



BRIEFING PAPER

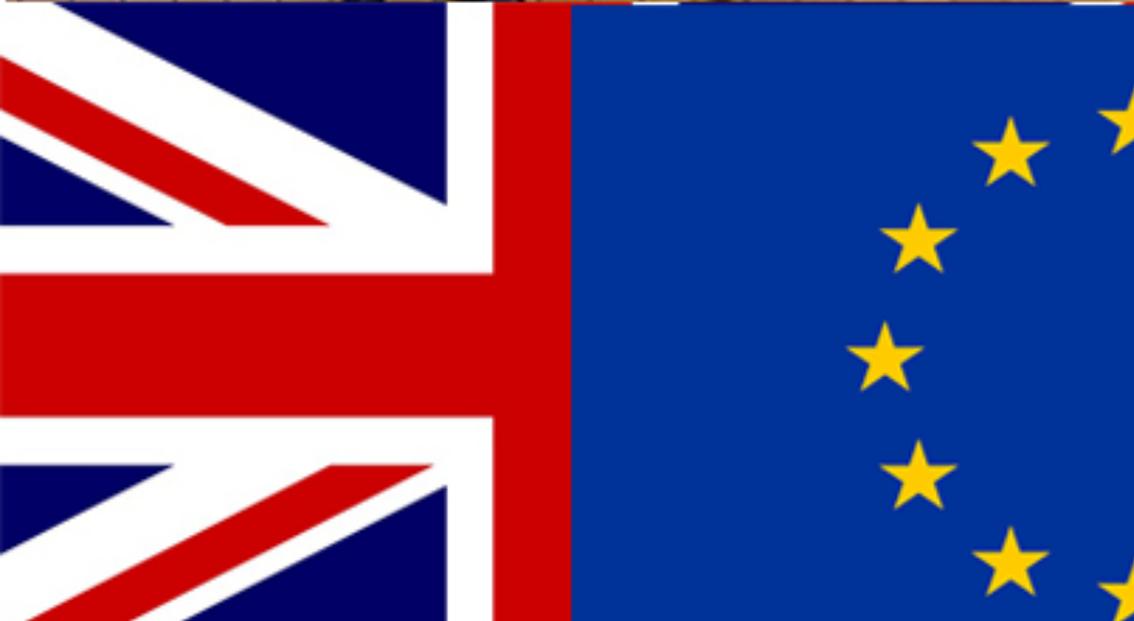
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Brexit: the talks begin

By Arabella Lang &
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Summary

The negotiations begin

After the UK triggered the Article 50 process on leaving the European Union at the end of March 2017, the European Council published guidelines for the negotiations, which were followed by a Council recommendation to the Commission setting out detailed negotiating directives.

The first meeting on 19 June

The chief negotiators, David Davis for the UK and Michel Barnier for the EU (Commission Article 50 Task Force), met for the first formal talks on 19 June. This meeting focussed on agreeing the timing, structure and initial priorities of the negotiations. Terms of Reference were also adopted.

As the negotiations begin there are differences in the starting positions of the two parties on citizens' rights and the financial settlement, but agreement on the need to find a solution to the Irish border question so as not to jeopardise the peace agreement.

Timetable

The negotiations will follow four-week cycles throughout the first phase and dates have been set up to the week beginning 9 October 2017. For several weeks during this period neither the UK Parliament nor the European Parliament will be sitting.

The EU proposed a phased approach to the negotiations, starting with three priority areas – citizens' rights, a financial settlement and the Ireland/Northern Ireland border – moving on to the UK's future relationship with the EU if "sufficient progress" is made in these three areas. It is not clear what exactly is meant by this, which will be for the other 27 EU Member States to decide.

Negotiators

The principal negotiators are Michel Barnier and David Davis. EU negotiators will be supported by the Council, the Committee of Permanent Representatives and the EU Presidency. UK officials include Oliver Robbins from the Department for Exiting the EU, and Sir Tim Barrow, the UK's top diplomat in Brussels.

There are joint negotiating groups of officials to tackle the first phase priorities, and a higher-level 'dialogue' on Ireland/Northern Ireland.

The European Parliament's role

The EP will not participate directly in the negotiations, but the requirement for its consent to any withdrawal agreement has given it a powerful voice. It has adopted a resolution on its position for the negotiations, and has appointed a Brexit negotiator, Guy Verhofstadt, as well as a 'steering group' of political group chairs.

The UK Parliament's role

The UK Parliament has no formal role in the negotiations and its consent is not formally required for any withdrawal agreement. It has no specific structures or procedures for scrutinising treaties, but will use parliamentary questions and debates as well as Committee inquiries and reports. It will also be dealing with all the domestic legislation required for Brexit.

At the end of the negotiations, the Government has promised a vote on the withdrawal agreement, and Parliament could also choose to debate and vote on the final signed agreement before ratification, but it does not have to.

The devolved administrations' role

The UK's devolved administrations have no formal role in the negotiations. A Joint Ministerial Committee (EU negotiations) was established as a forum for them to discuss Brexit with the UK Government, but there have been calls for them to have a greater say in the negotiations.

Transparency

Both the EU and the UK have made a commitment to transparency in the negotiations. However, the EU's policy is much more detailed, and it has so far published many more negotiating documents than the UK.

David Davis has repeatedly promised to provide the UK Parliament with information matching what the EP receives. However, it is still not entirely clear whether, when or how the EP will receive information on Brexit, still less how the UK will match that.

Links between the negotiations and UK Brexit legislation

At the same time as the negotiations, the UK will need to adjust domestic legislation for Brexit. One of the tasks is to ensure that domestic legislation reflects the withdrawal agreement's rights and obligations before the agreement comes into force – even though this legislation will have to be debated while the negotiations continue.

Giving Ministers wide powers to implement the withdrawal agreement will be controversial.

What will phase 1 cover?

The agreement on initial negotiating groups shows that the subjects for discussion in phase 1 are citizens' rights, the financial settlement, the Ireland/Northern Ireland border, and 'other separation issues' including Euratom and the EU's third party agreements.

Dispute resolution is a controversial topic that runs through all of these, with fundamental disagreement between the EU and UK on the role of the CJEU.

Discussion of a future relationship and any transitional arrangements must wait for phase 2, as the Commission has no mandate to negotiate them yet.

1. Negotiations have begun

1.1 First meetings, 19 June 2017

The first formal meetings of the Brexit negotiations took place in Brussels on 19 June 2017. These meetings focussed on agreeing the timing, structure and initial priorities of the negotiations.

The exit process had been triggered on 29 March 2017, when Prime Minister Theresa May delivered a [letter of notice](#) to the European Council declaring the UK's intention to withdraw from both the EU and [Euratom](#) (the connected European Atomic Agency Community). This letter started the clock on a two-year period for negotiating a withdrawal agreement before the EU Treaties cease to apply to the UK (as set out in Article 50 of the [Treaty on European Union](#) (TEU)). As a result of this deadline, the dynamics of the negotiations are quite different from most.

1.2 What were the starting positions?

The EU's plan for the organisation and broad agenda were set out in its [negotiating directives](#) for the Commission, which fleshed out earlier European Council [guidelines](#) on the negotiations. The UK Government's position had been set out in Theresa May's Lancaster House speech in January 2017, [The Government's negotiating objectives for exiting the EU](#), a White Paper in February 2017, [The United Kingdom's exit from, and new partnership with, the European Union](#), and the Prime Minister's [notice of withdrawal letter](#) of 29 March 2017.¹

The EU proposed a phased approach to the negotiations, with the priorities for the first phase being citizens' rights, the financial settlement and the border between the Republic of Ireland and Northern Ireland. The Secretary of State for Exiting the EU, David Davis, thought the EU insistence on discussing the financial settlement and the Irish border so early on was "wholly illogical".²

The EU also said there would be "preliminary and preparatory discussions" on the UK's future relationship with the UK only if "sufficient progress" was achieved on certain matters in the first phase of the negotiations. The UK Government, on the other hand, wanted a withdrawal agreement and a future relations agreement to be discussed in parallel.³

But by 19 June the Government had acquiesced in the EU's conditional, phased approach and the first phase priorities, which to some extent coincided with the Prime Minister's own. Some would argue David Davis had little choice but to agree.

¹ For information on the parties' starting positions, see Commons Briefing Paper 7938, [Brexit: red lines and starting principles](#), 22 June 2017.

² [Peston on Sunday](#), on 14 May 2017.

³ [Conservative and Unionist Party Manifesto 2017](#), 18 May 2017, p.36.

There were other changes to UK starting positions. The Prime Minister had said in her Lancaster House speech that “no deal for Britain would be better than a bad deal”, whereas on 18 June the Chancellor, Philip Hammond, said no deal at the end of the negotiations would be a “very, very bad outcome for Britain”.⁴ He confirmed this in his Mansion House [speech](#) on 20 June, adding that transitional arrangements would be needed to “avoid unnecessary disruption and dangerous cliff edges”.

There have been reports of disagreement in the Cabinet about the kind of Brexit the UK should aim for: soft, hard, or somewhere in between?

1.3 What was agreed?

The first meetings included an opening session between Michel Barnier and David Davis with officials, a working lunch between Michel Barnier and David Davis, working group meetings, a meeting of Coordinators (Sabine Weyand, the Commission's Deputy Chief Negotiator, and Olly Robbins, Permanent Secretary at the UK Department for Exiting the EU). After the closing session between Barnier and Davis, there was a joint press conference.⁵

The parties agreed that English and French would be the working languages of the negotiations and working documents, and that the default position with regard to communication and information sharing was transparency. While it is clear what the EU means by this from its [position on transparency](#), it is not clear how the UK Government will adhere to the commitment (see section 4.1 below).

The parties adopted [Terms of Reference](#) which set out the organisation, priorities and indicative timetable for the first phase. They confirmed the objectives for the first phase: agreements on citizens' rights, the single financial settlement, “other separation issues” and the Irish border.

A “dialogue on Ireland” will aim to protect as matters of urgency the Good Friday agreement and maintain the Common Travel Area.

If the EU Member States (the European Council of the EU27) decide that sufficient progress has been made on the first phase priorities, then talks can move on to the future EU-UK relationship and any transitional period.

⁴ Interview, BBC One Andrew Marr Show, 18 June 2017.

⁵ [Agenda](#) for Brexit meeting, 19 June 2017.

2. What's the timetable?

2.1 Monthly negotiating 'rounds'

The negotiations will follow four-week cycles throughout the first phase (including through August, when the EU institutions usually take a break).

The first two weeks in each cycle will be for preparations, with officials from both sides meeting to establish negotiating positions. The third week will be for negotiations between the chief negotiators Michel Barnier and David Davis. Week four will be for reporting back on any progress to the governments of the EU27.

The [Terms of Reference](#) set out the indicative timetable for the first phase of four-week cycles:

- Opening 19 June
- Second round w/c 17 July
- Third round w/c 28 August
- Fourth round w/c 18 September
- Fifth round w/c 9 October

The talks in the week of 17 July will be the first proper negotiations, and are expected to last four days.

If necessary there will be additional formal meetings of EU ministers and perhaps European Council (EU27) summits.

2.2 'Sufficient progress' on phase 1

The EU has specified that a discussion of the UK's future relationship with the EU will not take place until "sufficient progress" has been made on the priorities in the first phase. It is not clear what the EU means by this, other than that it will be for the EU27 leaders to decide and not for the UK.

Some reports suggest a degree of self-interest among Member States with regard to the criteria for 'sufficient progress':

Nations that stand to lose from a weak UK-EU trade deal, such as the Dutch and the Danes have taken a softer line, while others – like Germany, France and Poland – have argued for the first part of the deal to be more firmly tied down before progressing to talks.⁶

Council President Donald Tusk and Commission President Jean Claude Juncker have suggested it is, rather, a matter of having firm, legally watertight commitments from the UK on the main issues, not just political assurances. As Donald Tusk [told](#) the Special European Council on 29 April: "In order to achieve sufficient progress, we need a serious British response. I want to assure you that as soon as the

⁶ [The Telegraph, 29 April 2017.](#)

UK offers real guarantees for our citizens, we will find a solution rapidly”.

In a [letter](#) to the other 27 members of the European Council on 28 April Mr Tusk clarified this aim:

... before discussing our future, we must first sort out our past. We need to secure the best guarantees for our citizens and their families. Guarantees that are effective, enforceable, non-discriminatory and comprehensive, and which should be accompanied by simple and smooth administrative procedures. We should also agree with the UK that all financial obligations undertaken by the EU of 28 will be honoured also by the UK.

At present there appears to be a gap between EU and UK views on some of the substance of the main issues in phase 1:

- The UK agrees with the Republic of Ireland and the EU on the need to settle the Irish border issue, but to date there have been no position papers on this from either side. A central issue is how the UK can leave the EU customs union but maintain an open border between Northern Ireland and the Republic of Ireland.
- The Prime Minister described the UK’s plans for citizens’ rights as a “fair and generous offer”,⁷ but following the publication of the Government’s policy paper, [Safeguarding the Position of EU Citizens Living in the UK and UK Nationals Living in the EU](#),⁸ reaction from other EU Member States was that the UK offer fell short of the EU’s own [paper](#) on citizens’ rights of 29 May. Michel Barnier [tweeted](#) on 26 June: “More ambition, clarity and guarantees needed than in today’s UK position”. In a [Lords debate](#) on 4 July, four Peers also thought the UK offer could have been more generous.⁹ The EP steering group commented in a [position paper](#) on 6 July that the UK proposals would relegate EU citizens in the UK to “second-class status”.
- Although the UK agrees in principle that there will be a cost to Brexit,¹⁰ disagreement over the calculation of the financial settlement is likely to continue. The House of Lords’ EU Committee argued in March that based on various legal opinions, the UK could leave the EU without being liable for outstanding financial obligations.¹¹ But there have been estimates that leaving the EU could come with a bill of €60 – €100 billion. In the Lords debate on the report in April, Lord Butler of Brockwell was optimistic that progress could be made on the financial settlement:

Unless there are other elements of a claim for an exit payment which neither the EU Committee nor others have thought of, it seems clear to me that any reasonable claim that can be made

⁷ [HC Deb 28 June 2017 c596](#)

⁸ Cm 9464, 26 June 2017.

⁹ E.g. Baroness Smith of Newnham (LD), Baroness Bloomfield of Hinton Waldrist (Con), Lord Judd (Lab), Baroness Ludford (LD).

¹⁰ Robin Walker of the Department for Exiting the EU [told the House of Lords on 19 April](#): “We will also need to discuss how we determine a fair settlement of the UK’s rights and obligations as a departing member state, in accordance with the law and in the spirit of the deep and special relationship that we seek with the EU”.

¹¹ HL Paper 125, [Brexit and the EU budget](#), 4 March 2017.

will not amount to anything like the €60 billion figure attributed to M. Barnier and his team. It follows that, leaving aside the legal aspects, UK negotiators do not have a great deal to fear from a negotiation on this subject. In a reasonable world, it should be possible to make sufficient progress to open the way to negotiations on a future trade relationship.¹²

2.3 The end date: 29 March 2019?

The end of the two-year period triggered by the UK's notification of withdrawal is 29 March 2019. But this is not the only option for Brexit Day:

When a withdrawal agreement enters into force

Article 50 stipulates that the EU treaties would cease to apply to a withdrawing state on the date a withdrawal agreement comes into force.

The EU has called for the UK-EU withdrawal agreement to come into force no later than midnight Brussels time on 30 March 2019 (11pm GMT on 29 March).¹³ But the UK and EU27 could in theory agree for the withdrawal agreement to enter into force on any date before or after that.

Agreement to extend the two-year period

Or Article 50 allows for unanimous agreement of the UK and all other EU Member States to extend the two-year period.

The requirement for unanimity is a higher barrier than the super-qualified majority needed in the European Council to agree a withdrawal agreement. It gives individual EU Member States much more power to insist on conditions.

No further detail is specified in Article 50 about what sort of circumstances might trigger an extension, but it could for example be to wait for any pending decision of the Court of Justice of the EU about interpreting Article 50. Nor is there any guidance on when an extension must be agreed, or how long it can last.

No withdrawal agreement

If there is no withdrawal agreement by 29 March 2019, and no unanimous agreement to extend the two-year period, the EU Treaties will automatically cease to apply to the UK. Both sides have said they want to avoid this, but it is still a real possibility.

'No deal' would mean significant uncertainty about all the issues in the negotiations, such as citizens' rights, the financial settlement and the Ireland/Northern Ireland border. It would also result in UK-EU trade being subject to general WTO rules, meaning increased barriers to trade in goods and services.

¹² [HL Deb 6 April 2017 c 1146](#).

¹³ European Commission Brexit negotiating directives, 22 May 2017, para 8

However, leaving with no withdrawal agreement would not necessarily prevent the two sides from reaching future bilateral agreements on any or all of these matters.

Revoking the notification of withdrawal?

The UK Government has said that ‘regardless of the legal position, we do not intend to revoke our notice to withdraw’.¹⁴

But if there is a significant change of circumstance, would the UK be able to halt the withdrawal process unilaterally by revoking its withdrawal notification? If so, would the negotiations simply fall and the UK would remain a member on its existing terms? Or would the EU be able to insist on some price?

Nobody knows the answer. Article 50 doesn’t say anything about revoking a withdrawal notification, and the UK Supreme Court didn’t decide either way in the Miller case.¹⁵ There is considerable opinion in academia and EU that notification could be revoked before Brexit Day, but also considerable concern about the possible political ramifications.

¹⁴ Lord Bridges of Headley, then Minister in the Department for Exiting the EU, [HL Deb 20 March 2017 c9](#)

¹⁵ [R \(on the application of Miller and another\) v Secretary of State for Exiting the European Union](#), 24 January 2017.

3. Who is involved in the negotiations?

3.1 EU negotiators

Michel Barnier is the EU's chief negotiator, at the head of the European Commission's '[Task Force 50](#)'. He is assisted by the Council, the Committee of Permanent Representatives (COREPER), a representative of the rotating Council Presidency (currently Estonia), and the Council's Special Task Force on the UK headed by Didier Seeuws.

Other members of the Commission [Task Force](#) are:¹⁶

Sabine Weyand	Deputy Chief Negotiator
Stéphanie Riso	Strategy, coordination and communication
Martin Selmayr	Head of Cabinet of Jean-Claude Juncker (Commission President)
Nicola Pesaresa	Horizontal issues, crosscutting policies and level playing field
François Arbault	Internal market and sectoral policies
Philippe Bertrand	Budget, spending commitments and programmes
Antonio Fernandez-Martos	International agreements and customs

An ad hoc Working Party chaired by the Council General Secretariat, will also assist Coreper and the Council in Brexit matters.¹⁷

The General Affairs Council (GAC) will act as 'gatekeeper', deputising for the European Council of the EU27 during the negotiations. It will also help determine when to ask EU leaders if "sufficient progress" has been made to move from the first phase of negotiations to the second.

Donald Tusk, the European Council President, and Jean-Claude Juncker, the Commission President, will also be key figures during the negotiations, although not directly involved in the negotiations themselves. The 27 Member State governments in the Council and European Council will review developments in the negotiations and will be crucial to political agreement on the issues to be settled.¹⁸ Mr

¹⁶ For full list of Article 50 Task Force members, see <http://europa.eu/whoiswho/public/index.cfm?fuseaction=idea.hierarchy&nodeid=3611194>.

¹⁷ See Council Decision (EU) 2017/900, 22 May 2017, concerning the establishment of the ad hoc Working Party on Article 50 TEU chaired by the General Secretariat of the Council, OJ L 138, 25.5.2017.

¹⁸ EU leaders have already made one key decision on the procedure for relocating the UK's two EU agencies.

Tusk's task will be to seek consensus among the EU27 heads of state and government.

Mr Juncker's views will be important in interpreting what the Commission is thinking about progress in the negotiations. In a press conference after the most recent European Council on 23 June, for example, both Tusk and Juncker were critical of Theresa May's paper on citizens' rights, which Mr Tusk said was below the EU's expectations, while Juncker tweeted that it was "a first step, but not sufficient".

3.2 UK negotiators

The [UK negotiators](#) include David Davis, the Secretary of State for Exiting the EU, officials in his Department (Oliver Robbins and colleagues) and Sir Tim Barrow, the UK's top diplomat in Brussels.

Other members of the UK team are:

Sarah Healey (DExEU)

Philip Rycroft (DExEU)

Alex Ellis (DExEU)

Mark Bowman (Treasury)

Simon Case (UK - EU Partnership)

Glyn Williams (Home Office)

Catherine Webb (DExEU)

Mark Philip Sedwill (National Security Adviser to PM)

3.3 Joint negotiating groups

The [Terms of Reference](#) for the Brexit negotiations provide for negotiating groups and sub-groups to be established and for breakout sessions to be organised.

The initial negotiating groups are on citizens' rights, the financial settlement and other separation issues. These are made up of officials on both sides.

A 'dialogue' on Ireland/Northern Ireland has also been launched, operating at a higher level than the negotiating groups. It is under the authority of the Coordinators (Oliver Robbins and Sabine Weyand).

Principals and/or Coordinators have overall responsibility for managing the negotiating process and providing guidance, as appropriate, in line with the negotiating guidelines.

3.4 Role of the European Parliament

Although the European Parliament (EP) has no formal role in the negotiations, the requirement in Article 50 for its consent to any withdrawal agreement has given it a powerful voice.

An EP Brexit ‘negotiator’

The EP very quickly appointed a Brexit ‘negotiator’, Guy Verhofstadt (the Coordinator and Chair of the ALDE political group in the EP). He will not take part in the negotiations, but will keep the Conference of Presidents (comprising the EP President and political group leaders) fully informed of developments in the negotiations, and will help prepare the EP position in close consultation with the Conference of Presidents.

Mr Verhofstadt will also work closely with the Chair of the Constitutional Affairs committee, Danuta Hübner, and other committees where relevant to shape the EP’s negotiating position.

Resolution on EP position

The EP has passed a non-binding [Resolution](#) on the negotiations, making clear it will not vote for any agreement giving the UK similar benefits to EU membership.

Brexit ‘steering group’

It has also set up a Brexit ‘steering group’ composed of the chairs of the five political groups in the EP that supported the EP resolution on Brexit:

- Guy Verhofstadt, the EP ‘negotiator’ and Coordinator and Chair of the Alliance of Liberals and Democrats for Europe (ALDE)
- Manfred Weber, Chair of the European People’s Party (PPE)
- Gianni Pittella, Chair of the Socialists and Democrats (S&D)
- Philippe Lamberts, Ska Keller, Co-Chairs of the (Greens/European Free Alliance (Verts/ALE)
- Gabriele Zimmer, Chair of the European United Left/Nordic Green Left (GUE/NGL)
- Danuta Maria Hübner, Chair of the Committee on Constitutional Affairs (AFCO).

This steering group might get privileged access to some negotiating documents (see section 4.2 below).

Participation

In a [statement](#) on 15 December 2016, the European Council (EU27) agreed that EP representatives would be invited to the preparatory meetings of the Sherpas/Permanent Representatives on the Brexit negotiations.

The Member States also agreed:

The Union negotiator will be invited to keep the European Parliament closely and regularly informed throughout the negotiation. The Presidency of the Council will be prepared to inform and exchange views with the European Parliament before and after each meeting of the General Affairs Council.

The President of the European Parliament will be invited to be heard at the beginning of meetings of the European Council.¹⁹

The UK's MEPs

There is no stipulation in Article 50(4) TEU that the MEPs of a withdrawing state should not participate in discussions or decisions concerning its withdrawal. So the UK's 73 MEPs can continue to participate in debates in the EP and its committees about Brexit, and also in the EP's vote on whether to give its consent to the withdrawal agreement.

What are EP committees doing?

The EP Committee on Citizens' Rights and Constitutional Affairs (AFCO) is the lead EP Committee currently looking at Brexit, although others are contributing to the debate and will continue to do so as the negotiations progress.

Upon request by AFCO, the Policy Department for Citizens' Rights and Constitutional Affairs has commissioned reports on the following aspects of Brexit:

- [The impact and consequences of Brexit on acquired rights of EU citizens living in the UK and British citizens living in the EU-27](#), 2 May 2017
- [The Impact of the United Kingdom's withdrawal from the European Union on Scotland, Wales and Gibraltar](#), 26 April 2017
- [The Impact and Consequences of Brexit for Northern Ireland](#), 17 March 2017
- [The Brexit Negotiations: An Assessment of the Legal, Political and Institutional Situation in the UK](#), 16 March 2017
- [Brexit and the European Union: General Institutional and Legal Considerations](#), 25 January 2017

AFCO has also been compiling on a regular basis bibliographies of academic material on Brexit. These are available on the [AFCO supporting analyses website](#).

Brexit has been on AFCO's agenda 13 times since the EU referendum in June 2016.²⁰ It held an exchange of views on Brexit with the EP Brexit coordinator, Guy Verhofstadt, on 12 July 2017.

Other EP committees also discuss Brexit issues. For example, on 11 July 2017 a public hearing of the Committee on Transport and Tourism considered the impact of Brexit on aviation with experts and stakeholders.

¹⁹ [Statement](#) following informal meeting of the Heads of State or Government of 27 Member States, Presidents of the European Council and the European Commission Brussels, 15 December 2016.

²⁰ In 2016: 27 June, 5 and 29 September, 12 and 20 October, 8 November and 5 December; in 2017: 30 January, 9 February, 21 March, 3 May and 20 June.

3.5 Role of the UK Parliament

No requirement for consent

In contrast to the EP, the UK Parliament has no formal role in the negotiations. Nor is its consent formally required for any withdrawal agreement.

No special procedures for scrutinising negotiations

Unlike the EP and many other national parliaments, the UK Parliament has no structures or procedures for scrutinising treaties.²¹ It has been much less organised in its approach to the negotiations than the EP.

Various attempts to give Parliament some kind of formal role either during or at the end of the Brexit negotiations were defeated during debates on the European Union (Notification of Withdrawal) Act 2017.²²

Parliament will, however, want to scrutinise the Brexit negotiations. As well as parliamentary questions and short debates, Backbench Business and the petitions system are likely to initiate longer debates (though these do not produce any binding outcomes).

However, the UK Parliament (Commons and Lords) will not sit from 21 July until 5 September, and from 15 September until 9 October. So there will be few opportunities for the Government to inform Parliament about progress in the negotiations or for parliamentary debate and scrutiny of the negotiations during much of the first phase.

The question of what information Parliament receives on the negotiations is addressed in section 4 below.

Committees

During the negotiations, Parliamentary committees will continue to carry out inquiries into a wide variety of Brexit topics.

However, because the Commons select committees for the new Parliament are unlikely to be fully established until September or October 2017, it may be that Phase 1 of the negotiations is concluded before they can produce anything substantive. The Lords select committees, by contrast, have been re-appointed and are already holding Brexit-related sessions – for example, David Davis gave evidence to the Lords EU Committee on Tuesday 11 July.

Parliamentary committees in the Commons and the Lords were active in analysing aspects of Brexit before the General Election and before the negotiations began. In the Commons, since the EU referendum there have been over 70 committee reports or published evidence on Brexit matters. Some evidence did not make it into a final report because of the election. In the Lords there have been over 40

²¹ See [Parliament's role in ratifying treaties](#), Commons Library Briefing 5855, 17 February 2017

²² See [European Union \(Notification of Withdrawal\) Bill: analysis of Lords' amendments](#), Commons Library Briefing Paper 7922, 10 March 2017

committee reports, 29 by the European Union Committee alone, on Brexit-related issues.

Links to parliamentary committee reports and evidence in which Brexit was considered can be found in Commons Briefing Paper 7912, [Brexit: a reading list of post-EU Referendum publications by Parliament and the Devolved Assemblies](#), updated 10 July 2017.

Brexit legislation

Parliament will at the same time be dealing with the enormous task of adapting domestic legislation for Brexit, including putting in place the measures needed to implement the as-yet-unknown provisions of a withdrawal agreement. This is likely to take a vast amount of parliamentary time and energy, particularly in view of the slim majority created by the Conservative-DUP deal.

The way that this legislation interlocks with scrutinising the negotiations themselves is addressed in section 5 below.

At the end of the negotiations

The Government has promised a 'take-it-or-leave-it' vote on a motion in both Houses on the final version of the agreement, before the EP vote.

After that, Parliament could also debate and vote on ratifying the withdrawal agreement (although it does not have to) when the signed agreement is laid before Parliament under the Constitutional Reform and Governance Act 2010.

But in neither case would Parliament be able to propose amendments to the treaty – and because a 'no' vote on either could result in the UK leaving the EU without a withdrawal agreement, the usual calculations of parliamentary arithmetic are unlikely to apply.

3.6 Role of UK devolved administrations

The UK's devolved administrations have no formal role in the negotiations. A Joint Ministerial Committee (EU negotiations) was established in October 2016 as a forum for them to discuss Brexit with the UK Government, but despite this there has been considerable criticism of the degree to which the UK Government has involved the devolved administrations.

General position on treaties

There is no legal requirement for the UK Government to consult the devolved executives or legislatures on negotiating and implementing international treaties. It has however undertaken to cooperate with them in doing so.

Under devolution arrangements, international relations including treaty-making remain the exclusive responsibility of the UK Government. But it is recognised that the devolved administrations in Northern Ireland, Scotland and Wales need to be involved where a treaty might have implications for devolved areas of responsibility.

Rules governing the cooperation between Whitehall and the devolved administrations are set out in a Concordat on International Relations, which is one of five concordats supporting a Memorandum of Understanding.²³ This Concordat is explicitly intended to be binding in honour only rather than in law, but promises cooperation on exchanging information, formulating UK foreign policy, negotiating treaties and implementing treaty obligations. It also provides for ministers and officials from the devolved administrations to form part of UK treaty-negotiating teams and for apportioning any quantitative treaty obligations, as well as imposing penalties should the devolved bodies default on any agreed liability.

Joint Ministerial Committee (EU negotiations)

Discussions between the UK, Scottish, Welsh and Northern Ireland executives take place primarily in the Joint Ministerial Committee (JMC), although the Prime Minister also paid initial visits to the First Ministers for bilateral discussions.

A sub-committee has been established, known as the JMC(EN) (EN stands for EU Negotiations), with David Davis as chair. Its terms of reference stress that it is to seek agreement between the four governments:

Through the JMC(EN) the governments will work collaboratively to:

- discuss each government's requirements of the future relationship with the EU;
- seek to agree a UK approach to, and objectives for, Article 50 negotiations; and
- provide oversight of negotiations with the EU, to ensure, as far as possible, that outcomes agreed by all four governments are secured from these negotiations; and,
- discuss issues stemming from the negotiation process which may impact upon or have consequences for the UK Government, the Scottish Government, the Welsh Government or the Northern Ireland Executive.²⁴

The JMC(EN) has met four times (November, December, January and February). Its March 2017 meeting was postponed because of the elections in Northern Ireland, and it has not met again since. Until a new Government has been agreed for Northern Ireland, it is likely that discussions with the devolved administrations will be bilateral.

Ministers from the Scottish and Welsh governments told the Commons Exiting the EU Committee that the JMC(EN) had been a frustrating experience that had not given them an effective way of influencing the Government.²⁵ There have been various calls for the

²³ [Memorandum of Understanding and Supplementary Agreements between the United Kingdom Government, Scottish Ministers, the Cabinet of the National Assembly for Wales and the Northern Ireland Executive Committee](#), October 2013. See in particular section D4, Common Annex, p52 ff

²⁴ [Joint Ministerial Committee communique](#), 24 October 2016

²⁵ House of Commons Select Committee on Exiting the EU, [The Government's negotiating objectives: the White Paper](#), 3rd report of 2016-17, paras 65-74.

devolved administrations to have a greater say in the Brexit negotiations, right up to having a seat at the table when devolved matters are discussed.

4. Transparency

4.1 What will be made public?

Both the EU and the UK have made a commitment to transparency in the negotiations. The [terms of reference agreed by the UK and the EU for the negotiations](#) include this paragraph on transparency:

11. For both parties the default is transparency.
12. It is for the Party providing the information to state what, if any, restrictions should apply to their further distribution.
13. Any disclosure by either the United Kingdom or the European Commission of documents originating from the other Party will be subject to prior consultation of the originating party.
14. Both Parties will handle negotiating documents in accordance with their respective legislation.

The Commission published its more detailed [transparency policy](#) for the negotiations, along with [Guiding principles for transparency in negotiations under Article 50 TEU](#), on 22 May 2017. These set out the kind of documents that will be shared with EU Member States, the EP and the public, and published on a new Europa website, [Negotiating documents on Article 50 negotiations with the United Kingdom](#). These documents include:

- The initial European Council guidelines on Brexit, and any subsequent revisions.
- The negotiating directives issued by the General Affairs Council, and any subsequent revisions (this is a departure from normal practice, as negotiating directives for agreements between the EU and third countries or organisations are normally not made public).
- Agendas for negotiating rounds, position papers and other negotiating documents drawn up by the European Commission (as long as that doesn't breach EU law on access to documents²⁶ which for example prevents disclosure that would 'seriously undermine the institution's decision-making process').
- Other types of documents, such as legal opinions, notes on the status of the negotiations or compromise proposals, after a case-by-case assessment.
- Documents on the Article 50 process submitted by individual Member State Governments or by the UK, with the consent of the Government concerned.

So far the EU has published eight detailed position papers on topics for negotiation in phase 1, the negotiating guidelines and directives, and other documents such as the agenda for the first meeting and the agreed terms of reference. Michel Barnier has said that a further seven papers are due shortly.

²⁶ Regulation 1049/2001

The General Secretariat of the Council of the EU has reportedly created a [parallel document register](#) for all documents related to the Article 50 process, including those not made public. The UK Government and Parliament do not have access to this register.

The UK has not published a transparency policy, but it does have a website for [documents on the Article 50 negotiations](#), including:

- policy papers and correspondence
- speeches and statements
- negotiating team
- meeting agendas

So far the UK has published a detailed policy paper on only one negotiating topic, citizens' rights. However, Brexit Minister Baroness Anelay said on 4 July 2017 that the Government would publish responses to the other EU position papers "shortly",²⁷ and the Secretary of State for Exiting the EU (David Davis) told the House of Lords EU Committee on 11 July that some responses could be published later in the week.

4.2 Informing Parliament

David Davis told the House of Lords EU Select Committee on 12 September 2016 that the Government 'will certainly match and, hopefully, improve on what the European Parliament sees' in providing information to MPs and Peers. He has repeated this commitment many times since. But exactly what it will mean in practice is not yet clear.

What information will the EP get?

The [European Council's Brexit guidelines](#) state that MEPs will be 'kept closely and regularly informed throughout the negotiations by the Union negotiator, including through the transmission of negotiation documents through the appropriate channels and in accordance with applicable rules and practices'.

The expectation is that the European Parliament will get 'all relevant information', including draft amendments to negotiating directives, draft negotiating texts, agreed articles, the agreed date for initialling the agreement, and the text of the agreement. This means that at least some MEPs will have access to documents that are not in the public domain.

The EP's Brexit steering group (see section 3.4 above) is likely to get access to private information soon after it is made available to negotiators. It is not yet clear to what extent this will be shared with other MEPs. The Commission might also provide information direct to national parliaments, but it is not clear the extent to which this might include the UK Parliament.

²⁷ [HL Deb 4 July 2017 c788](#)

Guy Verhofstadt told AFCEC on 12 July 2017 that the EP is setting up a new Brexit website with EP papers (resolutions etc); EU papers (position papers etc); and EP steering group papers responding to positions set out in the negotiations.

What information will the UK Parliament get?

There has been no detailed statement yet on what documents the UK Government will share with Parliament, or when, to whom and under what conditions.

This gives rise to many questions, including:

- Who in Parliament is going to hold David Davis to his promise of keeping Parliament at least as well informed as the EP? How will they be able to tell whether his commitment has in fact been met?
- Does Mr Davis's commitment include providing UK Government documents that mirror the EU ones provided to the EP?
- Which Department will provide the information to Parliament, and to whom in Parliament? How will it relate to the process for providing EU documents to the EU Scrutiny Committee?
- The biggest problem is confidential information not published by the EU. Will Parliament expect to see the confidential information that the EP receives? Or the equivalent confidential UK information?
- If the answer to either or both of these questions is yes, then Parliament must establish a way of dealing with confidential negotiating documents. One possible method would be through the Liaison Committee (comprising Select Committee Chairs).

5. How do the negotiations relate to UK Brexit legislation?

5.1 Introduction

The negotiations are happening in parallel with the intimately connected task of adjusting UK domestic legislation for Brexit.

One of the tasks for the UK is to ensure that domestic legislation reflects a withdrawal agreement's rights and obligations before that agreement comes into force. This is because the withdrawal agreement would be an international treaty, which only binds the government under international law – it would not itself give rise to any rights or obligations that could be enforced directly in UK courts.

But because the Brexit legislation will have to be debated while the negotiations continue, it will probably only be able to set the principles and procedures needed to implement a withdrawal agreement, not the content. In turn, the question of what UK legislation is feasible, particularly given the lack of a strong majority for the government, is likely to influence the negotiations.

At the end of the negotiations there could be a very short time for implementing the content of an agreement before it comes into force.

5.2 What legislation is proposed?

The main piece of Brexit legislation announced in the Queen's Speech is the Repeal Bill (formerly known as the [Great Repeal Bill](#)). This is likely to include wide powers for the Government to implement substantive provisions of a withdrawal agreement through delegated legislation. It is due to be published on 13 July 2017.

Other primary legislation – whether the specific Brexit-related Bills mentioned in the Queen's Speech or other Bills – could also contain provisions or powers on implementing a withdrawal agreement.

If the Brexit legislation gives Ministers very wide powers to implement the withdrawal agreement, substantive changes would be made with little parliamentary scrutiny, which would be controversial. One alternative would be for the primary legislation to provide for the most extreme changes that could result from the negotiations, and then if some of those provisions were not needed they could be repealed, or delayed during an implementation period. But pre-empting the negotiations and potentially over-legislating could be equally controversial.

A group of [eminent lawyers](#) has argued that another Act of Parliament will be needed at the end of the negotiations because only then will it be known what rights are affected. But this argument is contested.

5.3 Example: an additional status for citizens' rights?

During the Brexit negotiations, the UK will have to explain to the EU how it plans to implement a withdrawal agreement through domestic law and policy.

For example, on the issue of citizens' rights, one of the EU's concerns is that rights specified in UK domestic legislation and upheld only by UK domestic courts could be altered by subsequent UK domestic legislation.

So the UK might consider giving citizens' rights some additional status. Possible options include entrenching them in some kind of constitutional statute, or linking domestic laws to the withdrawal treaty in some way so that they change along with any amendments to or interpretations of the withdrawal treaty (known as ambulatory provisions).

5.4 Interlocking timing

The interlocking timetable of negotiations and legislation could look something like this:

June 2017	Negotiations start
Summer 2017 to autumn 2018	Brexit bills go through Parliament
Autumn 2018	Negotiations end
	UK Parliament votes on withdrawal agreement
	EP votes on withdrawal agreement
	Withdrawal agreement signed
Winter 2018 to spring 2019	Secondary legislation implementing withdrawal agreement
Spring 2019	Withdrawal agreement laid before Parliament under Constitutional Reform and Governance Act 2010
	Withdrawal agreement approved by EU27 (qualified majority) and ratified by UK Government
30 March 2019	Withdrawal agreement and domestic legislation come into force.
	EU treaties cease to apply to the UK.

6. What will phase 1 cover?

6.1 Introduction

The initial groups set out in the agreed [Terms of Reference](#) for the negotiations show that the subjects for discussion in phase 1 are citizens' rights, the financial settlement, the Ireland/Northern Ireland border, and 'other separation issues'. Dispute resolution is a controversial topic that runs through all of these.

Because the Commission's powers in the negotiations are only those granted to it by the European Council, it cannot negotiate anything other than what is set out in its negotiating directives. This means in particular that it cannot yet discuss any transitional arrangements or future relations issues.

Since this selection of subjects reflects the EU's preferred 'phased approach' rather than the UK's wish to discuss the future relationship alongside other issues, it was interpreted by many as a capitulation by the UK. However, the fact that the EU now intends the future relationship to be considered in phase 2 of the negotiations could be seen as a concession on their side.

Below is a brief overview of the initial negotiating topics and summaries of position papers where available. Detailed Commons briefing papers on each topic are also being published.

6.2 Citizens' rights

Leaving the Single Market will mean ending the free movement of people. Both parties in the Brexit negotiations agree that the situation of EU citizens in the UK and UK citizens in the EU needs to be settled quickly.

EU position paper

The EU published a Position Paper to the EU27, [essential principles on citizens' rights](#), on 29 May 2017, and a [summary](#) of the main points to the UK Government on 12 June. The paper covers both EU citizens in UK and UK citizens in EU, including those who previously resided in one or the other.

The Commission wants "equal treatment amongst EU27 citizens by and in the UK in all matters covered by the Withdrawal Agreement". There should be the same level of protection for EU citizens on Brexit day as they have today, including "the right to acquire permanent residence after a continuous period of five years of legal residence".

Citizens covered by the provisions should be those covered by the EU's [Free Movement Directive](#) - workers, self-employed and economically inactive people - and by the [social security Regulation](#) (which provides for social security coordination across the EU, including frontier workers).

EU citizens in the UK legally before Brexit should not have to prove their right to remain immediately after Brexit, but should be able to

continue living and working in UK “even if they do not hold a residence document evidencing that right”.

Documents the UK Government requires should be “issued either free of charge or for a charge not exceeding that imposed on nationals for the issuing of similar documents”.

The rights to be protected should include:

- residence rights based on the EU Treaties or EU law
- procedural rules on documenting those rights
- social security coordination rules, including the export of benefits and accumulating social security contributions made in different Member States
- supplementary rights in EU law concerning the rights of workers' children to access to education
- access to self-employment
- recognition of qualifications obtained before Brexit day or which are in process of being recognised on that date.

The paper provides for the Commission to continue to monitor citizens' rights in the UK after Brexit and for the CJEU to have “full jurisdiction corresponding to the duration of the protection of citizen's rights in the Withdrawal agreement”.

The Agreement should be “without prejudice to Common Travel Area arrangements between the UK and Ireland”. The EU is prepared to be flexible in its approach to the border issue in the interests of maintaining the peace agreement.

The Commission also submitted a position paper to the UK Government, containing the main principles of the paper for the EU27: [Position paper transmitted to the UK: essential principles on citizens' rights](#), 12 June.

UK paper

The UK Government has also produced a paper on citizens' rights, [Safeguarding the Position of EU Citizens Living in the UK and UK Nationals Living in the EU](#), which it described as “generous” and “fair”.

The paper set out a new ‘settled status’ for EU citizens who arrive before a cut-off date, yet to be negotiated. Those granted this status would be treated like comparable UK nationals, entitled to broadly the same rights and benefits. There would be a grace period of up to two years for all EU citizens, including those who arrive after the cut-off date.

The paper also makes provisions for family dependants, for exporting benefits (subject to ongoing entitlement), protecting existing healthcare arrangements (including continued participation in the European Health Insurance Card scheme) and for continuing eligibility for higher/further education and student loans. The paper

also makes assurances about continued mutual recognition of professional qualifications.

For detailed information on the UK position, see Commons Library Briefing Paper 7871, [Brexit: what impact on those currently exercising free movement rights?](#) 11 July 2017.

The [Queen's Speech](#) announced a bill “establishing new national policies on immigration”. The purpose of the Bill will be to:

Allow the Government to end the EU's rules on free movement of EU nationals in the UK and make the migration of EU nationals and their family members subject to relevant UK law once the UK has left the EU, whilst still allowing the UK to attract the brightest and the best.²⁸

It is not wholly practicable for the EU's free movement rules to be 'converted' into UK law by the forthcoming Repeal Bill; a separate bill will be needed to implement the outcome of the negotiations on the treatment of UK citizens in the other 27 Member States. Free movement, like other Single Market provisions, involves reciprocal rights and obligations, so simply converting all the EU rules into UK law would not provide, for example, for German or Spanish or Latvian adherence to free movement rights for UK citizens.

6.3 Financial settlement

When the UK leaves the EU it is expected to make a contribution towards the EU's outstanding financial commitments. The media have labelled this as an 'exit bill' or 'divorce bill'; the EU sees it as a matter of 'settling the accounts'. The issue will be discussed in the first phase of Brexit negotiations, under the title of the 'single financial settlement'.

The EU set out its position on the settlement in a paper on 29 May on the [essential principles on the financial settlement](#) and in a position paper sent to the UK Government on 12 June containing the main points in the paper to the EU27: [Position paper transmitted to the UK: essential principles on the financial settlement](#).

Main points

The EU's position is built on the principle that the UK should honour its share of all the financial commitments made by the EU while the UK was a member. On the same basis, the EU says that the UK should be able to participate in EU funding programmes – such as agriculture and economic development funding – until the programmes close, which in most cases is 2020.

The EU expects the financial settlement to cover:

- the UK's participation in the EU budget
- the termination of the UK's membership in institutions such as the European Investment Bank and the European Central Bank

²⁸ Queen's Speech, [Background Notes](#), 21 June 2017.

- the UK's participation in specific EU funds and facilities that don't come under the EU budget, such as the facility for Refugees in Turkey.

The majority of outstanding financial commitments come from the EU Budget, including spending committed in the EU Budget but not yet paid – often described as 'reste à liquider' – and funding for EU spending programmes that have been agreed until 2020. The EU's liabilities and contingent liabilities should also be shared by the UK, according to the EU.

The EU's accounts and other documents do not apportion the outstanding commitments to Member States. The EU proposes that the UK should share them in proportion to its share of total contributions to the EU Budget over 2014-2018.

The EU also proposes that the UK should cover the costs of Brexit – such as moving EU agencies from the UK – and that the UK's shareholdings in the European Investment Bank and European Central Bank should be returned.

The EU would like a profile of payments to be established to spread the payments. This will mean that the UK will not pay in one go.

The UK's position

The UK has so far made no formal response to the EU's position.

The Government has spoken of reaching "a fair settlement of the UK's rights and obligations as a departing member state, in accordance with the law and in the spirit of the UK's continuing partnership with the EU".²⁹ Ministers have said that they don't expect the UK's payment to be as large as some of the figures reported by the media.

Estimates of the payment reported in the media have ranged from €25 billion to €100 billion. The range of estimates highlights the fact that almost every element of the settlement is subject to interpretation.

6.4 Ireland/Northern Ireland border

The EU has not produced a position paper on this policy area; it will be the subject of a working group 'dialogue'. The EU approach to the Northern Ireland border issue was set out in the European Council negotiating guidelines:

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

²⁹ [Prime Minister's Article 50 letter](#) to Donald Tusk, 29 March 2017.

and arrangements between the United Kingdom and Ireland which are compatible with EU law.

The UK government's negotiating objectives for Brexit as set out by the Prime Minister in January 2017 state:

- “we will work to deliver a practical solution that allows the maintenance of the Common Travel Area with the Republic, while protecting the integrity of the United Kingdom's immigration system.”
- “our guiding principle must be to ensure that – as we leave the European Union – no new barriers to living and doing business within our own Union are created.”

In its May 2017 White Paper the Government stated:

We recognise that for the people of Northern Ireland and Ireland, the ability to move freely across the border is an essential part of daily life. When the UK leaves the EU we aim to have as seamless and frictionless a border as possible between Northern Ireland and Ireland, so that we can continue to see the trade and everyday movements we have seen up to now.

And:

In recognition of their importance in the Belfast Agreement, the people of Northern Ireland will continue to be able to identify themselves as British or Irish, or both, and to hold citizenship accordingly.

The White Paper also confirms:

We will not be bound by the EU's Common External Tariff or participate in the Common Commercial Policy.

This effectively rules out staying a member of the EU's Customs Union.

Because of the legacy of the Northern Irish troubles, both the EU and the UK are keen to come to an agreement and think flexibly and creatively about solutions to the problems created by the UK's withdrawal. This suggests there is an amount of goodwill on both sides.

However, the Northern Irish border is probably the most complex of the three principal areas being discussed in the first round of the Brexit negotiations.

This complexity derives from four main areas:

- The issues of the border cut across both the withdrawal agreement that is currently being negotiated and an agreement on the future relationship between the two sides, on which discussions have yet to start;
- ‘Creative solutions’ to preventing a hard border run up against the established rules and procedures on which the Single Market and Customs Union are built;
- It is not clear whether, despite the wishes of the British and Irish Governments to maintain the Common Travel Area, after the

UK's withdrawal it can continue to function exactly as it does currently;

- The Northern Irish devolved government adds another layer to the complexity. The Executive is currently suspended, the major political parties have significantly differing approaches to Brexit, and the Democratic Unionist Party (DUP), the largest party in the Assembly, has signed a confidence and supply deal with the Conservative Party, which gives it an effective veto on government policy in this area.

Because of these complexities, and the fact that the functioning border will depend to a large degree on the future economic and trade relationship the UK negotiates with the EU, it has been suggested that once broad agreement has been reached on the principles of this issue, the border question might be 'parked' until later in the withdrawal negotiations.³⁰

6.5 'Other separation issues'

Euratom

The UK's notice of withdrawal from the EU is also a notice of withdrawal from the European Atomic Energy Community (Euratom).

Euratom was established in 1957 together with the European Economic Community. The UK became a member of both on 1 January 1973. Euratom provides the basis for the regulation of civilian nuclear activity, implements a system of safeguards to control the use of nuclear materials, controls the supply of fissile materials in EU Member States and funds leading international research such as the Culham Centre of Fusion Energy.

The Government has said that Euratom and the EU are "uniquely legally joined", such that "triggering Article 50 therefore also entails giving notice to leave Euratom".³¹ The legal basis of this point is debated.³²

Leaving Euratom has the potential to impact the UK's current nuclear operations, including fuel supply, waste management, cooperation with other nuclear states, and research. Industry has warned of a "cliff edge" exit that could cause "major disruption to business across the whole nuclear fuel cycle." The UK will need to take on a number of measures to leave Euratom smoothly and some are concerned that the timetable for achieving these measures is ambitious.

The Business, Energy and Industrial Strategy (BEIS) Committee have recommended delaying the departure from Euratom to give the nuclear industry time to set up alternative arrangements.

³⁰ Bloomberg, Irish Border Solution Could Be Parked Until End of Brexit Talks, 12 July 2017.

³¹ See, for example, Prime Minister, [HC Deb 10 July 2017, c34](#).

³² For information on withdrawing from Euratom, see Section 1.4 of Commons Briefing Paper 7884, [European Union \(Notification of Withdrawal\) Bill](#), 30 January 2017.

The UK hosts significant nuclear research work and current funding, such as that for the Culham Centre, will continue until 2018. Beyond that point it is unclear what the impacts of withdrawing from Euratom will be on nuclear regulation and research in the UK.

Further information on Euratom and the possible consequences of Brexit is available in Commons Briefing Paper 8036, [EURATOM](#), 7 July 2017.³³

EU position paper

The EU published a position paper on [nuclear materials and safeguard equipment \(Euratom\)](#) on 23 June 2017. These are the main points:

- The UK will remain a member of the International Atomic Energy Agency (IAEA) and will be bound by international conventions to which it is a party in its own right.
- The Withdrawal Agreement will set out arrangements for the transfer of ownership of special fissile materials and Community property located in the UK, used to provide safeguards to the UK, respecting EU obligations under international agreements.
 - The UK should reimburse the EU for this transfer
 - The reimbursement should be based on a value assigned to this property in the EU's consolidated accounts
 - The reimbursement should be included in the UK's obligations under the single financial settlement.
- The UK should assume all rights and obligations associated with the ownership of materials or property transferred, and regulate other issues concerning material and property under the EU Treaty, especially safeguards obligations: the UK must ensure that ores, source materials and special fissile materials on UK territory are not diverted from their intended uses under EU agreements with third States or international organisations, relating to any material, equipment, installation or property present on UK territory.
- Regarding special fissile material owned by the EU but on UK territory, EU rights under [Article 86 Euratom](#) should be preserved:
 - Existing rights to use of special fissile material with natural or legal persons should not be affected by Brexit
 - The Commission can require this material to be deposited with the Euratom Supply Agency and supervised by Commission
- Special fissile material owned by the UK, but located in the EU should be transferred to UK or another entity agreed by parties.

³³ See also House of Lords Library Note, [Leaving the European Union: Euratom](#), 23 February 2017.

- Spent fuel and radioactive waste generated in the UK and present in EU27 on Brexit day should remain responsibility of the UK.
- The UK must observe international obligations concerning nuclear safety, safeguards, non-proliferation and physical protection of nuclear materials, have in place a safeguards agreement with IAEA requirements and operate domestic nuclear safeguards system in line with international standards.
- The UK must comply with obligations under EU agreements with third States or international organisations regarding equipment or material on UK territory.

UK Nuclear Safeguards Bill

The Queen's Speech contained a Nuclear Safeguards Bill to give the UK's Office for Nuclear Regulation³⁴ powers to take on the role and responsibilities of Euratom, required to meet international safeguards and nuclear non-proliferation obligations. Its purpose is to "establish a UK nuclear safeguards regime as we leave the European Union and Euratom".³⁵

The main aims of the Bill would be:

- To ensure that the UK continues to meet its international obligations for nuclear safeguards, as applies to civil nuclear material through the International Atomic Energy Agency.
- To continue the UK's reputation as a responsible nuclear state, to support international nuclear non-proliferation, and to protect UK electricity supplied by nuclear power.

Nuclear safeguards are reporting and verification arrangements to ensure that civil nuclear material is not diverted from its intended use. These arrangements are essential for a responsible nuclear state, and a prerequisite for civil nuclear trade.

Goods placed on the market before withdrawal date

The EU published a short position paper on 29 June on [Goods placed on the Market under Union law before the withdrawal date](#).

This short paper aims to secure the status of goods already circulating in the EU under Single Market rules after Brexit. The main points are:

- "a good lawfully placed on the market before the withdrawal date and still in the distribution chain in the United Kingdom or in the single market after the withdrawal date can in principle continue to be made available if it complies with Union product rules applicable on the withdrawal date". Examples could include chemicals, machinery and consumer products.
- Live animals (including, for example, hatching eggs and semen) can enter UK if the movement was initiated before Brexit.

³⁴ The [Office for Nuclear Regulation](#) manages aspects of the UK's nuclear industry already, such as the Generic Design Assessment for new reactors.

³⁵ Gov.uk, [The Queen's Speech And Associated Background Briefing](#), 21 June 2017.

Cooperation in civil, commercial, criminal and administrative matters

The EU wants to ensure that ongoing legal procedures on Brexit day continue to their completion and according to criteria and procedures used when they were started. To this end, on 29 June 2017 the Commission published position papers on judicial cooperation in civil and commercial matters, police and judicial cooperation in criminal matters, and administrative and law enforcement cooperation.

Judicial Cooperation in Civil and Commercial Matters

The EU published a position paper on [Judicial Cooperation in Civil and Commercial Matters](#) on 29 June 2017. These are the main points:

- All cross-border civil legal matters started before Brexit should continue to operate under EU law after the UK leaves the EU.
- The Withdrawal Agreement should cover the following areas of EU law:
 - Contractual and non-contractual obligations
 - Jurisdiction, recognition, enforcement
 - Judicial cooperation procedures
 - Other relevant EU law: mediation in civil and commercial matters, access to legal aid in cross-border disputes, European judicial network in civil and commercial matters
- The choice of applicable law for a contract should be determined on the basis of law in force at the time the contract is made.
- Jurisdiction should be determined on the basis of EU law applicable at the date proceedings were started.
- Current EU law on the recognition and enforcement of judgments should apply only to judgments issued before Brexit day.
- The question as to what should happen to matters that post-date Brexit are to be negotiated.

Police and Judicial Cooperation in Criminal matters

The EU's position paper on [Ongoing Police and Judicial Cooperation in Criminal matters](#) was published on 29 June 2017. These are the main points:

- From the date of entry into force of the Withdrawal Agreement, a number of general principles should apply in accordance with EU law.
- The Withdrawal Agreement should allow for the orderly completion of ongoing procedures in a range of laws in the area of police and judicial cooperation in criminal matters, namely:
 - European investigation order (Directive 2014/41/EU);

- European Arrest Warrant (Council Framework Decision 2002/584/JHA);
- Recognition of supervision measures (Council Framework Decision 2009/829/JHA);
- Recognition of confiscation orders (Council Framework Decision 2006/783);
- Mutual recognition of financial penalties (Council Framework Decision 2005/214/JHA);
- Recognition of custodial sentences ("transfer of prisoners") (Council Framework Decision 2008/909/JHA);
- Mutual assistance and cooperation between customs administrations (Council act of 18 December 1997 – Naples II);
- ECRIS (Council Framework Decisions 2009/315/JHA and 2009/316/JHA);
- European protection order (Directive 2011/99/EU);
- Request for information or data held by law enforcement authorities (Council Framework Decision 2006/960/JHA);
- Passenger name records (Directive (EU) 2016/681);
- Cooperation between asset recovery offices (Decision 2007/845/JHA).

For these procedures, the Withdrawal Agreement should establish the procedural stage that has to be reached for the procedure to continue.

- All applicable procedural rights enshrined in EU law should continue to apply.
- The Withdrawal Agreement should clarify that the UK can keep and continue to use all information obtained before the withdrawal date from other Member States and EU institutions, for police and judicial cooperation in criminal matters.
- Provisions in EU law on personal data protection will continue to apply and classified information should also continue to be protected.
- All other restrictions in EU law regarding the use and processing of information and data should continue to apply, including rules on limitation of access, purpose restrictions, or limitations of retention periods.

Administrative and law enforcement cooperation

The EU published a position paper on [Ongoing Union Judicial and Administrative Procedures](#) on 29 June 2017. These are the main points:

- Relevant provisions of EU law on jurisdiction, recognition and enforcement applicable on Brexit day should continue to govern judicial proceedings and procedures in civil and commercial matters pending on Brexit day.

- The relevant provisions of EU law applicable on Brexit day should continue to apply to the choices of forum made before Brexit day.
- Judicial cooperation procedures that are ongoing on Brexit day should continue to be governed by relevant provisions of EU law applicable on Brexit day.
- The Commission will be able to take action against UK or UK nationals and UK companies in respect of infringements of EU law committed before Brexit, and EU procedural rules should continue to apply to investigations.

EU institutions, agencies and bodies

EU institutions

The EU institutions are subject to EU Treaty provisions, EU laws and their own Rules of Procedure. Their staff throughout the EU are subject to EU terms and conditions of employment and to obligations governing their behaviour and professional secrecy. Many officials enjoy the customary immunities and privileges of international bodies and are exempt from immigration and registration restrictions.

The EU and its property are exempt from direct taxation and from customs duty and import/export restrictions in respect of their own articles. Staff do not pay national taxes on salaries paid by the EU.

The EU seeks to maintain certain of these privileges after Brexit.

EU agencies

In the margins of a European Council (EU27) meeting on 22 June to review the latest Brexit developments, Member State leaders endorsed a procedure for relocating the two EU Agencies based in the UK – the European Medicines Agency (EMA) and the European Banking Authority (EBA).³⁶

Bids for one or both Agencies must be submitted by the end of July 2017, with the aim of reaching a decision in the margins of the GAC (Article 50) in November 2017.³⁷

For further information on EU Agencies, their regulatory architecture and possibilities for third party membership, see Commons Library briefing 7957, [EU Agencies and post-Brexit options](#), 28 April 2017.

EU position paper

The EU published a position paper [on Issues relating to the Functioning of the Union Institutions, Agencies and Bodies](#) on 29 June 2017. It deals with matters such as professional secrecy, the privileges and immunities of EU staff in the UK, and access to document requests and EU classified information. These are the main points:

³⁶ For further information on EU Agencies and Brexit, see Commons Briefing Paper 7957, [EU Agencies and post-Brexit options](#), 28 April 2017.

³⁷ [Procedure leading up to a decision on the relocation of the European Medicines Agency and the European Banking Authority in the context of the United Kingdom's withdrawal from the Union](#), 22 June 2017.

- The EU's "current activities in the United Kingdom will eventually come to an end".
- After Brexit the UK must provide the same level of protection to EU institutions and their staff based in the UK as is currently provided. This covers borrowing, financing and treasury operations of the European Investment Bank.
- The UK must continue to comply with obligations concerning secrecy incurred before Brexit for EU staff and related groups. UK and EU institutions and bodies should guarantee the protection of EU classified information exchanged in the interests of the EU both before and after withdrawal.
- For documents concerning matters relating to EU policies, activities and decisions that are drawn up before or on the date of withdrawal, requests to access them should be treated under the same conditions as Regulation (EC) 1049/2001.³⁸ The same applies to documents drawn up after Brexit day, pursuant to the Withdrawal Agreement.
- Regarding EU agencies in UK, UK should continue to ensure "the host agreements in force on the withdrawal date" (these stipulate, for example, that the EU and its property be exempt from direct taxes, customs duty and import/export prohibitions in respect of its own articles).

EU external agreements

The Commission's negotiating directives call for a 'constructive dialogue' on a common approach towards 'third country partners, international organisations and conventions', as early as possible in the first phase of the negotiations.

This refers to the thousand or more bilateral and multilateral treaties concluded by the EU, which bind the UK by virtue of its EU membership.³⁹ They are not just about trade but cover matters such as regulatory cooperation, fisheries access, airline services and nuclear fuel. These treaties and any amendments to them are currently subject to the EU scrutiny process in the UK Parliament.

It is likely that the UK will not automatically continue to be bound by these treaties after Brexit. Even where it is state party itself (in the 'mixed agreements' concluded by the EU and its Member States on the one hand with another state or states), the drafting often means that it is hard to see how the UK could continue as a state party in practice.

So there will need to be many decisions and agreements about the treaties that are of continued interest to the UK (the [FT](#) suggests there could be over 750 of these). While a withdrawal agreement could set out the principles of a common approach for the EU and the

³⁸ The purpose of this regulation is to make access to EU documentation easier for citizens.

³⁹ See Commons Briefing Paper 7850, [Legislating for Brexit: EU external agreements](#), 5 January 2017, for information on the EU's mixed and exclusive competence agreements.

UK, nothing can be resolved without agreement of the other countries concerned.

For that, the main options are:

- Memorandums of Understanding or Exchange of Notes on the UK's position after Brexit. These can be done relatively swiftly and informally. But they are not necessarily published and have no parliamentary process. So even for big policy decisions there might be little scrutiny and little clarity about exactly which treaties continued to bind the UK.
- Amendments or protocols to treaties.
- Wholesale re-negotiation.

The third countries concerned might in some cases also seek to re-open their EU treaties, if Brexit meant that the treaties no longer gave them what they expected.

UK Sovereign Base Areas in Cyprus

The UK Ministry of Defence owns Sovereign Base Areas (SBAs) in Akrotiri and Dhekelia in Cyprus. Under the [1960 Treaty of Establishment](#) the SBAs have remained under British jurisdiction since the creation of an independent Republic of Cyprus in 1960. They are regarded as part of the UK Overseas Territories, which is set out in Article 1 of the Treaty and detailed in annex A to the treaty.

The SBAs are not retained under any sort of leasing arrangement with the Government of Cyprus and no rent is paid for them. Some confusion arises from the fact that the UK agreed to give an annual sum to the newly-independent Republic of Cyprus from 1961 to 1965,⁴⁰ but this was described as a grant, not rent.

When Cyprus joined the EU in May 2004, the SBAs did not become part of the EU but were given a special status. The EU Treaties apply to the SBAs in Cyprus only to the extent necessary to ensure the implementation of the arrangements set out in the [Protocol](#) on the Sovereign Base Areas annexed to the Act of Accession of Cyprus and nine other states to the EU of 2003. This status is enshrined in Article 355(5)(b) TFEU. Under Article 2(1) of the Protocol, the SBAs are “included within the customs territory of the Community and, for this purpose, the customs and common commercial policy acts [...] shall apply to the Sovereign Base Areas”. EU law currently applies in other areas such as VAT, agriculture and fisheries.⁴¹

The SBAs will remain UK sovereign territory after Brexit and their status is not expected to change following Brexit, but concerns have been raised about the future status of around 15,000 Cypriots – EU citizens – living in the SBAs.

The European Council guidelines stated that the EU and the UK will need to agree on arrangements on the SBAs “and recognise in that respect bilateral agreements and arrangements between the Republic

⁴⁰ [Constitution of Cyprus, 1960, appendix R](#)

⁴¹ [Law of the SBAs](#), Sovereign Base Areas Administration.

of Cyprus and the United Kingdom which are compatible with EU law, in particular as regards the situation of those EU citizens resident or working in the Sovereign Base Areas”.

6.6 Dispute resolution

Dispute resolution has emerged as one of the most contentious areas of the negotiations.

The need for a method of resolving disputes runs through the EU’s negotiating directives and position papers, and is set out in more detail in its position paper on governance. It is also recognised in the UK’s position.

There are many different issues, not all of which would need the same solutions, including:

- Disputes currently pending before the Court of Justice of the European Union (CJEU).
- Disputes arising before Brexit Day but litigated afterwards.
- CJEU jurisdiction over regulatory bodies and agencies.
- Disputes between the UK and the EU over the application and interpretation of the withdrawal agreement – for instance the financial settlement.
- Individual challenges over citizens’ rights (although these would presumably begin in domestic courts).
- Commercial disputes over customs and trade issues.
- Disputes arising during any transitional/implementation period.
- Disputes arising if there is no withdrawal agreement.

But the two sides hold seemingly intractable positions on the role of the CJEU.

EU position

Introduction

The EU argues for the Court of Justice of the EU (CJEU) to have jurisdiction for almost every type of dispute, including citizens’ rights, the financial settlement and any transitional period. This is largely in order to preserve the autonomy of the EU legal system, in which the CJEU has exclusive jurisdiction to interpret EU law and treaties.

The Commission’s negotiating directives do allow for an alternative dispute settlement mechanism to apply and interpret provisions of the withdrawal agreement ‘other than those relating to Union law’.⁴² However, the decisions of any such tribunal or court must not have the effect of binding the EU and its institutions to a particular interpretation of the rules of EU law.⁴³

This reflects that fact that where the EU sets up new dispute resolution mechanisms in international agreements, it insists that

⁴² Para 42

⁴³ Tobias Locke, ‘[A Role for the ECJ after Brexit?](#)’, European Futures, 3 July 2017

where the terms of those agreements are ‘in substance identical’ to the corresponding rules of EU law, the dispute resolution body should not be able to arrive at interpretations that determine the interpretation of EU law itself.⁴⁴

It is unusual but not unheard-of for the CJEU to have jurisdiction over non-Member States.⁴⁵

Governance position paper

The EU’s position paper on [Governance](#) was published on 29 June 2017. The main points are:

- A reference to EU law in the Withdrawal Agreement includes the case-law of the CJEU interpreting concepts or provisions before Brexit.
- In any transitional arrangements providing for the continued application of EU law, future case-law of CJEU intervening after Brexit should be taken into account in interpreting those provisions of EU law.
- Any CJEU rulings on the Withdrawal Agreement are binding on EU and UK.
- Withdrawal Agreement provisions on citizens’ rights and continued application of EU law should deploy within the EU and UK legal orders the same legal effects as those that EU law had deployed in the EU until Brexit day, and the UK must ensure compliance.
- Disputes concerning the application or interpretation of the Withdrawal Agreement or any EU law referred to in it should be settled exclusively by means set out in Withdrawal Agreement.
- The Withdrawal Agreement should establish a Joint Committee for EU and UK representatives, with the following tasks and competences:
 - Ensure the good functioning of the Agreement.
 - Adopt measures necessary to deal with unforeseen situations not covered in Withdrawal Agreement
 - Decide on incorporation of future amendments to EU law in Withdrawal Agreement where it provides for such incorporation.
 - Discuss divergences of views between parties.
 - Perform other tasks conferred on it by Withdrawal Agreement.
- The Withdrawal Agreement should establish separate enforcement regimes for provisions on citizens’ rights and enshrining continued application of EU law, and other provisions.

⁴⁴ See Allan Rosas, judge at the European Court of Justice, ‘[The EU and international dispute settlement](#)’, *Europe and the World: a Law Review*, vol 1 no 1, June 2017

⁴⁵ See Allan Rosas, ‘International Dispute Settlement: EU Practices and Procedures’, (2003) 46 *GYIL* 284, 288

- The Commission has full powers to monitor implementation of provisions on citizens' rights (as in Articles 258 and 260 TFEU and monitoring procedures in EU law) and the CJEU has jurisdiction corresponding to the duration of protection of citizen's rights in the Withdrawal Agreement.
- The same rules apply for continued application of EU law, in particular for goods placed on the market, ongoing EU procedures or cooperation procedures between Member States.
- The Joint Committee may be asked to discuss improper implementation or divergent interpretation of provisions of the Withdrawal Agreement.
 - The Joint Committee should be empowered to adopt “where necessary, appropriate measures to implement the solution agreed between the contracting parties”.
 - If no solution is found in Joint Committee, matter may be referred to CJEU jointly or by either party within three months of initial referral.
- The Withdrawal Agreement should provide for “effective mechanism to ensure compliance by the parties with judgments of the Court of Justice handed down in accordance with the Withdrawal Agreement”. If there is no action to remedy situation, the complaining party may ask the CJEU to request a penalty payment or suspension of part of the Withdrawal Agreement, other than citizens' rights, after giving other party the opportunity to express its position.

This last point would give the CJEU greater powers than it currently has.

UK position

For the UK, on the other hand, removing the jurisdiction of the CJEU in the UK after Brexit has been one of its ‘red lines’. Recently, however, there have been some signs that this red line could be blurred.

Theresa May told the Conservative Party conference in October 2016 that ‘we are not leaving only to return to the jurisdiction of the European Court of Justice. That’s not going to happen’. This was largely an issue of sovereignty – the point of leaving the EU was to remove the UK from all EU institutions including the CJEU, in order to re-establish national control.⁴⁶ One particular issue is that CJEU decisions currently have ‘direct effect’ in UK law, and if they conflict with UK law, the UK courts are bound to disapply UK law.

The UK’s February 2017 [Brexit White Paper](#) recognised the need for dispute resolution mechanisms to ‘ensure that all parties share a single understanding of an agreement, both in terms of interpretation

⁴⁶ See David Allen Green, [‘Brexit: why did the ECJ become a UK ‘red line’?](#), Financial Times, 12 April 2017

and application' and 'ensure uniform and fair enforcement of agreements'.

Although the UK courts would be able to apply the Brexit legislation implementing a withdrawal agreement, they would not be able to directly apply the withdrawal agreement itself as it would be part of international not domestic law.

The White Paper went on to set out some examples of dispute resolution in other EU and UK international agreements (although none of these cover complaints from individuals or businesses) and give some parameters for new dispute settlement in the Brexit negotiations:

2.9 As with any wide-ranging agreement between states, the UK will seek to agree a new approach to interpretation and dispute resolution with the EU. This is essential to reassure businesses and individuals that the terms of any agreement can be relied upon, that both parties will have a common understanding of what the agreement means and that disputes can be resolved fairly and efficiently.

2.10 There are a number of examples that illustrate how other international agreements approach interpretation and dispute resolution. Some of these are set out in Annex A. Of course, these serve only as examples of current practice. The actual form of dispute resolution in a future relationship with the EU will be a matter for negotiations between the UK and the EU, and we should not be constrained by precedent. Different dispute resolution mechanisms could apply to different agreements, depending on how the new relationship with the EU is structured. Any arrangements must be ones that respect UK sovereignty, protect the role of our courts and maximise legal certainty, including for businesses, consumers, workers and other citizens.

But on 10 July 2017 the Prime Minister's official spokesman confirmed that the UK could remain subject to the CJEU's jurisdiction 'for a limited time' during a transitional period. This was in response to rather more oblique specific comments from the first secretary of state, Damian Green, on BBC Radio 4's Today programme:

If there needs to be some kind of implementation period, or transition period, in certain areas after March 2019, which I think everyone agrees is quite likely, then the rules that operate during that transition period will by definition not be the rules that we have afterwards.⁴⁷

Another possible area of compromise could be in relation to Euratom. Although the need to remove the CJEU's jurisdiction was cited as one of the UK's reasons for seeking to leave Euratom, the court has made few significant rulings on Euratom.⁴⁸

⁴⁷ Quoted in '[UK government: European top court could have role during Brexit transition](#)', Politico Pro, 10 July 2017

⁴⁸ The main ones are *Saarland and Others v. Minister for Industry and Others*, 1988, [case 187/87](#) (the Commission has to be informed about plans to dispose of nuclear waste before such a disposal is authorised by a member state) and the *Temelin case Oberösterreich v. ČEZ*, 2009, [C-115.08](#) (Euratom provides for sufficient protection against transnational risks of nuclear radiation and contamination)

6.7 No negotiations yet on transitional arrangements or future relations

The Commission currently has no mandate to discuss transitional arrangements or future relations.

However, the EU intends them to be part of the second phase of negotiations, once sufficient progress has been made on the first phase. So the Commission's current [negotiating directives](#) says that a second set of negotiating directives will include transitional arrangements:

As soon as the European Council decides that sufficient progress has been achieved to allow negotiations to proceed to the second phase, there will be new sets of negotiating directives. In this context, to the extent necessary and legally possible, matters that should be subject to transitional arrangements (ie bridges towards the foreseeable framework for the future relationship) and which are in the interests of the Union, will be included in those future sets of negotiating directives in the light of the progress made.

This is likely to involve keeping the current system of EU law – including CJEU jurisdiction – in place for the relevant sectors, which would include allowing references from UK courts to the CJEU on questions of EU law.

The UK also expects there to be some kind of implementation or transitional period, though what it might entail or how long it might last are yet to be determined.

Article 50 requires the negotiations to 'take account' of the future relationship between the UK and the EU. This implies that there must be at least some indication of the UK's future relations with the EU for a withdrawal agreement to take into account. However, the EU and UK cannot conclude a future relations agreement until after Brexit, though the EU has now conceded that it can at least be discussed beforehand:

5. While an agreement on a future relationship between the Union and the United Kingdom as such can only be finalised and concluded once the United Kingdom has become a third country, Article 50 TEU requires to take account of the framework for its future relationship with the Union in the arrangements for withdrawal. To this end, an overall understanding on the framework for the future relationship should be identified during a second phase of the negotiations under Article 50 TEU. We stand ready to engage in preliminary and preparatory discussions to this end in the context of negotiations under Article 50 TEU, as soon as the European Council decides that sufficient progress has been made in the first phase towards reaching a satisfactory agreement on the arrangements for an orderly withdrawal.⁴⁹

⁴⁹ [European Council guidelines for Brexit negotiations](#), 29 April 2017, para 5

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