



BEERG Brexit Briefing No. 1 April 2017

INTRODUCTION

On March 29th, UK prime minister, Theresa May, sent the letter to Brussels which formally notified the European Union that the UK was starting the procedure which would see it leave the bloc by March 2019. The following day, March 30th, the UK government published a White Paper setting out details of the “Great Repeal Act”, which will take effect when the UK leaves the EU. The Act will see the incorporation of all existing EU legislation into UK law, which the government/Parliament can then scrap or amend in its own good time.

It is clear from May’s letter to the EU that what the UK wants is a trade deal with the EU that mimics membership of the Single Market and the Customs Union in all but name. However, such a deal would leave the UK free to disregard the principle of free movement within the EU and allow it to control immigration from the European Union. It would also leave it outside the jurisdiction of the Court of Justice of the European Union (CJEU). Further, the UK wants to be able to negotiate trade deals on its own with third countries, something not allowable to it as an EU member. The EU negotiates all trade deals on behalf of the bloc. Put it this way: The UK wants to cancel its club membership but it wants continued access to all the club’s facilities, while being free to ignore the rules committee. If you could get such membership terms at Mar-a-Lago it would be a deal of some art.

As she made clear in her letter to the EU, May wants negotiations on the metrics of the UK’s exit from the EU and on a future trade deal to run in parallel.

On Friday, March 31st, the EU gave its initial, draft response to the UK’s exit letter. The draft made it clear that the two negotiations, exit and trade, would run sequentially, not in parallel. Further, the trade negotiations would only commence when sufficient progress had been made on the exit deal, which needs to cover three items:

1. A resolution of the UK’s ongoing financial obligations to the EU after it leaves. These obligations arise from commitments made by the EU, with the UK as a member. Think of it as a mortgage signed for by two people. Just because the relationship between the two comes to an end, it does not mean that one of the parties can simply walk away from their mortgage obligations.
2. An agreement on the rights of EU citizens living in the UK and UK citizens living elsewhere in the EU.
3. The potential return of a “hard border” between the Republic of Ireland and Northern Ireland. This border will be the only land border between the EU and the UK after Brexit. The reintroduction of a hard border, which all parties say they want to avoid, with police checks and custom controls, could have significant consequences for political processes on the island of Ireland.

The EU will refine its the mandate for its negotiators over the coming month. It will be finalised at a meeting of EU leaders at the end of April.

Given that it is the UK that is leaving the EU and not vice versa, the EU can be expected to have the upper hand in structuring the negotiations. If the EU wants the negotiations to be structured sequentially, then that is how it will be. The UK has limited leverage to force the EU to do otherwise. "Open talks on a trade deal now, or we are leaving". "But you are leaving anyway." Reminiscent of the hold-up artist who threatens to shoot himself if you do not hand over your wallet.

To make matters worse for the UK, it is negotiating against a deadline of two years from March 29th, a deadline which can only be extended if the 27 remaining members of the EU unanimously agree. If there is no deal by March 2019 then the UK crashes out of the EU on March 30th. In reality, the negotiations may not seriously kick-off until after the German elections in February. They will need to finish by October 2018 to allow sufficient time for ratification. A year to try and finalise a Rubik's Cube negotiation.

Given these circumstances, it is not surprising that some calmer voices on both sides are suggesting that there will need to be a transition phase for some years, during which a number of the British objectives for Brexit (such as its wish to escape the jurisdiction of the CJEU) will not be achieved and some membership benefits will be retained for a period.

THE EXIT NEGOTIATIONS

Settling the Bills

The first major roadblock to a successful negotiation is the resolution of the UK's ongoing financial obligations to the EU after it leaves. Those who campaigned for Brexit never mentioned such an obligation. On the contrary, they famously proclaimed that quitting the EU would save the UK £350m a week which could be redirected to the National Health Service. Little has been heard about such a transfer since the vote. There are those in May's Conservative Party who will reject any exit or ongoing payment to the EU. They will be egged on in this by the rabidly anti-EU tabloid press. May has a majority of less than 20 in the House of Commons. She will do all she can to avoid splitting the Conservative Party. Caught between the EU's insistent demand that financial liabilities must be honoured and the rejectionist stance of the ultra-Brexiteers in her own party, May's negotiating margin on this issue is slim, if non-existent. Never underestimate the negative effect the ideological purity of a raucous, parliamentary minority can have on political negotiations. American readers can think Freedom Caucus.

While we noted earlier in this paper that the UK's obligations are somewhat akin to a mortgage obligation. Of course there may be shared equity in the property that needs to be taken into account in calculating who owes what. But if, after doing that, an amount to be repaid remains then that obligation must be met.

Negotiations could come to a halt very quickly if a solution to the issue of financial liabilities cannot be found. If the UK refuses to honour what the EU sees as financial obligations on the part of the UK could the EU take the view that the process has come to an end? What would happen then? Article 50 states:

The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.

This language suggests that the UK cannot be forced to leave the EU before the two year period ends. But what if the UK decided that there was no point in further negotiations and decided to go sooner rather than later?

Could Brexit become a reality long before March 2019?

Citizens Rights

While it might seem that it should be a straightforward matter to mutually agree the rights of EU citizens living in the UK and of UK citizens living in the EU this is far from the case. For a start, residency requirements for non-EU nationals differ across the 27 member states. (It is still 28, but we are counting the UK out). If a deal were done when would it start and how long would it last? Would an EU citizens living in the UK, or a UK citizen living in an EU member state, be free to have relatives join him or her? Would they have access to state benefits? What about health care? Pensions? If they buy property what rights have they got if the UK/EU deal is time limited?

The UK currently requires that EU citizens who have been in the UK for 5 years and qualify for permanent residency fill out an 82-page form, complete with copious supporting documentation, to have the right to residency confirmed. 20% of such applications are rejected, often for very minor reasons. The process seems designed to deter applications rather than facilitate them.

Officially, 300,000 UK citizens live in Spain. Some put the number nearer a million. Many are retired, living on a UK pension. They have already taken a hit because of the fall in the value of the pound against the euro since the Brexit vote. They are concerned, rightly, about their continued access to the Spanish medical system after Brexit. Today they can access that system on the same terms as a Spanish citizen, as a result of their EU citizenship. They will lose that access after Brexit. Will the UK be prepared to buy them access to the Spanish system? How much would that cost? The same applies to UK citizens living elsewhere in Europe, though the Spanish case is exceptional because of the number of retirees.

As always with any negotiation, the devil is in the detail. This is a matter of major importance for BEERG members. They have many EU employees in the UK and UK employees in the EU. We already know the uneasiness that many of these employees are expressing to management about their futures. It is difficult to offer any reassurance when there are so many unknown unknowns. But we can listen to their concerns and let them know we understand and that we share these concerns.

Irish Borders

Post Brexit, the Republic of Ireland will be the only country to have a land border with the UK, the border between the Republic and Northern Ireland (until Scottish independence?) Ireland and the UK have long had a common travel area, without controls, whether between the Republic and Northern Ireland or the Republic and the UK mainland. No passports required. (Which is why Ireland never joined Schengen as it would have put the Ireland/UK travel zone at risk).

But, post-Brexit, Ireland will still be a member of the EU, with full freedom of movement between Ireland and other EU countries. The EU, conscious of the political risks involved, is anxious to ensure that there is no re-introduction of a hard border on the island of Ireland. But, the driving force behind Brexit is to enable the UK to control who crosses its borders. Logically, that means the UK may have to re-establish a border with Ireland. Now that does not much matter if you travel from Ireland to anywhere in the UK mainland. You'll just have to queue up and show your passport. Like any other European. Assuming that the EU and the UK can negotiate a visa-free arrangement. Not necessarily guaranteed if the divorce goes hostile (see *Settling the Bills* above).

But the Republic/Northern Ireland is another matter. The politics are deep rooted in a bloody history. Within living memory. The disappearance of the border between the two parts of the small island played a significant role in bring a degree of peace and stability where before there was everyday violence.

Will Brexit see the return of a hard border between the Republic and Northern Ireland? Remember, Northern Ireland voted to remain in the EU, in no small part because it has been a significant beneficiary of EU largess. A majority in Northern Ireland sees its future in the EU. And now it is going to be dragged out of the EU by England. And have a border, with custom and police controls, between it and the Republic erected. The relative peace and stability that has developed since the Good Friday Agreement could all too easily be put at risk as old animosities re-emerge.

The difficulties of finding a solution to this problem should not be underestimated.

BEERG
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