

**CULTURE, TOURISM, EUROPE &
EXTERNAL RELATIONS COMMITTEE**
#SPICeBrexitUpdate

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BREXIT UPDATE



**EUROPEAN COUNCIL POLITICAL GUIDELINES
FOR BREXIT NEGOTIATIONS**

**THE EUROPEAN UNION
NEGOTIATING MANDATE**

**THERESA MAY'S MEETING WITH
JEAN-CLAUDE JUNCKER**

SPICe

The Information Centre
An t-Ionad Fiosrachaidh

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The Scottish Parliament
Pàrlamaid na h-Alba

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About this paper

This regular paper produced by SPICe sets out developments in the UK’s negotiations to leave the European Union, the process for which has now formally begun following the Prime Minister’s triggering of Article 50 on 29 March.

The weekly updates will provide information on the UK Government’s approach to leaving the EU, along with details of the Scottish Government and the other Devolved Administrations positions. The updates will also provide information on developments within the EU with regard to the UK’s departure. Finally the update will provide information on the key issues likely to be at play during the negotiations and in developing the UK’s future relationship with the European Union.

As was clear during the referendum campaign and since the decision to leave the EU was taken, there is an abundance of information and analysis available, and this SPICe paper will try to cover the key issues by drawing on that information and analysis. This week’s update focuses on publication of the European Council guidelines for the Brexit negotiations and the Prime Minister’s meeting with Jean-Claude Juncker.

European Council political guidelines for Brexit negotiations

On 29 April, the EU27 met to agree their [negotiating guidelines](#). The political guidelines define the framework for negotiations under Article 50 TEU and set out the overall positions and principles that the EU will pursue throughout the negotiations.

The guidelines are based on the draft guidelines published by Council President Donald Tusk on 31 March and cover 6 headings:

1. Core principles
2. A phased approach to negotiations
3. Agreement on arrangements for an orderly withdrawal
4. Preliminary and preparatory discussions on a framework for the Union - United Kingdom future relationship
5. Principle of sincere cooperation
6. Procedural arrangements for negotiations under Article 50

Under the core principles heading, the EU27 reaffirmed its commitment to keeping the UK as a close partner in the future and also to the principle that participation in the Single Market could not be conducted on a sector by sector basis. In relation to access to the single market the guidelines state:

“A non-member of the Union, that does not live up to the same obligations as a member, cannot have the same rights and enjoy the same benefits as a member. In this context, the European Council welcomes the recognition by the British Government that the four freedoms of the Single Market are indivisible and that there can be no “cherry picking”. The Union will preserve its autonomy as regards its decision-making as well as the role of the Court of Justice of the European Union.”

The guidelines are clear that the EU27 will negotiate in a unified way with the negotiations conducted transparently:

“The Union will approach the negotiations with unified positions, and will engage with the United Kingdom exclusively through the channels set out in these guidelines and in the negotiating directives. So as not to undercut the position of the Union, there will be no separate negotiations between individual Member States and the United Kingdom on matters pertaining to the withdrawal of the United Kingdom from the Union.”

These core principles apply both to the withdrawal agreement and to any preliminary discussions on the framework for a future relationship and any transitional arrangements should the negotiations make sufficient progress.

The EU27's commitment to a phased approach to the negotiations reiterates the message in the draft guidelines that the priority will be reaching agreement on the terms of the UK's withdrawal from the EU. According to the guidelines, the first phase of negotiations will aim to:

- provide as much clarity and legal certainty as possible to citizens, businesses, stakeholders and international partners on the immediate effects of the United Kingdom's withdrawal from the Union;
- settle the disentanglement of the United Kingdom from the Union and from all the rights and obligations the United Kingdom derives from commitments undertaken as Member State.

In the event sufficient progress is made on the withdrawal agreement, the guidelines present the opportunity for the start of discussions about the future relationship between the EU and the UK though it is stated that the future relationship cannot be finalised and concluded until the United Kingdom has left the EU.

In the event progress is made on the future relationship, the guidelines also present the possibility that negotiations on transitional arrangements might also be possible on the EU's terms:

“To the extent necessary and legally possible, the negotiations may also seek to determine transitional arrangements which are in the interest of the Union and, as appropriate, to provide for bridges towards the foreseeable framework for the future relationship in the light of the progress made. Any such transitional arrangements must be clearly defined, limited in time, and subject to effective enforcement mechanisms. Should a time-limited prolongation of Union acquis be considered, this would require existing Union regulatory, budgetary, supervisory, judiciary and enforcement instruments and structures to apply.”

The third section of the guidelines refers to the arrangements for the UK's orderly withdrawal from the EU and deal with some of the key issues which are likely to be at play during the negotiations of the withdrawal agreement.

The guidelines are clear that the EU27's initial priority in the negotiations will be to address the issue of citizens' rights:

“Agreeing reciprocal guarantees to safeguard the status and rights derived from EU law at the date of withdrawal of EU and UK citizens, and their families, affected by the United Kingdom's withdrawal from the Union will be the first priority for the negotiations. Such guarantees must be effective, enforceable, non-discriminatory and comprehensive, including the right to acquire permanent residence after a continuous period of five years of legal residence. Citizens should be able to exercise their rights through smooth and simple administrative procedures.”

A further priority highlighted is to ensure there is no legal vacuum affecting businesses which have invested in the UK and UK businesses which have invested in the EU and also to protect those organisations taking part in EU funded projects with UK based partners.

The financial settlement to ensure the UK honours its financial commitments and liabilities is highlighted as the EU27's next priority for the withdrawal agreement:

“A single financial settlement - including issues resulting from the MFF as well as those related to the European Investment Bank (EIB), the European Development Fund (EDF) and the European Central Bank (ECB) - should ensure that the Union and the United Kingdom both respect the obligations resulting from the whole period of the UK membership in the Union. The settlement should cover all commitments as well as liabilities, including contingent liabilities.”

In the lead up to the Council meeting, there was speculation about the way in which Northern Ireland might be addressed in the guidelines. Despite the speculation, there was no direct reference in the final guidelines to Northern Ireland being able to resume EU membership in the event of Irish unification. The guidelines instead referred to continuing support for the peace process:

“The Union has consistently supported the goal of peace and reconciliation enshrined in the Good Friday Agreement in all its parts, and continuing to support and protect the achievements, benefits and commitments of the Peace Process will remain of paramount importance. In view of the unique circumstances on the island of Ireland, flexible and imaginative solutions will be required, including with the aim of avoiding a hard border, while respecting the integrity of the Union legal order. In this context, the Union should also recognise existing bilateral agreements and arrangements between the United Kingdom and Ireland which are compatible with EU law.”

The arrangements for an orderly withdrawal also suggest that following Brexit, the UK will no longer be “covered by agreements concluded by the Union or by Member States acting on its behalf or by the Union and its Member States acting jointly”. This suggests that the international agreements that the EU has made such as free trade agreements will no longer apply to the UK following Brexit.

Finally, under the arrangements for an orderly withdrawal, the guidelines address issues of legal certainty and dispute settlement and enforcement mechanisms for the withdrawal agreement. On legal certainty, the guidelines state:

“Arrangements ensuring legal certainty and equal treatment should be found for all court procedures pending before the Court of Justice of the European Union upon the date of withdrawal that involve the United Kingdom or natural or legal persons in the United Kingdom. The Court of Justice of the European Union should remain competent to adjudicate in these procedures. Similarly, arrangements should be found for administrative procedures pending before the European Commission and Union agencies upon the date of the withdrawal that involve the United Kingdom or natural or legal persons in the United Kingdom. In addition, arrangements should be foreseen for the possibility of administrative or court proceedings to be initiated post-exit for facts that have occurred before the withdrawal date.”

Having set out the EU27's priorities for the withdrawal agreement, the guidelines then set out the principles for beginning discussions about a framework for the future EU-UK relationship. The guidelines reiterate that any future relationship cannot offer the same

benefits as EU membership but state that the EU stands ready to “initiate work towards an agreement on trade, to be finalised and concluded once the United Kingdom is no longer a Member State”. On what the free trade agreement might look like, the guidelines state:

“Any free trade agreement should be balanced, ambitious and wide-ranging. It cannot, however, amount to participation in the Single Market or parts thereof, as this would undermine its integrity and proper functioning. It must ensure a level playing field, notably in terms of competition and state aid, and in this regard encompass safeguards against unfair competitive advantages through, inter alia, tax, social, environmental and regulatory measures and practices.”

The guidelines also commit the EU to seeking future partnerships with the UK in areas additional to trade such as the fight against terrorism and international crime along with security, defence and foreign policy.

The guidelines also state that a future agreement must include appropriate enforcement and dispute settlement mechanisms which do not affect the EU’s autonomy. In addition, any future agreement may not apply to Gibraltar “without the agreement between the Kingdom of Spain and the United Kingdom”.

The guidelines conclude with an acknowledgment that whilst the UK remains an EU Member State, it continues to be subject to all rights and obligations set out in the Treaties and under EU law.

The EU Negotiating Mandate

With the negotiating guidelines now published and setting out the EU27’s political position, the next stage for the EU27 is to agree a Council Decision on the detailed negotiating mandate. This is likely to be based on a Commission [“non-paper”](#) which was leaked last week and reflects the legal directives for the negotiations. A meeting of [EU27 Permanent Representatives on 3 May](#) will take forward work on the negotiating mandate with final agreement expected at the General Affairs Council meeting on 22 May.

According to the [European Commission](#), the Council will authorise the start of the negotiations by adopting the negotiating directives. They must be adopted by strong qualified majority (72% of the 27 Member States, i.e. 20 Member States representing 65% of the population of the EU27). Once these directives are adopted, the Union negotiator, as designated by the Council, is mandated to begin negotiations with the withdrawing Member State.

Given the negotiating directives are likely to be based on the Commission’s non-paper, further information about the content of the non-paper is provided below. This is informed by a [series of tweets](#) by Professor Steve Peers from the University of Essex.

Firstly, the non-paper deals exclusively with the withdrawal agreement, if there are negotiations on the future framework and a transitional deal then separate negotiating mandates will be published.

On citizens' rights, the Commission's paper foresees full application of EU free movement law for those who "have resided in the UK or EU27 before the withdrawal date, and their family members who accompany or join them at any point in time before/after the withdrawal date)".

On the budget settlement, the non-paper foresees a single financial settlement which should contain:

(a) A calculation of the global amount that the United Kingdom has to honour in order to settle its financial obligations toward the Union budget, all institutions or bodies established by the Treaties, and other issues with a financial impact. The global amount may be subject to future annual technical adjustments. This calculation will also identify the amounts covering or guaranteeing loans which have to be reimbursed to the United Kingdom if uncalled, on the basis of the maturity of the loans.

(b) A schedule of the annual payments to be made by the United Kingdom and the practical modalities for making these payments.

(c) Transitional rules to ensure control by the Commission (or, where applicable, another body responsible under Union law before the withdrawal date), the Court of Auditors, OLAF and the power to adjudicate of the Court of Justice of the European Union for past payments/recovery orders to United Kingdom beneficiaries and any payments made to United Kingdom beneficiaries after the withdrawal date to honour all legal commitments (including possible loans) authorized by the responsible entity before the withdrawal date.

(d) Specific possible arrangements in relation with legal commitments or future legal commitments made towards United Kingdom beneficiaries.

(e) Specific rules to address the issue of contingent liabilities assumed by the Union budget or specific institutions or bodies or funds (such as loans made by the European Investment Bank).

As with the political guidelines, the non-paper outlines a number of transitional issues which the UK's departure from the EU may affect. These include:

- Goods placed on the market under Union law before the withdrawal date
- Ongoing judicial cooperation between Member States under Union law
- Ongoing administrative and law enforcement cooperation under Union law
- Ongoing Union judicial and administrative procedures

Finally, the non-paper envisages the European Court of Justice having a role in enforcing the withdrawal agreement stating:

"The Agreement should include provisions ensuring the settlement of disputes and the enforcement of the Agreement. In particular, these should cover disputes arising from:

- continued application of Union law;
- citizens' rights;
- application and interpretation of the other provisions of the Agreement, such as the financial settlement or measures adopted by the institutional structure to deal with unforeseen situations.

In these cases, the jurisdiction of the Court of Justice of the European Union (and the supervisory role of the Commission) should be maintained. For the application and interpretation of provisions of the Agreement other than those relating to Union law, an alternative dispute settlement should only be envisaged if it offers equivalent guarantees of independence and impartiality to the Court of Justice of the European Union.”

One absence from the non-paper is any reference to Northern Ireland.

Theresa May’s meeting with Jean-Claude Juncker

On 26 April, the Prime Minister had dinner with the European Commission President Jean-Claude Juncker in Downing Street. Following the meeting, the [Prime Minister’s office](#) described the meeting as constructive and said that in addition to discussing Brexit, “the Prime Minister and President Juncker also discussed a range of other international issues in a useful working dinner”.

At the time, the meeting elicited little media or public interest. However, a [report in German newspaper Frankfurter Allgemeine](#) published four days later received widespread coverage. According to a translation of the Frankfurter Allgemeine report provided by [Jeremy Cliffe](#) – the Berlin Bureau Chief at The Economist – the meeting left the European Commission President “ten times as sceptical as I was before”.

Key points reported by Frankfurter Allgemeine included:

- The EU side were astonished at the Prime Minister’s suggestion that the EU/UK expats issue could be sorted at one EU Council meeting at the end of June. The astonishment centred on how such a complex issue could be addressed in one meeting.
- The Prime Minister wanted to work through the Brexit talks in monthly, 4-day blocks; all confidential until the end of the process. In response, the Commission said it was impossible to reconcile this with need to square off member states and the European Parliament, so documents must be published.
- The EU side felt the Prime Minister was seeing Brexit and the process through rose-tinted-glasses. “Let us make Brexit a success” she told them. Juncker countered that Britain will now be a third state, not even (like Turkey) in the customs union: and therefore, “Brexit cannot be a success”.
- The Prime Minister also told Jean-Claude Juncker that the UK owes the EU no money because there is nothing to that effect in the treaties. The Secretary of State for Exiting the EU, David Davis then objected to the idea that the EU could

force a post-Brexit, post-ECJ UK to pay the bill. In response, the Commission President is reported to have said that in that case there would be no trade deal.

- Frankfurter Allgemeine reported that the Commission President told the Prime Minister "I leave Downing St ten times as sceptical as I was before".
- It's reported that next morning, Jean-Claude Juncker called German Chancellor Angela Merkel, he reportedly said the Prime Minister is living in another galaxy and totally deluding herself. Accordingly, the German Chancellor quickly reworked her speech to the Bundestag that day to include her "some in Britain still have illusions" comment
- According to Frankfurter Allgemeine, Juncker's team now think it more likely than not that Brexit talks will collapse & hope Brits wake up to harsh realities in time.

Following the Frankfurter Allgemeine report and the translation by Jeremy Cliffe, the Prime Minister dismissed the reports as "Brussels gossip". According to the [Guardian newspaper](#):

"The prime minister told reporters: "From what I have seen of this account, I think it is Brussels gossip. Just look at what the European commission themselves said immediately after the dinner took place, which was that the talks had been constructive.

"But it also shows that actually at times these negotiations are going to be tough. And in order to get the best deal for Britain we need to ensure that we've got that strong and stable leadership going into those negotiations."

SPICe timeline and who's who

As background information ahead of the beginning of the Brexit negotiations, SPICe has published two Infographics. A [timeline](#) provides an indicative guide to the withdrawal process leading up to the UK's departure from the EU in March 2019, whilst the [who's who](#) outlines the key players in both the UK and EU negotiating teams.

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