

## Europe Express about terms of Transition

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“The representatives of the EU27 Member States yesterday adopted the negotiating directives for the transition period after the UK’s withdrawal from the EU. They do not contain any surprises but are in line with the constitutional framework within which the Commission and the Council are acting.

The EU27 have formally proposed that there will be a “transition period” until 31 December 2020, which is (not coincidentally) the last day of the EU’s seven-year budget cycle. During this period the UK shall remain bound by the entirety of EU law (including changes enacted during this time) and the jurisdiction of the European Court of Justice. It shall effectively be part of the single market and customs union, and free movement of people will continue. The UK shall not generally be represented in the EU’s institutions, bodies or agencies (except where “necessary and in the interest of the Union”), and shall no longer have UK Members sitting in the European Parliament.

The UK will not be able to sign international trade agreements during the transition period, unless specifically authorised by the EU27 Member States. In this respect it is interesting to note that the negotiation directives provide only that the United Kingdom should remain bound by the obligations stemming from the agreements concluded by the Union, but do not state that on the other side the United Kingdom should continue to have the rights under such agreements concluded by the Union. This doesn’t mean that Liam Fox, Secretary of State for International Trade and President of the Board of Trade, will not be able to talk to the US (for example) about the general terms of a future agreement, but his room for making significant progress will be severely curtailed for nearly three years.

While under this scenario the UK remains tethered to the EU during the 21-month period and significantly limited in its scope for developing an independent trade policy (prominent Brexit supporter and Chairman of the European Research Group, Jacob Rees-Mogg is correct in asserting that such an arrangement does indeed make the UK a “vassal state” during this transition), it still remains unclear what relationship the UK would have vis-à-vis the existing EU trade treaties with third countries. As the UK is technically outside the EU, as a matter of law third countries would not be bound to treat the UK as if it is part of the EU. Some countries may be relaxed about continuing to assume that the UK is in the EU. Others are unlikely to be. Even if they would like to help, the EU27 cannot deliver the acquiescence of other sovereign nations acting in their own self-interest.

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Very little, if anything, in these negotiating directives, which the EU27 took just two minutes to adopt, should come as a surprise.

Very few think that these are negotiating directives in the sense that the EU27 will be prepared to actually negotiate them. It is also unlikely that the EU27 will accept many (if any) of the “carve outs” the UK may request from the general principle of simple continuation of the entire *acquis communautaire* during the transition period.

The UK is faced with some tough choices:

1. accept the EU27 position (either immediately or after demonstrating token resistance for a few weeks),
2. walk out of the talks, or
3. seek to extend the time period under Article 50.

Option one is politically challenging for the UK government, and Theresa May personally, as it represents something of a humiliation, particularly given that the UK government has continually failed to communicate that leaving the UK is both hard and involves compromises, even if the view is that the destination makes it worthwhile in the end. Option two effectively means a hard Brexit in some form. But there is absolutely no chance that the UK could be able to prepare for the “cliff edge” within 14 months, such as establishing new customs infrastructure and agreeing air transport treaties. Plus it puts it in breach of international undertakings given in December. Option three is politically challenging, not least because it throws into sharp relief the questionable wisdom of triggering Article 50 in March 2017. And, in a sense, all that changes under option three is the UK keeps MEPs and some degree of representation: it has not even technically left the EU in March 2019. It is not entirely clear whether all 27 Member States of the EU27 would agree to extend Article 50. Finally, because it likely pushes the UK’s exit into the next budget cycle, the cost of Brexit is likely to increase.

None of these options will be appealing to the UK government. We haven’t even mentioned another theoretical option – revoke the Article 50 notification – which is politically even less attractive, and (in a wonderful piece of irony) would almost certainly involve a visit to the European Court of Justice to establish if it can, in fact, be revoked, in this respect, please see our [previous blog post](#).

As mentioned, all of the foregoing was predictable (and indeed predicted) before Article 50 was notified. One of the deficiencies of the mechanism contained in the Lisbon Treaty for leaving the EU is that two years is clearly insufficient to effect a full departure from the EU and negotiating of a future relationship, even if the departing Member State has a plan prior to notification, which the UK plainly did not. It means a transition, and that transition is inevitably going to look like the one the EU27 will effectively impose on the UK. In addition, this will require amendments to the EU (Withdrawal) Bill, which Eurosceptic MPs may be inclined to vote against.

The leadership of the Prime Minister, weakened by the failed General Election gambit, a rebellious Cabinet and the lack of an expressed vision of what Brexit actually means, appears to be coming under renewed pressure from Conservatives MPs. Only 48 MPs are needed to trigger a no-confidence vote. Only one person, Sir Graham Brady MP, Chairman of the 1922 Committee, knows how many MPs have so far expressed a desire to trigger such a vote. There is speculation that the number of additional MPs needed may be in single digits.

The UK government only just managed to navigate getting to “sufficient progress” agreement on the Phase 1 issues in December 2017. Agreeing the terms of transition will put it under fresh pressure.

Businesses should not file away their “no deal” contingency plans just yet.”

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