

Brexit maze

The role of EU institutions in the negotiations

By Agata Gostyńska-Jakubowska

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- ★ On June 19th Michel Barnier and David Davis started the Brexit talks. But EU citizens in the UK and British citizens in other EU countries, as well as businesses, know little more about their post-Brexit future than they knew a year ago when the UK voted to leave the EU.
- ★ Theresa May does not have a majority in the newly elected UK Parliament. But it seems unlikely that MPs will force the prime minister to be more open about her Brexit strategy and the difficult choices the UK will have to make as it departs from the EU.
- ★ The best hope for citizens, businesses and other groups concerned about Brexit is to look to the EU institutions for information. These institutions have been open about the EU's negotiating principles and red lines from the moment the UK voted to leave the EU on June 23rd 2016.
- ★ Theresa May has seemingly identified the 27 EU governments as the prime focus of her diplomatic efforts. But EU capitals will not undermine the EU institutions in the Article 50 process. The interests of the 27 are more or less aligned in the withdrawal talks; the institutions can help member-states to defend the EU's integrity and to maintain a unified front.
- ★ The European Council guides the European Commission which negotiates with the UK. Throughout the Brexit talks Michel Barnier will also share negotiating documents with the Council of Ministers and the European Parliament, and report back on progress. This is because the Council will have to conclude the exit agreement after MEPs have voted on the text. The 27 also want the European Court of Justice (ECJ) to have a role in monitoring the application of the exit agreement.
- ★ Now is probably the last chance for businesses, citizens and other interest groups to influence the EU's negotiating team in relation to the divorce terms. Michel Barnier wants to achieve 'sufficient progress' with the British on the principles of the divorce deal in early autumn 2017, and then to move on to scoping out future relations with the UK.
- ★ However, stakeholders should not put all their eggs in the Commission's basket. Barnier negotiates on behalf of the EU, but the member-states will steer the Commission's work from the back seat, either through the General Affairs Council (GAC) or the Council working group on Article 50.
- ★ Interest groups should not underestimate the role of the European Parliament in the Brexit talks. They should not wait until the final text of the agreement is on the agenda for ratification before making contact with MEPs.
- ★ Since the EU has said that it will only discuss the future relationship with the UK after it judges that there has been "sufficient progress" in the withdrawal talks, business should not expect the EU institutions to talk about a future UK-EU free trade agreement before the second phase of the negotiations.
- ★ The chances of a 'no deal' scenario might have fallen as a result of the British general election, but this should not lull businesses and other stakeholders into a false sense of security. They should hope for the best and plan for the worst if they do not want to wake up with a hangover on March 30th 2019.

On June 19th 2017 the UK and the EU-27 started Brexit negotiations, almost exactly a year after the UK referendum on EU membership. But as the British and EU delegations set out their negotiating positions, European citizens in the UK and British citizens in other EU countries, businesses, and other stakeholders know little more about their post-Brexit future than they knew immediately after the referendum.

The general election on June 8th 2017, called by Prime Minister Theresa May in the hope of strengthening her negotiating hand, has created even more uncertainty about what kind of Brexit the government will eventually deliver. Not only did the Tories fail to win big, they lost their parliamentary majority. They obtained 318 seats in the 650 seat House of Commons, and have been forced to form a minority government, with the support in key votes of the Northern Irish Democratic Unionist Party (DUP), which has 10 seats.¹

“Poor public scrutiny of Brexit leaves many stakeholders at a disadvantage and in need of a voice in the negotiations.”

The lack of a guaranteed majority is unlikely to force the government to be more open about its negotiating strategy. Admittedly, Theresa May has promised that Westminster will have a vote on the agreed text before the European Parliament has its say. The British parliament could in theory have forced the prime minister to brief it regularly on the negotiations as the price of cross-party support for the final deal. But the DUP has committed to voting with the Conservative government on Brexit-related legislation, which leaves the opposition parties and pro-EU Conservative MPs with little leverage. Indeed, in March 2017, during the passage of the bill authorising May to trigger Article 50, Tory MPs voted down Labour amendments calling for a greater role for Parliament in scrutinising the negotiations. They accepted May’s argument that revealing her negotiating position would weaken her hand in talks with the EU. In the wake of the June election, the Commons’ select committees will also struggle to hold the government to account, at least for the first few months of the negotiations. Although committee chairs could be elected before the summer recess on July 20th, their full membership will probably be finalised only in September – that is, after three negotiating sessions have taken place.

Poor public scrutiny of Brexit leaves many stakeholders at a disadvantage and in need of a voice in the negotiations: EU citizens who have made Britain their home; British citizens (including EU officials) who have emigrated from the UK to live and work on the Continent; businesses,

environmental organisations, and academic institutions in the UK. These stakeholders still have little idea about the conditions under which they can continue living in their adopted countries; what access Britain will have to the single market; which EU environmental standards the UK will keep; or whether British universities will continue to be able to benefit from EU programmes and funds.

The best hope for these groups is to look to the EU institutions for information and influence. Unlike the British government, the EU institutions have been transparent about their negotiating objectives.² The guidelines of the European Council (the EU heads of state or government) for the negotiations with the UK are available to the public, as are the Commission’s negotiating mandate and position papers. These documents set out the red lines of the 27 in the Brexit talks and, as such, give all interest groups an idea of the conditions the UK will have to fulfil for an orderly exit. The EU’s negotiating documents also give citizens, businesses and other groups a sense of the kinds of compromise the Union might strike with the UK.

In the election campaign May argued that every vote for the Conservatives would make her stronger when she negotiated with other EU leaders.³ But she was wrong if she thought that there was no unified EU position on Brexit, or that the UK would be able to make special deals with individual EU countries. The interests of the 27 are broadly aligned in the withdrawal talks. All member-states want equal treatment for their citizens and all want the UK to pay as much as possible post-Brexit (net payers because they do not want to pay more; net recipients because they do not want to receive less). Member-states might feel at times uneasy about the European Commission or the European Parliament using the Brexit negotiations to strengthen their positions in the EU decision-making process, but they will not undermine the institutions in the Article 50 talks. The European Commission and the European Parliament represent the general interests of the EU and its citizens; they will help member-states to maintain their unified front on Brexit.

By looking at the role of individual EU institutions in the Brexit talks, this paper aims to help stakeholders see when and how best to intervene on issues of particular concern to them. It will offer recommendations on how stakeholders should conduct their advocacy and whom they should talk to.

1: The Conservatives and the DUP have negotiated a so called ‘confidence and supply’ arrangement, whereby DUP commits itself to support the government in no-confidence votes, budget votes, and on legislation related to Brexit and national security, while remaining outside the government.

2: European Council, ‘Guidelines following United Kingdom’s notification under Article 50 TEU’, April 29th 2017.

3: ‘Theresa May’s general elections speech announcement: full transcript’, *Financial Times*, April 18th 2017.

Article 50 of the Treaty on European Union: What it does not say

Article 50 of the Treaty on European Union (TEU) sets out which EU institutions have a say in the negotiations, and outlines the mechanics of the talks. It provides that a departing member-state must notify the European Council of its intention to withdraw. The European Council then agrees guidelines for the exit negotiations. The Council of Ministers (which together with the European Parliament adopts the majority of EU laws) endorses the exit agreement by a qualified majority. The final deal is subject to the consent of the European Parliament – the only directly elected institution in the EU. Article 50 also sets a deadline for exit. After notification, the departing member-state has only two years to conclude the agreement. Otherwise, exit takes effect automatically, leaving a withdrawing EU country without any arrangement on citizens' rights, trade rules or customs procedures. The two-year period can only be extended if all member-states agree.

But what seems easy in theory is more difficult in practice. After the Brexit referendum on June 23rd 2016, it soon became clear that Article 50 did not provide answers to some of the practical questions that Brexit raised.

“There is nothing in Article 50 that prevents a departing member-state from changing its mind as it negotiates its withdrawal.”

First, Article 50 does not say who should negotiate on the EU's behalf; it only indicates that the agreement will be negotiated in accordance with Article 218.3 of the Treaty on the Functioning of the EU (TFEU), which provides the legal basis for international negotiations between the EU and third countries. Article 50 does not explicitly say that the Commission, which conducts most of the EU's international negotiations, should lead the talks. Thanks to this ambiguity, the European Commission and member-states disagreed initially over who should be in charge of the Brexit talks. The member-states considered that Brexit involved disentangling an EU country from the rest of the EU and could not be compared to any other EU international negotiation. For stakeholders, it was hard to know immediately after the referendum whether to concentrate their lobbying efforts on the Brussels institutions or the member-states.

Second, Article 50 sets a two-year deadline for the UK to leave the EU, with or without an agreement. But it is silent about when negotiations should end, in order to give the

European Parliament and member-states time to assess and where necessary ratify the final agreement before the deadline. The European Commission has warned that the British government has less than two years to negotiate. It has argued that the final divorce agreement would have to be agreed no later than October 2018 in order to give the European Parliament time to assess it (see Figure 1). Theresa May could in theory ask EU leaders for an extension but there is little appetite on the continent to agree to that. The 27 want to get Brexit negotiations out of the way before the final phase of the talks on the next multiannual financial framework, which is due to start in 2021. The European Parliament also wants the British gone by the next European elections, which will take place in Spring 2019.

Third, Article 50 does not say what the negotiations should cover exactly. The article indicates that the main focus of the talks should be the terms of divorce, but it also mentions that they should take into account “the framework for the future relations” between the UK and the EU. Theresa May thinks that this vague wording authorises her to negotiate an ambitious and comprehensive free trade deal with the 27 alongside the withdrawal agreement. She claims that she can finalise both sets of talks within two years.⁴ But according to EU law, the EU cannot conclude a free trade agreement with one of its members; so the UK would have to leave the EU before it could sign the deal. Experience shows, moreover, that it takes many years to finalise and ratify ambitious FTAs.

Fourth, Article 50 does not say whether a departing member-state can withdraw its intention to leave the EU. Public opinion polls suggest that a majority of the British want the government to go ahead with Brexit.⁵ But it is conceivable that some Leave voters might change their minds if Britain's economic performance worsens significantly. There are already worrying signs: the UK economy did worse than any other EU member in the first quarter of 2017.

The British government has argued that the Article 50 notification cannot be revoked.⁶ But there is nothing in the text of Article 50 that prevents a departing member-state from changing its mind as it negotiates its withdrawal from the EU. Frans Timmermans, first vice president of the European Commission, and French President Emmanuel Macron have been among those arguing that the UK would be welcome to stay in the EU if it had a change of heart. The European Parliament agrees – though in its April resolution on the Brexit talks, it underlined that any reversal by the UK should be

4: Conservative Party manifesto, 'Forward, together: our plan for a stronger Britain and a prosperous future', May 18th 2017.

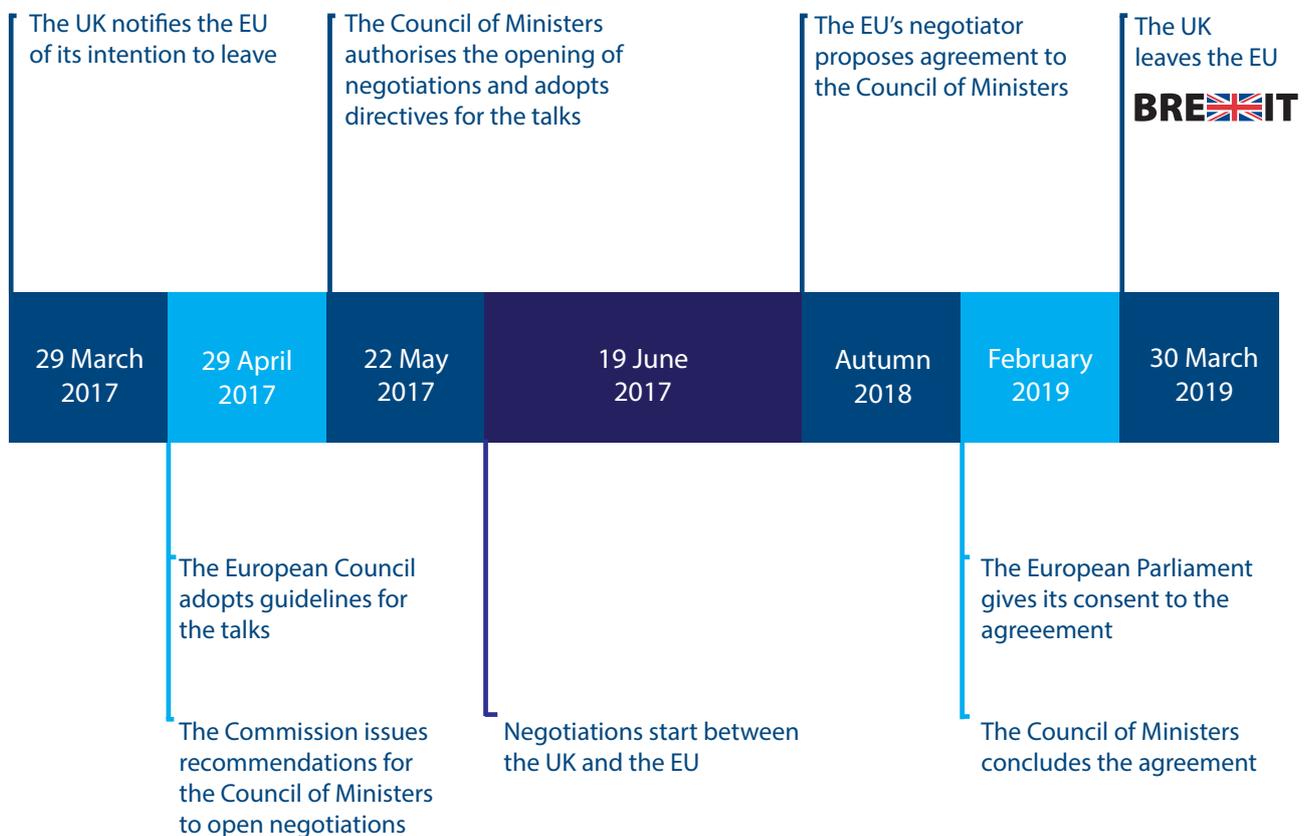
5: Anthony Wells, 'Majority favour pushing on with Brexit – but many are tempted by a softer path', YouGov, June 15th 2017.

6: Supreme Court Judgment, Hilary Term [2017] UKSC 5 On appeals from: [2016] EWHC 2768 (Admin) and [2016] NIQB 85, January 24th 2017.

subject to conditions set by the EU, and should not result in the UK having better membership terms than it has currently. In particular, the European Parliament reminded

Britain that the reforms won by David Cameron before the referendum expired when Britain voted to leave.⁷

Figure 1: Brexit timeline



Note: This figure builds on the European Commission's Brexit graphic, https://ec.europa.eu/ireland/file/brexit-timeline-webjpg_en

The European Council: A compass for the Brexit talks

The European Council, which sets the EU's political direction, has provided answers to some of the practical questions that Article 50 does not answer. In its guidelines adopted on April 29th 2017, the European Council made clear that the EU wants to discuss the withdrawal terms first, before talking about the future relationship. The EU's number one priority is to obtain safeguards for the current status and rights of EU citizens in the UK and vice-versa. The EU also wants the UK to honour its outstanding financial commitments as a member-state. Britain's departure from the EU part-way through the current multiannual financial framework will leave a hole in the budget from 2019. The EU also worries that Britain's departure from the EU – and especially its customs union – could undermine the peace process in Northern Ireland.

The re-imposition of border checks could fuel tensions between unionists and nationalists in the province. The 27 want the UK to come up with creative solutions which would help to avoid that scenario. Finally, EU leaders want a role for the ECJ in any enforcement and dispute settlement instrument in the withdrawal agreement.

Only after the EU and the UK have made 'sufficient progress' in the divorce talks will the 27 be ready to discuss the future relationship and possible transitional provisions between Brexit and the entry into force of a free trade agreement. The guidelines do not explain what sufficient progress means, but in a letter to the 27 EU leaders Donald Tusk, the European Council president, explained that "clear progress on people, money, and

⁷: European Parliament resolution of April 5th 2017 on negotiations with the United Kingdom following its notification that it intends to withdraw from the European Union.

Ireland must come first” before the future could be discussed.⁸ In the first round of negotiations, on June 19th, the UK’s Secretary of State for Exiting the EU, David Davis, appeared to concede this point.

The European Council also accepted that the European Commission was better placed to conduct Brexit talks on the EU’s behalf than the Council of Ministers. The Commission has the necessary resources; it has led accession talks with candidate countries and could apply its experience to Brexit, which is often referred to as ‘accession in reverse.’⁹ The Commission appointed former Commissioner Michel Barnier as its EU negotiator. However, the Commission included representatives of the rotating presidency of the

Council of Ministers and of European Council President Donald Tusk in its negotiating team.¹⁰ The 27 urged the Commission to report back regularly to the European Council and to the Council of Ministers (see Figure 2).

The European Council will deal with Brexit again when Michel Barnier recommends that the second phase of negotiations should begin. Leaders will have to decide unanimously if they agree with Barnier’s judgment. This scenario assumes that Theresa May adopts a constructive approach, and that the talks go smoothly. If she is not willing to compromise and the talks get stuck, Barnier would have to return to the European Council and ask for further guidance.¹¹

The European Commission: The EU’s negotiator

At a dinner with European Commission President Jean-Claude Juncker in London on April 26th Theresa May is reported to have argued that she would take the lead in the final stage of negotiations.¹² She also wanted to discuss the British offer on the rights of EU citizens residing in the UK personally with the EU heads of state or government, rather than leaving it to the British and EU negotiating teams to resolve the issue. British eurosceptics have never held the European Commission in high regard, and have regularly vilified EU officials as faceless bureaucrats who boss sovereign countries around. This is why perhaps Theresa May seemed to think that she could bypass the EU institutions and negotiate the UK’s departure directly with the 27 governments.

“When others were getting into cat fights, Barnier was busy talking to the member-states and the European Parliament.”

At the European Council meeting on June 22nd, EU leaders allowed the British prime minister to set out her ideas on the status of EU citizens in the UK after Brexit, but refused to engage in direct negotiations with her. May’s colleagues politely reminded her that the European Commission negotiated on behalf of all of them. The European Commission is a supranational institution which will represent the interests of all 27 and help them to maintain their unity throughout the negotiations.

Tom Newton Dunn, the political editor of the British newspaper *The Sun*, called the appointment of Michel

Barnier as an EU negotiator an ‘act of war’ against the UK. During his time as a commissioner, Barnier antagonised some in the City of London by pushing for tighter regulation of financial services. But Barnier has proved more cool-headed than his boss Jean-Claude Juncker or Theresa May. When others were getting into cat fights, Barnier was busy talking to the member-states and the European Parliament. These conversations smoothed his work on the negotiating directives adopted by the Council of Ministers on May 22nd.

An orderly departure of Britain from the EU is not only in the interests of the UK and EU, but also in Barnier’s political interest. Some speculate that he would like to be the European People’s Party (EPP) candidate for Commission President after the next European elections in 2019. The European Council will nominate the candidate of the political party that gets the largest number of seats in the European Parliament. Successful Brexit negotiations would help Barnier, who lost the race for the EPP nomination to Juncker in 2014, to present himself as a European statesman. This could strengthen his chances of being the EPP’s nominee.

As soon as the Commission appointed him as its Brexit representative, Barnier assembled a small task force, surrounding himself with experienced personnel. He appointed Sabine Weyand, a German national, as his deputy. Weyand has worked for the Commission since 1994, dealing with trade, development, economic, climate and energy portfolios. Barnier and his team can also draw on the expertise of other Commission departments.

8: Invitation letter from President Donald Tusk to the members of the European Council, April 28th 2017.

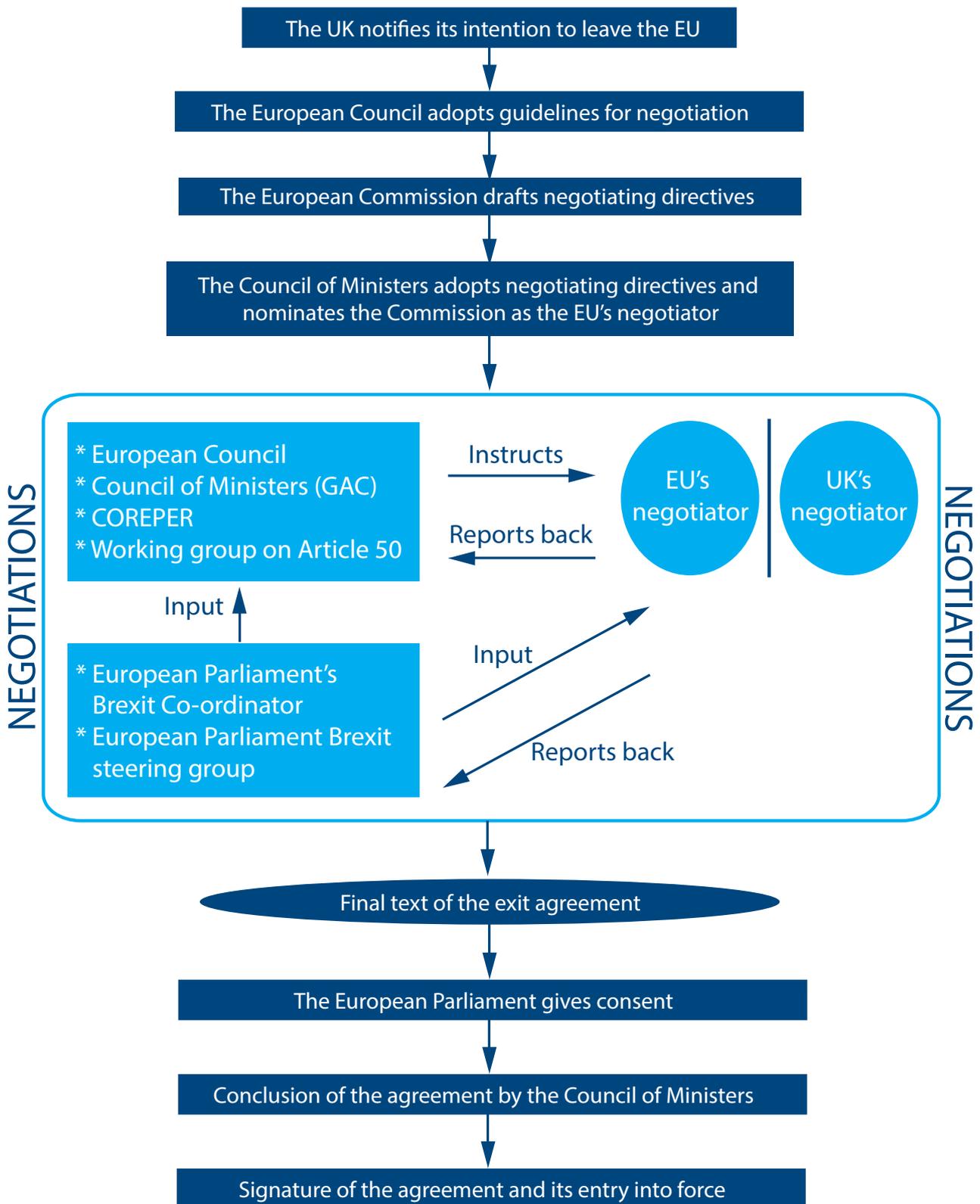
9: Both exit and enlargement negotiations can include talks about transition periods. For the UK, such a period would stretch between the date of its formal withdrawal from the EU and the entry into force of a new agreement on its future relationship with the EU-27. New member-states also face transition period in application of some EU rules. This gives newcomers time to adjust their laws and economies to the enlargement.

10: European Council, ‘Statement from the informal meeting of the Heads of State or Government of 27 member-states as well as presidents of the European Council and the European Commission’, Brussels, December 15th 2016.

11: Andrew Duff, ‘Brexit: Time for Plan B’, discussion paper, European Policy Centre, May 30th 2017.

12: Oliver Wright, Bruno Waterfield, ‘You can’t lead the Brexit talks, EU tells Theresa May’, *The Times*, May 3rd 2017.

Figure 2: Co-ordination of the EU's negotiating position



BRE**IT**

Note: This figure builds on the European Council's Brexit graphic, <http://www.consilium.europa.eu/en/infographics/brexit-process/>

It has been up to the two negotiating teams to organise themselves internally, but both had to agree on how the negotiations should be structured. On June 19th David Davis accepted the Commission's proposal to conduct the talks on a four-week cycle. The first week of each cycle is to allow the European Commission to check if it has the backing of member-states and the European Parliament for the proposals it intends to make to the UK; it presents working papers on its negotiating stance to both the Council and to the European Parliament. In the second week the EU and the British delegation will exchange negotiating documents, and in the third week they conduct talks. In the fourth week, the EU negotiator reports back to the Council and to the European Parliament on the progress of negotiations. The negotiating cycle then repeats.

EU officials are no fans of David Davis whom May appointed as the UK's chief negotiator. He is a long-standing eurosceptic, and happy to use bellicose language about the EU in public. EU officials worry that he will maintain this tone in the talks. But ultimately, it does not matter to Barnier who represents the UK. What matters is that the person on the other side of the table has a mandate to make commitments and compromises as the negotiations progress. The UK's decision to hold elections has already eaten into the time available to reach a deal. The UK cannot afford to waste more time by sending to Brussels a negotiator who has to refer all decisions back to London.

The Council of Ministers: Steering the negotiations from the back seat

Brexit is hardly the only issue occupying Chancellor Angela Merkel and President Emmanuel Macron. The duo view the future of the eurozone, the refugee crisis and the fault lines between member-states as being at least as important as the UK's departure from the EU. EU leaders have therefore delegated the Brexit dossier to 'sherpas' (national negotiators), who meet ahead of the European Council to discuss Brexit; and to EU affairs ministers meeting in the General Affairs Council (GAC).¹³

“The future of the eurozone and the refugee crisis is as important for Merkel and Macron as the UK's departure from the EU.”

The GAC deals with matters that cut across different policy areas, such as institutional affairs, enlargement or Brexit. The GAC is one of several forums where member-states can set out their Brexit-related priorities, co-ordinate with other ministers and develop a joint stance on the UK's exit from the EU. On May 22nd the GAC authorised the European Commission to start the negotiations with the UK, and adopted a detailed mandate for the first phase of the talks. The GAC can revise this mandate and will need to adopt another if and when the European Council agrees that Barnier has

achieved sufficient progress in negotiating withdrawal terms.

Normally the GAC would expect COREPER, the committee of member-states' ambassadors to the EU, to do the preparatory work for ministers. But COREPER has to deal with a full agenda of issues unrelated to Brexit, from agriculture to aviation. The Council of Ministers has therefore established a separate working group on Article 50. Each member-state has appointed one permanent Brexit delegate and can send up to two more officials if sectoral expertise is required. This working group, chaired by Didier Seeuws, who once served as chef de cabinet of former European Council President Herman Van Rompuy, meets twice per week. The Commission presents the group with working papers which form the basis for its negotiating stance, and reports back on the progress of the talks with the British. The group facilitates the flow of information between capitals and Barnier, and allows member-states to raise their concerns about the direction of the negotiations. The group will not go so far as to draft compromise texts for Barnier, leaving the Commission holding the pen. Some member-states, particularly smaller and newer ones, may worry that the group will be relegated to a talking shop, or that it will not have enough weight to influence the Commission's actions. It would then fall to the GAC to resolve any contentious issues that divided the capitals and the Commission.

The unity of the 27

Some British politicians, including David Davis, hoped after the referendum that the UK could make special deals with individual EU countries to get their backing in the European Council or the Council of Ministers.

The UK had previously been successful at cutting such deals on various EU issues. And, other EU capitals often turned to the UK first when they wanted to assemble coalitions of member-states.¹⁴ But under Article 50,

¹³: In some member-states, like Poland, EU affairs ministers also perform the role of sherpa.

¹⁴: Daniel Naurin, Rutger Lindahl, 'Out in the cold? Flexible integration and the political status of euro opt-outs', European Union Politics vol 11 no 4, 2010, cited by Simon Hix in 'Is the UK at the top table in EU negotiations?', LSE EUROPP blog, November 15th 2015.

British representatives do not participate in any of the European Council or Council of Ministers' meetings in which the other EU countries debate their negotiating positions on Brexit.

“European leaders agreed that there would be no bilateral negotiations between the UK and individual member-states.”

European leaders agreed in their guidelines that there would be no bilateral negotiations between the UK and individual member-states. EU leaders have stuck to that line because their interests are broadly aligned in the exit talks. The rights of EU citizens in the UK are equally important to all EU capitals, whether they have 916,000 citizens in the UK – like Poland – or 30,000 – like Denmark. No EU leader could justify curtailing their own citizens' rights.¹⁵ Brexit has also brought together the EU net payers and beneficiaries of the EU budget. Net payers do not want to make up for the loss of the British contribution and to pay more to the EU budget, post-Brexit; beneficiaries do not want to receive less money. Both groups agree, therefore, that the negotiations on the UK's financial commitments should produce as large a sum as possible.

Some might think that the member-states with the closest economic ties to the UK might want the European

Commission to make compromises on citizens' rights, financial commitments and Northern Ireland, and move quickly to scoping out future relations with the UK. Much of the UK's trade in goods, for example, transits through the Netherlands; keeping tariffs at zero is therefore in The Hague's interest.¹⁶ But even if like-minded countries are more receptive to the British negotiating position on the divorce terms, the EU will still have to agree unanimously to move on to the second phase of the talks. Michel Barnier will have to take account of the interests of all 27 before he recommends this step.

There is perhaps one clear example of divergent interests among the 27, but the UK will not be able to exploit it in its favour. Member-states are already competing to take business and investment away from the UK. Banks and other financial institutions in the UK enjoy so-called 'passporting rights', meaning that they are regulated in Britain but can do business across the EU. But when the UK leaves the single market they will lose these privileges. As a result, many financial institutions will have to relocate elsewhere on the continent. Germany, France, the Netherlands and Italy are among those competing to create a new financial centre post-Brexit. The Netherlands' Foreign Investment Agency (NFIA) has hired extra staff in London to help companies considering relocation. In March 2017 the Italian minister of finance, the minister of foreign affairs and the mayor of Milan visited London to brief business on the opportunities of setting up in Milan.

The European Parliament: Bad cop in the Brexit talks

The governments, parliaments and civil society of the 27 help to exert democratic control over the Brexit process; so does the European Parliament.¹⁷ It does not formally participate in the negotiations. But Michel Barnier co-operated closely with MEPs before the Brexit talks started and will continue to do so until they end. The European Parliament must ratify the withdrawal agreement and any UK-EU deal on the future relationship. In the past, the European Parliament has used its veto when it judged that the Commission and the member-states had not involved it properly in international negotiations.¹⁸ Michel Barnier wants to reduce any risk of a repeat by liaising with Guy Verhofstadt, the Parliament's Brexit co-ordinator, and with the Parliament's steering group on Brexit. The latter is composed of Verhofstadt himself, from the Alliance of Liberals and Democrats for Europe (ALDE), as chair of the group; Elmar Brok and Danuta Hübner from the EPP; Roberto Gualtieri from the Socialists and

Democrats (S&D); Philippe Lamberts from the Greens; and Gabriele Zimmer from the European United Left (GUE). This body mirrors the Council working group on Article 50 and helps facilitate a cross-party position on the UK's exit. Barnier will update the group on the progress of the talks.

The steering group plans to respond to the Commission's working documents with its own position papers. These contributions are not intended for publication; ostensibly this is because they do not represent the position of the European Parliament, but only the opinions of the representatives of individual political groups. But in reality, MEPs want to reduce the risk of any leaks about the EU's negotiating tactics reaching the British government. This is also why the steering group does not include any representatives of the European Conservatives and Reformists (ECR), which is the third largest group in the European Parliament. The ECR is

15: The only exception could be Croatia whose citizens have not been able to exercise their right to work in the UK yet; the British government decided not to lift borders for Croatians immediately after they joined the EU in 2013. But Croatia, which is a newcomer to the EU club and wants to earn the reputation of a credible partner, has not tried to question the stance of the remaining 26.

16: Rem Korteweg, 'The Netherlands: Helpful, but no blank check', LSE Brexit blog, April 21st 2016.

17: This section builds on Agata Gostyńska-Jakubowska, 'Parliamentarians in Brexit talks: Bulls in a china shop?', CER policy brief, February 2017.

18: In February 2010, for example, the European Parliament voted down the US-EU agreement on processing and transfer of financial data for the purposes of terrorist finance tracking (the so-called SWIFT agreement), because MEPs received text of the agreement long after it had been signed.

chaired by a British Conservative MEP, Syed Kamall, who campaigned for Brexit. The steering group also excludes representatives of the main eurosceptic groupings in the Parliament, Europe of Freedom and Direct Democracy (which includes the United Kingdom Independence Party) and Europe of Nations and Freedom (which includes France's Front National). But the support of these groups is not crucial: the Parliament can approve or vote down the final text of the agreement without the votes of their MEPs if it has the backing of mainstream political groups.

“The European Parliament will push hard for the ECJ to maintain its jurisdiction over the rights of EU citizens in the UK.”

The European Parliament plans to influence the negotiations by adopting resolutions, based on the work of the steering group, before the Council of Ministers and the European Council take any further decisions. The aim of the resolutions is to set out the Parliament's red lines for the Brexit talks. In its first resolution, adopted on April 5th, MEPs argued that the ECJ should be the “competent authority for the interpretation and enforcement of the withdrawal agreement”.¹⁹ The European Parliament will push hard for the ECJ to maintain its jurisdiction over the rights of EU citizens in the UK. If the British refuse to make any concessions on this point, the European Parliament might use the next resolution to advise against moving to the second phase of negotiations. When the European Parliament adopts its resolution to approve or reject the final agreement, it will draw mainly on the work of the Constitutional Affairs Committee (AFCO), chaired by Danuta Hübner.

Some EU countries feel uneasy about the Parliament's Brexit group acting as the equal of the Council's Brexit working group. EU capitals do not want to set a precedent which could further shift power from the member-states to the supranational institutions. They fear that if they give the European Parliament an inch it will take a mile. For example, the member-states agreed to invite Verhofstadt to sherpa meetings on Brexit ahead of the European Council. Verhofstadt has responded by rushing to take the floor before member-states have a chance to express their views.²⁰ EU capitals worry that the European Parliament will expect member-states to invite a representative of the Parliament to attend when member-states discuss other policy dossiers. This is perhaps why some EU countries, including Germany, demanded that negotiating directives for Brexit made clear that Article 50 conferred “one-off exceptional competence” on the EU institutions to cover all matters with regards to UK's exit from the EU.²¹ The competence will be removed again when the Brexit talks are over.

Member-states recognise, however, that the European Parliament can be useful, as Michel Barnier tries to negotiate the best deal for them. The current Polish government is not a big fan of the European Parliament which has criticised Warsaw for backtracking on the rule of law. But the governments are probably happy for the European Parliament to take a hawkish stance on the EU citizens' rights in the UK post-Brexit and on financial commitments. A majority of MEPs are strongly pro-integration, and against the UK picking and choosing which EU rules it wants to follow and which ones it wants to ditch. If the British negotiating team questions any of the divorce terms that the European Commission has put forward, Barnier can always threaten that any amendment would make it more likely that the Parliament would veto the final deal.²²

The ECJ: A major stumbling block in Brexit talks

The job of the ECJ is to ensure that EU law is applied in all member-states in the same way, and that they do not breach EU law. Theresa May wants the ECJ's jurisdiction in the UK to end with Brexit. If the government does not change its mind about the ECJ, it will clash with the 27, and could end up with no exit deal and without an agreement on future political and economic relations with the EU. This is for several reasons.

First, the EU wants the ECJ to be able to rule on cases brought against the UK before its formal departure from the EU, and on cases submitted after Brexit but referring to events that occurred before Britain's withdrawal.

19: European Parliament resolution on negotiations with the UK following its notification that it intends to withdraw from the EU, April 5th 2017.

20: An interview with an official from a member-state.

If the European Commission opened an infringement procedure against the UK for breaching EU law on, say, air quality before UK's formal departure, but the ECJ issued its ruling after Brexit, the UK should (in the EU's view) execute the verdict. And the EU wants British courts to continue to be able to ask the ECJ to interpret EU law (so-called ‘preliminary rulings’) in proceedings submitted after Brexit but referring to events that occurred before.

Second, the Commission wants the ECJ to oversee the process of disentangling the EU and the UK. In particular, it wants the ECJ to maintain its jurisdiction over the rights of EU citizens in the UK and British citizens in the

21: The Council of the EU, ‘Directives for the negotiation of an agreement with the United Kingdom of Great Britain and Northern Ireland setting out the arrangements for its withdrawal from the European Union’, May 22nd 2017.

22: Agata Gostyńska-Jakubowska, ‘Parliamentarians in Brexit talks: Bulls in a china shop?’, CER policy brief, February 2017.

EU after Brexit. In the Commission's working paper on citizens' rights, Barnier argued that EU citizens resident in the UK should be able to seek justice from the British courts, and that British courts should then ask the ECJ for a decision on the interpretation of EU law. The European Commission also wants to be able to monitor whether post-Brexit Britain is respecting the rights afforded to EU citizens.²³ It also wants to establish a joint committee which would ensure the good functioning of other provisions of the withdrawal agreement. But if the committee composed of British and EU representatives is unable to reach an agreement on disputes between the UK and the EU, both parties should be able to appeal to the ECJ.²⁴ In a policy paper published on June 26th, the British government argued that the ECJ should not have jurisdiction in the UK post-Brexit and that EU citizens' rights should be enforceable only through the British legal system.²⁵

“If the government does not change its mind about the ECJ, it will clash with the 27, and could end up with no exit deal.”

Third, the EU will probably demand that the ECJ police any transitional arrangements that involved the UK maintaining its membership of the single market for a period. Transitional provisions would help to bridge the gap between the UK's departure and any future relationship with the EU, and smooth the hard edges of Brexit. British Chancellor of the Exchequer Philip Hammond and Theresa May have acknowledged that the UK might indeed need such a bridge.²⁶ But they have

refused to say what concessions the government would have to make in order to obtain such a transition period.

Fourth, any ambitious political and economic relationship between the UK and the EU in the future will have to entail some role for the ECJ. When Denmark, which has an opt-out from the EU's justice and home affairs co-operation, negotiated access to the databases of Europol, the EU police agency, it had to accept ECJ jurisdiction over the application of the deal.²⁷ The UK should not expect the EU to treat it better than Denmark, which remains a member-state.

The ECJ could also complicate Brexit in a different way. Any EU capital or EU institution that is unhappy about the outcome of the negotiations could ask the ECJ to review the legality of the Council's decision to conclude the exit agreement (Article 263 TFEU). In 2004 the European Parliament asked the ECJ to annul the Council's decision to conclude an agreement with the US on the processing and transfer of air passengers' personal data. Two years later the ECJ agreed with the European Parliament that the Council decision had been adopted on the wrong legal basis, and annulled the decision. Some legal experts also believe that the ECJ could be asked to rule on whether the final exit treaty complies with EU law (Article 218.11 TFEU).²⁸ The Council legal service thinks that Article 50 does not authorise such a reference to the ECJ. EU lawyers acknowledge, however, that it would be up to the ECJ to rule on the admissibility of such an action. But in any case, member-states accept that the UK is leaving the EU. They are keen to turn a page in their relations with the British and will not make it even more difficult for the British to withdraw from the EU.

Transparency: A negotiating tool

Theresa May has argued that she cannot reveal too many details of her negotiating stance because this would undermine her position in Brussels. There is some truth in this; full transparency may result in less room for manoeuvre and limit the scope for trade-offs in the talks. But conducting the negotiations in secret also makes it more difficult for political opponents to pick holes in May's strategy. By refusing to offer a 'running commentary' on the progress of the talks May hopes to be less vulnerable to her opponents in the Labour party and in her own party.

But Brexit is like no other negotiation; it will have implications for around 3 million EU citizens in the

UK and 1.2 million British citizens in the EU, as well as for business, academia, and science, all of which have benefitted from the UK's membership of the EU. It makes a big difference to them how the UK leaves the EU and what ties it will have with the EU-27 in the future. The EU recognises these concerns and does not want the talks to take place over stakeholders' heads.

On May 22nd, the Council of Ministers endorsed a set of guiding principles for transparency in the negotiations; the document says among other things that the EU's negotiator will regularly inform the public about the progress of the talks.²⁹ Since he was appointed as the

23: European Commission, Task Force for the preparation and conduct of the negotiations with the United Kingdom under Article 50 TEU, 'Essential principles on citizens' rights', working paper, May 24th 2017.

24: European Commission, Task Force for the preparation and conduct of the negotiations with the United Kingdom under Article 50 TEU, 'Position paper on Governance', June 29th 2017.

25: HM Government, 'Safeguarding the position of EU citizens living in the UK and UK nationals living in the EU', June 26th 2017.

26: Phillip Hammond, 'Annual Mansion House speech', June 20th 2017.

27: Article 20 of the Agreement on operational and strategic co-operation between the Kingdom of Denmark and the European Police Office. See also Camino Mortera-Martinez, 'Good cop, bad cop: How to keep Britain inside Europol', CER insight, May 16th 2017.

28: Davor Jancic, 'Why the European Court of Justice isn't going away', LSE Brexit blog, April 26th 2017.

29: General Secretariat of the Council of the EU, 'Guiding principles for transparency in negotiations under Article 50 TEU', May 22nd 2017.

Commission's negotiator, Barnier has been visiting EU capitals and meeting representatives of trade unions and businesses worried about Brexit. Stakeholders can also learn more about the EU's opening position by reading the EU's negotiating documents. The European Commission has published negotiating directives and working papers for the first phase of the Brexit talks.

“The EU's transparency policy is about more than its sympathy for those left in limbo by Brexit.”

But the EU's transparency policy is about more than its sympathy for those left in limbo by Brexit. Michel Barnier has used transparency to increase his leverage in the negotiations.³⁰ If the British delegation accuses him of unwillingness to compromise in the talks, he can always point to the Council negotiating directives and argue that his hands are tied by mandate from the member-

states. Regular exchanges of views between Barnier's team and the member-states will also make it harder for the British to do side deals with individual countries. Barnier's programme of contacts also minimises the risk of one or another member-state suspecting that the Commission is selling out their particular interests in secret talks. Keeping the talks secret would also invite leaks; they could reinforce the perception that the EU is an elite-driven project for which transparency is not a priority. The EU hopes that if it shows that it has nothing to hide and that it fights for citizens' rights, it will improve its public standing.

This strategy has also forced the British government to soften its stance on transparency. Theresa May must recognise that she cannot credibly claim that full transparency about her negotiating stance would give a one-sided advantage to the EU, if the latter has already published its position. The government's policy paper with its 'offer' on the rights of EU citizens may be the first fruit of the Commission's pressure on May to become more open.

Conclusions and recommendations: How to influence the Brexit talks

Leavers argued that Brexit would liberate British business from EU red tape. They also claimed that by voting to leave the EU the UK would regain its parliamentary sovereignty. But rather than removing any burdens stemming from EU law, Brexit has so far created legal uncertainty for business.

International companies with operations in the UK have demanded greater clarity from the government on the Brexit process. Some have threatened to withdraw from the UK if the government does not keep the UK in the single market, or at least secure transitional provisions to reduce the cost of leaving it. In September 2016 the Japanese government, in an unusually outspoken intervention, urged the UK to inform the public regularly about progress in the talks and the prospects for a final withdrawal agreement.³¹ But British businesses have been wary of speaking out. Retail, food and beverage companies have benefitted from the UK's membership of the single market, in particular from the free movement of EU workers. But they have worried that any public statement appearing to question the rationale for Brexit would upset their British customers, many of whom must have voted to leave. The House of Commons has also done nothing to force Theresa May to show her negotiating hand or to talk openly about the difficult choices the UK will have to make as it negotiates its departure from the EU.

The general election on June 8th created a window of opportunity for all who want greater clarity and transparency in the Brexit talks. Parliament should demand regular Brexit briefings from the government. Theresa May will be reluctant to share sensitive information about the talks with opposition parliamentarians, even if the Labour Party's official position is in favour of Brexit. But the government no longer has a secure parliamentary majority. Even a small rebellion by Conservative back-benchers would leave May struggling to get essential legislation for Brexit through parliament, without the acquiescence of the opposition. She should make a virtue of necessity, and at least offer confidential briefings to leading members of other parties on so-called 'Privy Council terms'.³²

Businesses and the lobbies that represent them should also speak out in support of MPs and peers who want the government to be more open about its negotiating position. The government has established a new EU exit business advisory group which will be chaired by David Davis and by Business Secretary Greg Clark.³³ But experience suggests that, even when the British government is ready to meet business or civil society representatives, it is often unwilling to change its position in response to their lobbying.

30: Oliver Illott, 'In Brexit, transparency is a tool – and Europe is using it', Institute for Government, May 22nd 2017.

31: Ministry of Foreign Affairs of Japan, 'Japan's message to the United Kingdom and the European Union', September 4th 2016.

32: Agata Gostyńska-Jakubowska, 'Parliamentarians in Brexit talks: Bulls in a china shop?', CER policy brief, February 2017.

33: Robert Buck, 'Three conditions for effectively engaging business on Brexit', Institute for Government, June 2^{8th} 2017.

Groups who are worried about Brexit may have more luck engaging in dialogue with the EU institutions. There are a number of steps they can take to make their voices heard in Brussels and in other EU capitals.

First, visit the European Commission's task force website. This gives details of the members of Barnier's task force. Negotiating documents are also published there. The website also lists organisations that have already met Barnier, giving interested parties the chance to exchange notes on what they have learned about the negotiations and how they may be affected.

Second, study the timetable for the talks. The negotiations started on June 19th. The deadline for wrapping up the talks is October 2018, but Barnier wants an agreement on the principles of the Article 50 deal as early as October 2017. If the European Council agrees that sufficient progress had been made, he can then move on to scoping out future relations with the UK. Now is probably the last chance for outside organisations to influence the EU's negotiating team in relation to the divorce terms. And the time for advocacy between now and October is even more limited than it seems because of the summer holidays; although the cycle of negotiations will continue without interruption for Barnier's team (the British and EU teams will conduct talks on July 17th and August 28th), other parts of the Commission will be less able to engage with stakeholders' concerns.

Third, do not ignore the Council working group on Article 50 or the GAC. The European Commission negotiates on behalf of the EU, but the member-states will have to conclude the final exit deal and will want to steer Barnier's work from the back seat. The European Commission is likely to check with the member-states that they are happy with any significant compromises or offers to the UK.

Fourth, do not underestimate the role of the European Parliament. The European Parliament is much more than a talking shop and has helped to shape the Brexit process. Stakeholders should make contact with MEPs immediately, rather than waiting until the European Parliament votes on the final text of the agreement. The work of the Parliament's Brexit steering group seems to be closed to the public, but individual committees have held public hearings on Brexit-related issues. The committee on civil liberties, justice, and home affairs, the committee on employment and social affairs and the committee on petitions held a joint hearing on May 11th on EU citizens' rights. Other interest groups should also get committees to organise such hearings and make MEPs familiar with their concerns.

Fifth, do not expect that in the first phase of the negotiations the EU institutions will talk about anything but the divorce agreement. EU institutions will be reluctant to talk to business and civil society about issues such as the impact of the UK-EU free trade agreement on certain sectors before they have moved to the second phase of the negotiations. The EU would not want to give the appearance of pre-negotiating any deals with interest groups or acting inconsistently with its sequencing policy.

Sixth, bypass the tabloids. The British eurosceptic media has spread innumerable myths about the EU and its institutions. The Brexit negotiations are no exception. As the UK and the EU conduct the talks there will be a lot of misreporting and scaremongering in the British press. This could lead to unnecessary confusion among citizens, businesses and other interested parties. The European Commission's representation in the UK should offer regular media briefings about the progress of the talks, to debunk myths. Together with EU embassies in London, the Commission's representation should also explain to EU citizens their current status and how it could change when the UK leaves the EU.

Finally, factor in a 'no-deal' scenario. Barnier's team has urged stakeholders to make contingency plans in case the UK crashes out of the EU without a deal. Many commentators believe that the chances of a no deal scenario have diminished after the general election. They think that any attempt by May to walk away from the negotiating table without a deal would prompt further divisions in the Conservative party and play into Labour's hands. But this should not lull businesses and other stakeholders into a false sense of security; it is also possible that May, or a successor, will find it politically easier to take the UK out of the EU without a deal than to make the compromises that would be needed to obtain one; the resultant economic chaos will be blamed on Brussels, regardless of the facts. Britain has become an unpredictable place. A month ago the smart money was on a Conservative majority of 100, not a minority government. Stakeholders should hope for the best and plan for the worst. Otherwise, they might wake up on March 30th 2019 with a terrible hangover.

This policy brief is supported by the Open Society European Policy Institute.

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July 2017