decline over the two-year period, with moves already taking place to marginalise them from key decision-making processes. The same is true of UK officials in other EU institutions. Officials in the European Commission have also faced a gradual process of marginalisation, which will likely continue over the two-year withdrawal period. Moreover, it is already very difficult for UK nationals to get high ranking positions.

² <https://www.theparliamentmagazine.eu/articles/news/uk-meps-retain-their-seats-duration-brexit-process>

³ <http://www.politico.eu/article/euro-deputies-mull-taking-back-control-from-british-peers/>

The Race Against Time

The complexity of negotiations stems from the fact that the terms of a member state's withdrawal are legally distinct from the agreement establishing the framework for the future relationship. Article 50 TEU provides that the negotiations for withdrawal take 'account of the framework of the new relationship with the Union'. Interpretations over this phrasing differ, with the UK government preferring to negotiate the terms of withdrawal and the new partnership, including the future trading arrangements, in parallel, and the Commission preferring to secure an agreement on certain key points before proceeding with deeper discussions on the future relationship. "The sooner we agree on the principles of an orderly withdrawal, the sooner we can start preparing this future relationship," the EU's Brexit negotiator, Michel Barnier, said in a speech at the European Committee of the Regions on Wednesday 22 March, adding, "If we do not remove the uncertainties, if we push the difficult subjects to the end of the negotiations, we run the risk of failure".⁴



Mr Barnier has been tasked first with securing a settlement on the UK's financial contributions after Brexit and the rights of EU citizens in the UK. Only if those negotiations are successful will discussions proceed to a trade deal or partnership agreement. Financial contributions and an agreement on the rights of EU and UK citizens are two significant hurdles that both sides need to overcome. It is in the interest of both sides that citizens' rights are not used as a bargaining chip in the negotiations, however the UK government will be mindful that freedom of movement was a key concern for the UK electorate in voting for Brexit.

Given the time pressure and complexity of the talks, it will be difficult for both aspects of Brexit - withdrawal and a new partnership - to be agreed before the deadline. However, neither the UK nor the EU will find it acceptable to let the EU treaties cease to apply without a suitable deal being in place, given the number of issues that would arise. The division of assets and liabilities, including the contributions to the budget, contingent liabilities and other loan guarantees, outstanding payment promises, staff pensions, international agreements and so on would be left undetermined.

The likely scenario then is that the two-year period will be extended, perhaps by virtue of a transitional arrangement, as discussed below, and negotiations will continue until all the withdrawal arrangements have been agreed. According to the TEU, by unanimous decision of the Council, in agreement with the UK, the negotiation period can be extended.

⁴ http://europa.eu/rapid/press-release_SPEECH-17-723_en.htm

It should also be noted that the process is reversible, as the notification of withdrawal is not legally binding. The UK Labour Party has pledged not to support a deal that fails to offer the same economic and trade benefits that the UK currently enjoys as an EU member,⁵ and Conservatives on the ‘remain’ side have said they could oppose the bill repealing the 1972 European Communities Act if Brexit talks are going badly.⁶

The Brexit Bill

Being an EU member entails a number of financial commitments, for example a weighted share of the Multiannual Financial Framework (MFF), the seven-year budget from which funds for a whole host of programmes and projects are disbursed, including EU agricultural support and cohesion funds. Mr Barnier has been clear that these previous commitments will not be forgotten, saying, “There is no price to pay to leave. But we must settle the accounts”, adding “We will not ask the British to pay a single euro for something they have not agreed to as a member.” Previous administrations may have signed these commitments, but the EU will remain adamant that the current UK government must continue to honour them.

The UK government and the EU may hold different opinions as to the size of those commitments but it is likely that the UK will continue to contribute in some form to the EU budget for the foreseeable future. In a recent [interview](#), the Commissioner for Budget and Human Resources, Günter Oettinger, suggested that the figure of €60 billion mentioned in UK newspapers is “not totally wrong.” On the UK side, despite loud noises from Brexiteers, Theresa May has not ruled out financial payments. A Brexit invoice is inevitable, but protracted negotiations over the amount will risk delaying meaningful discussions over the future relationship and poisoning any remaining goodwill.

EU Citizens’ Rights

Another significant hurdle is the status of the 2.8 million EU citizens living in the UK and the 1 million British citizens resident in the EU. For this issue to be settled an agreement taking into account principles of continuity, reciprocity and non-discrimination will need to be reached.

The EU has unequivocally set securing citizens’ rights as its first priority. “Guaranteeing their rights as European citizens, in the long term, will be our absolute priority from the very start of the negotiations” Mr Barnier has said.⁷ The EU will emphasise that freedom of movement and non-discrimination based on nationality are fundamental rights and therefore non-negotiable. Re-affirming this commitment, Commission President Juncker said in an interview with the BBC, “This is not about bargaining, this is about respecting human dignity.” Furthermore, the EU will

⁵ <http://www.independent.co.uk/news/uk/politics/brexit-jeremy-corbyn-article-50-latest-vote-deal-labour-keir-starmer-tests-a7650521.html>

⁶ Brexit negotiators ‘risk rushing into harmful trade deals’, *The Times* (27 March 2017)

⁷ http://europa.eu/rapid/press-release_SPEECH-17-723_en.htm

insist that a deep trading relationship will go hand in hand with freedom of movement, one of the four ‘fundamental freedoms’ of the EU single market.

While Theresa May has faced harsh criticism for appearing to use the rights of EU citizens in the UK as a bargaining chip in negotiations, the UK government’s White Paper on Brexit lists securing these rights as one of the “early priorities for the forthcoming negotiations”.⁸ The White Paper says the UK “will not be seeking membership of the Single Market”, aware that this would entail accepting the full range of EU regulations and directives relating to it, including provisions on freedom of movement. The UK government will point to the levels of net immigration from other EU countries as a justification for some restrictions on free movement. It will also insist that it can participate in the single market without complete freedom of movement, perhaps accepting some form of trade restrictions in exchange for concessions on free movement. Whether the EU sees such an option as viable remains to be seen.

2. What Kind of Relationship?

The Government will prioritise securing the freest and most frictionless trade possible in goods and services between the UK and the EU. We will not be seeking membership of the Single Market, but will pursue instead a new strategic partnership with the EU, including an ambitious and comprehensive Free Trade Agreement and a new customs agreement.

- UK government White Paper on Brexit⁹

Already, the concerns of the UK government and EU appear to indicate which direction the negotiations will go. Both the UK and the EU will wish to maintain as close an arrangement as possible, with tariff and non-tariff barriers to trade as low as possible, as well as continued deep cooperation and collaboration in a number of key areas. The UK’s main concerns – freedom of movement and the sovereignty of the British parliament and courts – are already known.

Existing trade and cooperation agreements may offer some insight into the eventual shape of the new arrangement; however, any parallels should be approached with caution. Usually a trade and partnership agreement entails negotiating the reduction of barriers and enhancing cooperation in a number of areas. This will be the first time that two entities have sought to forge a new trading and partnership agreement starting with tariff barriers already set at zero and a deep and intertwined set of common laws and regulations.

⁸ <https://www.gov.uk/government/publications/the-united-kingdoms-exit-from-and-new-partnership-with-the-european-union-white-paper/the-united-kingdoms-exit-from-and-new-partnership-with-the-european-union>

⁹ ‘The United Kingdom’s exit from and new partnership with the European Union White Paper’, <https://www.gov.uk/government/publications/the-united-kingdoms-exit-from-and-new-partnership-with-the-european-union-white-paper/the-united-kingdoms-exit-from-and-new-partnership-with-the-european-union--2>

A number of possible scenarios for Brexit have been discussed using existing agreements as a yardstick, including the UK participating in the European Economic Area (EEA) or European Free Trade Association (EFTA) (a ‘Norway-style’ deal), a ‘Switzerland-style’ deal of participation in EFTA and a series of bilateral agreements or a ‘Canada-style’ economic and trade deal. Politically, most if not all of these would appear to be unpalatable to the UK, in particular the EEA option, which would likely entail membership of the single market – which is specifically ruled out by the White Paper – and consequently free movement of persons.

On its surface, a ‘Canada-style’ deal may appeal to the British public, many of whom consider themselves as closer culturally to their North American, Anglophone counterparts, however, the terms of such a deal are unlikely to match up to the ambitions for free and frictionless trade laid out in the White Paper.¹⁰

The UK will therefore seek to negotiate a new *sui generis* international trade deal, with deep and comprehensive cooperation in a number of areas, particularly in those of special interest to both parties, such as security, that may contain many of the elements of these previous examples but that is legally and structurally distinct from all of them.

An EFTA-type Agreement: A Fall Back Option?

The UK’s White Paper on Brexit would appear to rule out participation in the EEA due to two main concerns, sovereignty and migration. As a member of the EEA, the UK would likely have to accept the vast majority of European laws relating to the single market, including the so-called ‘four freedoms’: free movement of persons, goods, services and capital. Current EEA countries do have opt-outs, notably in agriculture and fisheries; however, they have to accept the majority of other single market legislation, including freedom of movement.

As a member of the single market, the UK would also have to accept the jurisdiction of the European Court of Justice, one of UK ministers’ key Brexit ‘red lines’, specifically ruled out in the White Paper.

The EEA option would also be perceived as a considerably worse deal than that which the UK currently has as a member of the EU. It would likely mean continuing to pay into the EU budget, accepting EU laws, including freedom of movement, and ECJ jurisprudence while forgoing a seat or vote in the European Council therefore having no statutory influence over the EU’s decision-making and legislative processes.

Switzerland, like Norway, has been a member of the EFTA since its foundation in 1960 but voted against EEA membership in a referendum in 1992. Instead, Swiss-EU relations exist on the basis of a number of bilateral deals and a number of sectoral deals based on its free-trade agreement with the European Communities in 1972.¹¹ This makes the UK attempting to secure

¹⁰ https://www.ceps.eu/system/files/ME_BrexitAgenda.pdf

¹¹ <https://www.martenscentre.eu/sites/default/files/publication-files/brexit-negotiations-european-impact.pdf>

a ‘Swiss-style’ deal highly unlikely, at least structurally, as the Swiss-EU bilateral agreements have been concluded on a gradual basis, in tandem with evolving EU legislation.

Substantively, the Swiss model may not appeal to the UK government either. The bilateral deals include the free movement of persons. In 2014 the Swiss voted in a referendum in favour of the introduction of immigration quotas for EU nationals. This has led to political deadlock that has threatened to undermine the system of bilateral agreements. Furthermore, the agreements do not cover a key area for the UK government in any future negotiations, financial services.

Remaining in the Customs Union, like Turkey, Monaco or Andorra, can also be ruled out, as this would leave the UK unable to undertake key priorities – forging an independent commercial policy and concluding free-trade agreements with non-EU countries.

The UK's Preferred Option: Uncharted Waters



As mentioned above, the White Paper makes it clear that the UK government will seek to negotiate its own *sui generis* agreement unlike any of the above models. A highly advanced form of free-trade agreement, with collaboration in a wide range of areas, including services, intellectual property, telecommunications and social rights, seems like the logical outcome. However, the UK would have to continue to apply vast amounts of EU law for it to be able to trade freely and seamlessly with the rest of the EU. As Mr Barnier said on 22 March, the EU is open to a “bold and ambitious free-trade agreement”, as called for by Mrs May, provided Britain and the EU operate on a “level playing field” in tax, labour law and consumer rights matters.¹²

Adding to the complexity, the EU continuously reviews its legislation in all of these areas and others, so the UK would have to keep with these developments and reach agreements on equivalence, for example social and environmental standards, for it to continue trading with the 27-country bloc. As Steve Woodcock, an academic from the London School of Economics preparing UK diplomats for the trade negotiations, said recently, establishing common regulations and standards will likely prove the most difficult aspect of the discussions, rather than establishing tariffs.¹³

The issue then arises as to how politically the UK could continue to abide by EU law while maintaining its status as independent from the EU. One mechanism by which this could be achieved is in a new economic, trade treaty that could describe the goals of the agreement and conditions for market access in broad terms, with the relevant legislation the UK would have to comply with, included in a list of annexes, which would be constantly updated as EU legislation

¹² http://europa.eu/rapid/press-release_SPEECH-17-723_en.htm

¹³ ‘Brexit negotiators “risk rushing into harmful trade deals”, *The Times* (27 March 2017)

develops.¹⁴ Another, similar approach might be to include in the new treaty a reference to the need to comply with standards equivalent to those in EU law in order to continue trading.¹⁵

Such a comprehensive free-trade agreement would greatly mitigate the impact of Brexit on the creative and cultural industries. As outlined in a House of Lords report, without single market membership “it will be much harder” to achieve a liberalised trade in services.¹⁶ A no-deal or a deal that does not pay specific consideration to non-financial services could cause “serious harm to sectors such as professional business, digital, broadcasting, aviation and travel services,” according to the Lords.¹⁷ UK negotiators will aim for an agreement that contains high levels of market access however without EU law being directly applicable.

Nevertheless, given the UK government’s political red line over the freedom of labour, one of dominant themes leading up to the referendum, we can expect at least some restrictions on movement to form part of the future relationship. Continued ease of movement for time-limited activities is crucial to music, audiovisual production and performance-based industries. Important restrictions would threaten the UK’s continued status as a prime location for foreign productions and tours. For the UK creative sector to remain competitive, any future UK migration system should allow for easy access to critical skills and talent from EU countries. Furthermore, both EU and UK creative industries will suffer if there is no mutual recognition of professional qualifications and agreements to maintain the free flow of data.

For the creative and cultural industries, maintaining the free movement of goods is crucial. Much of the economic output of the creative and cultural industries comes in the form of tangible goods, such as CDs, DVDs and books. Citizens in other EU countries not only enjoy many UK cultural products, they also sell a great deal of goods in the UK market. Copyright licensing for books is likely to be unaffected as rights are sold on a global basis. The placement of tariff barriers on such goods could have highly troubling consequences for the creative sector for the UK and the EU. However, the stakes would appear to be considerably higher for the UK.

Depending on the terms of the new partnership, television companies wanting to benefit from the UK licensing regime and country of origin passporting may wish to relocate. Otherwise, they may sell programmes exclusively to broadcasters and video-on-demand platforms or retransmit via cable or satellite according to the terms of the contract.

Post-Brexit, geo-blocking rules currently being drafted by the EU institutions could actually help UK based firms. Furthermore, the current indications are that the UK is unlikely to impose very strict advertising and consumer protection rules, but that remains to be seen. The EU will not

¹⁴ https://www.ceps.eu/system/files/ME_BrexitAgenda.pdf

¹⁵ <http://www.friendsofeurope.org/media/uploads/2017/03/Friends-of-Europe-How-to-Brexit.pdf>

¹⁶ www.publications.parliament.uk/pa/ld201617/ldselect/ldcom/135/135.pdf

¹⁷ <http://www.parliament.uk/business/lords/media-centre/house-of-lords-media-notice/house-of-lords-media-notice-2017/march-2017/comprehensive-fta-with-eu-crucial-to-protecting-uks-services-sector-post-brexit-says-lords-committee/>

sanction the import of UK creative and cultural products if they do not meet consumer protection standards.

Periodicals are unlikely to be affected regardless of a deal as they are mainly sold based on a franchising system or, like newspapers, made available on a worldwide basis for free or on subscription. Sales on platforms such as the Apple App Store, iTunes, Amazon and Netflix are already segmented by market. Business to business licensing will likely be subject to local law.

3. Unsuccessful Negotiations: Scenarios

No Deal At All

No deal represents the worst-case scenario - “the hardest of Brexits”, to use former European [Parliament](#) President Martin Schulz’s phrase – causing damage to both parties but in particular to most areas of the UK economy, including its creative and cultural industries.

In response to May’s suggestion that no deal was preferable to a bad deal, Barnier ramped up the rhetoric on 22 March, warning Britain it will face serious consequences if negotiations fail. “More than four million British citizens in the EU and European citizens in the UK faced with complete uncertainty about their rights and their future; the reintroduction of binding customs controls, which will inevitably slow down trade and lead to queues of trucks at Dover; serious disruption to air traffic; an overnight suspension in the movement of nuclear materials to the UK,” the EU’s chief negotiator said. However he made it clear that this would not be the EU’s intended outcome: “a no-deal scenario is not our goal. We want an agreement. We want to succeed.”

With no special framework for the relationship in place, the general rules and laws, including all international conventions, treaties and agreements that both the Union and the UK are parties to, will apply to trade, investments, security and all other matters. For trade and trade-related matters, all existing World Trade Organisation (WTO) rules would apply, including the General Agreement on Tariffs and Trade (GATT) and the General Agreement on Trade in Services.

Yet even this nightmare scenario will not be straightforward. As suggested by WTO Director General Roberto Azevedo, the process of reanimating Britain’s WTO membership will likely be slow, complex and potentially costly.¹⁸ Since its accession to the EU, the European Commission has exercised the UK’s rights and obligations in the General Agreement on Tariffs and Trade on its behalf. The UK will therefore need to reallocate and renew all the obligations entered into during its EU membership, which entails negotiations with 163 member countries.

¹⁸ https://www.wto.org/english/news_e/spra_e/spra126_e.htm

Last week, an association of British manufacturers, the EEF, described Mrs May’s statement that “no deal” on Brexit was better than a bad deal as “simply unacceptable”. This sentiment is likely to be echoed in other industries.

The creative and cultural sector would lose access on favourable terms to EU markets as well as a key supply of skills and talent from the EU. UK companies would also no longer benefit from EU funding. Combined, the impact could destroy the UK’s role as a hub for Europe’s creative industries.

For example, UK nationals will no longer be EU citizens, introducing administrative procedures requiring the obtaining of visas for UK artists to perform in Europe. This is already an issue for agents working with non-EU artists; it will likewise extend to UK artists post-Brexit.

Furthermore, with the UK leaving the Union with no association terms agreed, it would no longer benefit from key country of origin provisions in EU legislation. For example, dropping out of the Audiovisual Media Services Directive, works produced in the United Kingdom will not qualify as EU works and will therefore be excluded from broadcasters' financing quotas. The obligation to fulfill these quotas could lead broadcasters to rethink their production schemes or even redirect some investments to EU productions.

An Intermediary Deal

Given the potentially disastrous effects of having no deal in place at the end of the two-year period, it is likely there will be a transition period between the end of the UK’s membership of the EU and the entry into force of the new treaty between the EU, its Member States and the UK. Most EU trade deals take a number of years to negotiate, and the new EU-UK agreement is likely to be the most comprehensive trade and partnership agreement ever negotiated. As such, Pascal Lamy, the former head of the WTO, said last week that negotiating a comprehensive trade deal could take six years.¹⁹



While a delay of the application of Article 50 is possible by unanimous vote, effectively extending UK membership, a more likely scenario is the establishment of an intermediary deal, applying membership rights and obligations until the framework for the future relationship is agreed. On citizens’ rights, negotiators may seek to find a transitional arrangement whereby the rights deriving from EU citizenship continue to apply until a final deal is agreed,²⁰ therefore

¹⁹ <https://www.instituteforgovernment.org.uk/blog/pascal-lamy-brexit-trade-deal-not-possible-two-years>

²⁰ [http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/577971/EPRS_BRI\(2016\)577971_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/577971/EPRS_BRI(2016)577971_EN.pdf)

avoiding a legal ‘vacuum’ in which it is uncertain whether EU right continue to apply on UK territory. It is rumoured the terms of some sort of transitional deal are already being discreetly discussed.

Yet there are hurdles to overcome before a transition agreement can be put in place. Mr Barnier has opened the door to such an arrangement but under the condition that it be “within the framework of European law” and therefore subject to the oversight of the European Court of Justice. Maltese Prime Minister Joseph Muscat, whose country holds the current rotating Presidency of the European Council, agreed it was “quite obvious” that a transitional arrangement would be put in place, whereby the jurisdiction of the European Court of Justice remained provisionally in place and “not a transition period where British institutions take over”. Such an arrangement will likely rankle with the main Brexiteers, who insist on restoring the sovereignty of British courts. Nevertheless, considering the potential repercussions of the alternative – no deal – putting those concerns on hold, at least for a few years, may seem more palatable, including to the most ardent Brexiteers.

Conclusions

In the short-term, given the complexity of discussions and the short time actually available for negotiation, it is likely that the terms of the UK’s withdrawal will not be agreed within the two-year period foreseen in the Treaty of the European Union. A transition deal will then be in the interest of both parties eager to avoid the damaging impact on business and legal uncertainty of letting the treaties lapse.

Longer term, we anticipate negotiators will overcome significant challenges to strike a bespoke deal, going beyond a comprehensive free-trade agreement. Theresa May’s Lancaster House speech on 17 January 2017 and the subsequent White Paper make clear the UK’s preference for an ambitious comprehensive free-trade agreement, ruling out several options including accession to the EEA or EFTA. Early indications from EU officials confirm Brussels is open to such an agreement, provided an orderly withdrawal securing the rights of EU citizens in the UK and settling the UK’s Brexit ‘bill’. However, the question remains as to how the UK will maintain the kind of free and frictionless trade outlined in the White Paper, which will require adherence to vast amounts of EU law or the creation of equivalent standards, while taking into consideration key concerns such as freedom of movement and the sovereignty of UK courts. One of the few certainties of Brexit is that negotiators on both sides will require a lot patience and good will in order to come out stronger from this messy divorce.

28th March 2017