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THE PROCESS OF BREXIT: WHAT COMES NEXT?

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Working Paper
January 2017

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Executive Summary

The phoney war around Brexit is almost over. The Supreme Court has ruled on Article 50. The government has responded with a bill, to which the House of Commons has given outline approval. The government has set out its negotiating objectives in a White Paper. By the end of March, if the government gets its way, we will be entering a new phase in the Brexit process.

The question is: What comes next? What will the process of negotiating and agreeing Brexit terms involve? Can the government deliver on its objectives? What role might parliament play? Will the courts intervene again? Can the devolved administrations exert leverage? Is a second referendum at all likely? How will the EU approach the negotiations?

This paper – so far as is possible – answers these questions. It begins with an overview of the Brexit process and then examines the roles that each of the key actors will play. The text was finalised on 2 February, shortly after publication of the government's White Paper.

Overview: Withdrawing from the EU

Article 50 of the EU treaty sets out a four-step withdrawal process: the decision to withdraw; notification of that decision to the EU; negotiation of a deal; and agreement to the deal's terms. There are five possible outcomes:

1. A comprehensive deal covering both the terms of Brexit and the details of the UK's future relationship with the EU;
2. A deal on Brexit only, plus transitional arrangements to tide matters over while the future relationship is determined;
3. A Brexit deal only, with no transitional arrangements while future relations are agreed;
4. No deal, with Brexit taking place after two years via Article 50's automatic provision;
5. A decision for the UK to stay within the EU after all.

The UK government wants the first of these, within two years. The EU wants the second. All agree that the third and fourth are highly undesirable. The fifth is not (currently) on the table. It appears very unlikely that the UK government will obtain a deal such as it wants within two years. When that becomes apparent, it is most likely either that the negotiating period will be extended, or that the UK will enter a transitional arrangement, as in option 2.

An important question concerns whether, once the UK has triggered Article 50, it could revoke that notification unilaterally. Most experts think it could, but final judgement can come only from the European Court of Justice.

The Role of Government

The UK government has primary responsibility for deciding the UK's negotiating objectives, triggering Article 50, and conducting the subsequent negotiations.

The Brexit process will impose great burdens on the machinery of government. While the Department for Exiting the European Union (DExEU) has built itself up quickly, complementing the expertise in the UK Permanent Representation to the EU (UKREP), conducting such wide-ranging negotiations effectively will be hard. All Whitehall departments will be involved to a degree. Some of those most affected have recently faced substantial budget and staff cuts.

The Role of Parliament

Parliament will be involved in authorising the government to trigger Article 50, in scrutinising the government's work in the negotiations, in agreeing (or not agreeing) the final deal or deals, and in legislating to give Brexit domestic effect and to make consequential changes.

- Scrutiny of the Article 50 bill has begun and appears likely to conclude in early March; whether amendments will be passed to constrain the government remains to be seen.
- Parliament has multiple instruments for scrutinising the negotiations: questions; debates and statements; and the work of select committees. While none of these puts formal powers in parliament's hands, they have already induced multiple concessions. Parliamentary influence can be expected to continue.
- The government has agreed that parliament will be able to vote on the final deal. Whether that will be only at the ratification stage or also before the deal has been signed is unclear. An amendment to the Article 50 bill that would require the latter has been tabled; its fate is unknown at the time of writing.
- Two areas of Brexit-related legislation have been discussed in depth. First, the 'Great Repeal Bill' will repeal the law that gives the UK's EU membership domestic effect, transpose EU laws into UK law, and empower ministers to alter those laws to make sense in a post-Brexit context. Second, a post-Brexit review of the transposed EU law will decide what should be retained, amended, or repealed. Neither process will be easy. Other legislation will give effect to the treaties negotiated with the EU.

The Role of the Courts

The potential for judicial involvement in the Brexit process has been seen in the judgements on Article 50. There are further ways in which courts might become involved:

- Any attempt to overturn the result of the referendum is vanishingly unlikely to succeed.
- The question of whether, by leaving the EU, the UK automatically leaves the EEA as well is likely to come up for judicial ruling.
- A case before the Irish courts seeks a referral to the European Court of Justice on the question of whether a notification under Article 50 can be unilaterally revoked.
- Other issues that could come before the courts include the legality of the UK-EU deal and claims regarding rights that might be violated by Brexit.

The Role of the Devolved Administrations and Local Authorities

The UK government has undertaken to consult with the devolved administrations. The Scottish and Welsh governments have, however, expressed dissatisfaction with the degree of engagement so far. The Supreme Court confirmed that the devolved legislatures have no legally justiciable right to be consulted. But Brexit will require measures on which it would breach convention to override the will of the devolved legislatures. How these matters will play out varies between the nations:

- The Scottish government is walking a tightrope: it wants to uphold the will of Scottish voters in the EU referendum, but is wary of falling into a second referendum on Scottish independence that it might lose. Brexit will antagonise Scottish opinion, but may also make leaving the UK harder.
- The Welsh government wants continued membership of the single market. But it has little leverage: the majority of Welsh voters opted for leaving the EU; ministers in Cardiff cannot dangle the threat of an independence ballot.

- The implications of Brexit are particularly acute in Northern Ireland: a more tangible border with the Republic could damage both the economy and the peace process; divisions over Brexit contributed to the recent collapse of the Executive and will make any resumption of effective devolved government harder. The UK government has pledged to do all it can, but that may be too little to prevent harm.

Local government leaders and the London Mayor are seeking a voice in the Brexit process. They may exert some influence but will have no formal role.

The Role of the Public

All sides agree that public opinion should continue to influence the process, but there are two views on what that should mean. One view is that the public spoke in the referendum and the task now is simply to implement that decision. The other view is that opinion is more complex and changeable and that evolving public views should also be considered.

One way public opinion might be heard is through a referendum on the final deal. The form this would take, the effects it might have, and how it might come about are complex issues. The most likely version would pit the negotiated deal against remaining in the EU. Circumstances leading to such a vote are imaginable, but its outcome is impossible to predict.

The prevailing public mood will, in any case, influence MPs' and ministers' day-to-day decisions. Direct public intervention could also come in the form of a general election.

The Role of EU Institutions and EU Member States

The negotiations on Brexit will be two sided. The European Council – comprising the heads of government/state of the remaining member states – will set the framework for the EU's negotiating position. The European Commission's chief negotiator, Michel Barnier, will lead in the talks themselves. The European Parliament will formally only observe, though its power to veto the final deal may give it a greater role than this implies.

Three points deserve note in how the EU and its member states will approach the negotiations:

1. EU leaders have said that they are determined to protect the EU and the European project. They do not want to water down the ideals of that project or give the UK a deal that might attract other countries down the withdrawal path.
2. But they know that a hard or disorderly Brexit would damage their own economies and citizens, not just those of the UK. They want to secure the best deal possible.
3. All sorts of particular member-state and institutional interests may come into play. National elections – for example, in the Netherlands and France – could be disruptive. Some states may seek to use the opportunity to reshape the EU itself. The UK might seek to use such rivalries to its own advantage, but the process might also become a hostage to a range of internal EU debates and disagreements.

Conclusion

The process of Brexit will be complex and unpredictable. The coming years will be full of deep challenges and considerable opportunities. It will be important for all involved – from prime ministers and presidents to ordinary citizens – to engage honestly and constructively.

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1. Introduction

This paper sets out the process through which the United Kingdom will pursue its withdrawal from the European Union. Over the last several months, attention has focused primarily on the first step of this process: the mechanism through which the UK can trigger the start of negotiations. The UK government thought that, in the wake of last June's referendum, it could do this itself. Others disputed this and said that parliament had to agree the move first. The Supreme Court's ruling on 24 January settled the matter: parliamentary approval is indeed required. The process of securing that approval has now begun. The question that arises is: What happens next?

This paper – so far as is possible – answers that question. Theresa May set out her objectives in a speech at Lancaster House in London on 17 January,¹ and the government reiterated these in a White Paper on 2 February.² But will the government be able to secure these goals, how will it seek to do so, and what might hold it back?

This paper begins with an overview of the withdrawal process as laid down by the now-famous (but rather Delphic) Article 50 of the Lisbon Treaty and as fleshed out in the months since the referendum. It then looks at the roles that will be played by the various actors in the drama. The focus is primarily upon the UK: the processes through which the UK will work out what it wants, negotiate with EU interlocutors, and decide whether it accepts the terms that are agreed. We thus look at the roles of the UK government, UK parliament, and UK courts, then at the roles of the various devolved institutions and of local government, and finally at the ongoing impact of public opinion. The paper does not attempt a comparable analysis of the positions of the twenty-seven continuing EU members, all of which will be involved and each of which will have the capacity to knock the UK government off its desired course. To look at a negotiation without considering both sides would, however, be highly misleading. The penultimate section therefore provides an overview of the role of EU institutions and EU member states. Finally, the concluding section draws the strands together and highlights some questions that remain unanswered.

The paper text was finalised on 2 February, shortly after the government's White Paper was published. In a fast-moving context, it is inevitable that some sections will rapidly be overtaken by events. But the path towards Brexit has become much clearer over the first five weeks of 2017. Now is the time to try to set it out.

¹ Theresa May, '[The Government's Negotiating Objectives for Exiting the EU](#)', speech delivered in Lancaster House, London, 17 January 2017.

² HM Government, '[The United Kingdom's Exit from and New Partnership with the European Union](#)', White Paper, Cm 9417, 2 February 2017.

2. Overview: Withdrawing from the EU

A year ago, barely anyone had heard of Article 50 of the Treaty on European Union. Today, many of us talk about it routinely. Article 50 sets out the process through which a country can leave the EU. It is, however, both short and untested: it leaves many aspects of the withdrawal process uncertain. This section begins with an overview of what we know so far about the withdrawal process – both from Article 50 itself and from the various developments since the referendum result was announced on 24 June last year. It then outlines three key points on which considerable uncertainty remains: the nature of the deal between the UK and the EU that will be done; the likelihood that, if necessary, the permitted negotiating period could be extended; and whether the UK, once it has started the withdrawal process, can change its mind. This will serve as the foundation upon which the detailed analyses in subsequent sections are based.

2.1 The Withdrawal Process

Article 50 sets out a four-step withdrawal process:³

1. The first step is the decision to withdraw: ‘Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.’⁴ The effect of the January Supreme Court ruling was to clarify what the ‘constitutional requirements’ for making this decision are in the UK. The court determined that the UK parliament must make its consent explicit through legislation, but that the devolved institutions in Scotland, Wales, and Northern Ireland have no legal right to be consulted.
2. The second step is notification of this decision to the EU. Assuming that parliament does give its approval (as discussed in section 4.1, this is all but certain), it will be for the government to make this notification by writing to Donald Tusk, the President of the European Council (the EU’s highest decision-making body, comprising the heads of government/state of the twenty-eight member states).
3. The third step is negotiation of the terms of withdrawal. Article 50 states that ‘the Union shall negotiate and conclude an agreement with that [withdrawing] State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union’.⁵ Article 50 does not spell out what these phrases mean. It is understood, however, that ‘the arrangements for its withdrawal’ encompass transitional matters such as how the departing state’s involvement in ongoing EU programmes will be wound down, what one-off contribution (if any) the UK will make to the EU budget, and what rights will be held by nationals of the withdrawing state living elsewhere in the EU and of EU nationals living in the withdrawing state. The ‘framework for its future relationship with the Union’, meanwhile, covers possible future trade arrangements and other features of the long-term relationship. The negotiations are conducted between the withdrawing state and the European Commission, the latter working according to principles determined by the European Council. While the withdrawing state remains a full member of the EU throughout the negotiations, it does

³ For much more detailed, legal analysis of Article 50, see the first paper in the present series: Piet Eeckhout and Eleni Frantziou, *Brexit and Article 50 TEU: A Constitutionalist Reading*, working paper, UCL European Institute, December 2016.

⁴ [Article 50\(1\)](#), Treaty on European Union.

⁵ [Article 50\(2\)](#), Treaty on European Union.

not participate in European Council discussions on the withdrawal issue: that is, it does not sit on both sides of the negotiating table.⁶

4. The fourth and final step is agreement to the terms that are negotiated. For the arrangements on withdrawal, such agreement is required from the withdrawing state itself, from the European Parliament, and from what in EU parlance is known as a 'super qualified majority' of the remaining member states: that is, at least twenty of the twenty-seven states, comprising at least 65 per cent of their population.⁷ The agreement on withdrawal itself does not require further ratification by national parliaments. If, however, agreement is sought not just to the withdrawal terms, but also to the future relationship that the withdrawing state will have with the EU, this will (assuming the deal provides for future cooperation anything like as deep as the UK government wants) require unanimous agreement and ratification by member states. As the recent drama over whether the Walloon parliament would endorse the EU's free trade deal with Canada illustrates, the unanimity requirement can apply even to a relatively limited trade arrangement, and a straightforward ratification process is not guaranteed.⁸

Article 50 contains one crucial further stipulation: 'The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.'⁹ In other words, from the moment of notification (step 2), two years are available for steps 3 and 4: negotiation and agreement. If the negotiations are not concluded *and* all the necessary endorsements given within those two years, then, unless an extension can be unanimously agreed, the withdrawing state simply exits the EU automatically. For the reasons made clear in section 2.2, this has come to be known as 'disorderly exit'.

We have learnt some additional things since June 2016 about how the negotiations will work in practice. On the UK side, they will be headed by the Prime Minister, Theresa May, and the Secretary of State for Exiting the EU, David Davis. Much of the heavy work will, of course, be done by officials. The senior civil servant in the Department for Exiting the EU (DExEU) is Oliver Robbins. The UK's Permanent Representative (in effect, Ambassador) to the EU is (following the resignation of Sir Ivan Rogers at the start of January) Sir Tim Barrow. Sir Tim can be expected to lead the day-to-day negotiations on the ground in Brussels in close coordination with DExEU.¹⁰

On the EU side, the day-to-day work will be conducted by the European Commission on behalf of the European Council. The Commission has appointed former French Foreign Minister Michel Barnier as its Chief Negotiator. Key decisions will, however, be heavily shaped by European heads of government and heads of state, coordinated by the European Council President, Donald Tusk and supported by the Council's own Brexit Task Force, which is headed by Didier Seeuws, a senior official within the General Secretariat of the Council. In

⁶ [Article 50\(4\)](#), Treaty on European Union.

⁷ [Article 50\(2\) and \(4\)](#), Treaty on European Union.

⁸ Robert-Jan Bartunek, '[EU and Canada to Sign Trade Pact after Belgians Strike Key Deal](#)', Reuters, 29 October 2016.

⁹ [Article 50\(3\)](#), Treaty on European Union.

¹⁰ For useful discussion, see Nicholas Wright, '[Is Tim Barrow just the man for Brexit?](#)', *Prospect*, 20 January 2017. See also the comments on the negotiation mechanics given by Sir Ivan Rogers in evidence to the House of Commons European Scrutiny Committee on 1 February 2017: '[Sir Ivan Rogers gives evidence on EU-UK relations](#)'.

addition, the European Parliament has appointed former Belgian Prime Minister Guy Verhofstadt as its 'point man' in the Brexit negotiations.¹¹

There are other questions that remain unanswered (or, at least, not definitively answered). The most important of all, of course, concerns what the content of the negotiations and any final deal will actually be. Two further questions are more procedural, but also matter. They concern what might happen towards the end of the negotiations and have fundamental implications for the distribution of power among actors and the nature of the deal that might be done. First, what are the chances that, if necessary, the negotiating period could be extended beyond two years? Second, once Article 50 has been triggered, could the UK, if it changes its mind, decide to turn back and remain within the EU after all? We consider these three questions in the following subsections.

2.2 The Content of the Negotiations

As just set out, Article 50 is ambiguous as to the content of the negotiations that will ensue once the UK has triggered the withdrawal process. The view taken (so far at least) by the European Commission has been that those negotiations will include only the terms of withdrawal, covering transitional arrangements such as the rights of EU nationals living in the UK and UK nationals living elsewhere in the EU, provisions to extricate the UK from ongoing EU programmes, and an agreement on what one-off budgetary contribution (if any) the UK will make to the EU upon departure. The view taken by the UK government, by contrast, is that the negotiations will also cover the UK's future relationship with the EU, including, for example, terms of access to the EU single market, cooperation in areas of policing and security, and possible continuing collaboration in research and other areas.

It is well beyond the scope of this paper to attempt predictions regarding the detailed content of any deal. But there are five possibilities as to the basic structure of that deal:

6. first, a comprehensive deal covering both the terms of Brexit and the detailed terms of the UK's future relationship with the EU;
7. second, a deal on withdrawal terms that is combined with transitional arrangements that tide matters over while the future relationship is determined;
8. third, a deal on withdrawal terms only, with negotiations on the future relationship conducted after withdrawal, but without any transitional arrangements in place during that period;
9. fourth, no deal, with Brexit taking place after two years (or longer if an extension has been agreed) via the automatic provision set out in Article 50(3);
10. finally, a decision for the UK to stay within the EU after all.

Clarity as to which of these the UK government wants to pursue was first provided by the Prime Minister on 17 January in her speech at Lancaster House. She indicated clearly that the government will pursue the first option: a comprehensive deal. She did say that she wants a 'phased approach', but this related only to the implementation of the deal: she recognised that, if the deal that she wants is struck, it will take some time for the UK, the EU, and the continuing member states to implement its terms, and a gradual process of implementation will therefore be required. But she wants the deal itself to be a single package, and she wants

¹¹ ['Parliament appoints Guy Verhofstadt as representative on Brexit matters'](#), European Parliament News Service, 8 September 2016. For excellent introductions to the key players on the EU side, see Uta Staiger and Nicholas Wright, ['Meet the Brexit Brokers'](#), *Prospect*, 10 November 2016.

it to be agreed within the two-year period set out in Article 50.¹² The White Paper published on 2 February restated that aspiration.¹³

Setting aside the details of Mrs May's proposals, there are two major reasons to doubt whether a comprehensive deal within two years is feasible. The first concerns whether the EU will be willing to negotiate on the terms of the future relationship while the UK remains within the EU. As noted above, the position of the European Commission so far has been that it will not be. Michel Barnier has said that the European Commission wants negotiations of the second kind: a deal on withdrawal first, followed by a transition period during which decisions about future arrangements are made.¹⁴ He appeared to reiterate this in a tweet following May's speech, saying 'Agreement on orderly exit is prerequisite for future partnership'.¹⁵ Reactions to the speech from a wide range of key EU players – including Michel Barnier himself, as well as European Commission President Jean-Claude Juncker, Donald Tusk, Guy Verhofstadt, and a range of national government ministers¹⁶ – repeated that they do want a detailed deal on future cooperative relations. But the degree to which they will be willing to discuss that deal within the two-year period is not clear.

Second, even if EU leaders are willing to pursue a comprehensive deal in one go, it is far from clear that a two-year timetable is feasible. In fact, experts overwhelmingly see it as wholly unrealistic. In December, Sir Ivan Rogers, then the UK's Permanent Representative to the EU, was reported as having warned the government that a comprehensive deal could take ten years.¹⁷ Speaking on 1 February before the House of Commons European Scrutiny Committee, he clarified that he had never said that; nevertheless, he had advised the government that the consensus view among senior Brussels officials was that it would take into the 'early or mid 2020s' for a free trade deal to be negotiated and ratified.¹⁸ Former Cabinet Secretary Lord O'Donnell has said, 'We certainly won't have come to any final arrangements in two years' time. We might well get to a point where we can symbolically leave, but all sorts of details will still remain to be sorted out.' In particular, he emphasised that many aspects of future trade relations would still need to be agreed.¹⁹ Reacting to Theresa May's speech, Charles Grant, the Director of the Centre for European Reform, said, 'She thinks the negotiations will take only two years, but they will take longer.'²⁰ EU law expert Professor Steve Peers said simply, 'This time frame is unlikely'.²¹

¹² Theresa May, '[The Government's Negotiating Objectives for Exiting the EU](#)', speech delivered in Lancaster House, London, 17 January 2017.

¹³ HM Government, *The United Kingdom's Exit from and New Partnership with the European Union*, White Paper, Cm 9417, 2 February 2017, p. 65.

¹⁴ Alex Barker, '[Brussels on Brexit: What Michel Barnier said and what he meant](#)', *Financial Times*, 6 December 2016; House of Commons Exiting the European Union Committee, *The Process of Exiting the European Union and the Government's Negotiating Objectives*, First Report of Session 2016-17, HC815, 14 January 2017, p. 22.

¹⁵ <https://twitter.com/michelbarnier>.

¹⁶ "'Ready as soon as UK is": How Europe's leaders reacted to Theresa May's Brexit speech', *Telegraph*, 17 January 2017; Guy Verhofstadt, '[We're not out to punish Britain, but you need to shed your illusions](#)', *Guardian*, 18 January 2017.

¹⁷ 'Brexit trade deal could take 10 years, says UK's ambassador', BBC News online, 15 December 2016.

¹⁸ House of Commons European Scrutiny Committee, '[Sir Ivan Rogers gives evidence on EU-UK relations](#)', 1 February 2017.

¹⁹ Lord O'Donnell speaking to BBC Radio 4's *Westminster Hour*, 18 December 2016.

²⁰ Charles Grant, '[What Does Theresa May's Speech Tell Us about How Britain Will Leave the EU?](#)', Centre for European Reform, 17 January 2017.

²¹ Steve Peers, '[Brexit: The Prime Minister Sets the Wrong Course](#)', EU Law Analysis blog, 17 January 2017.

The deal sought by Mrs May is not only comprehensive, but also highly complex: she wants a deep, bespoke free trade deal as well as a yet-to-be-fleshed-out form of limited customs union. These matters will be contentious, and there will be many devils in many details. She also indicated a desire for deep continuing cooperation in security matters, in scientific research, and in other areas. As discussed in section 3.2, the UK government has limited resources to conduct all these negotiations.

Michel Barnier has said that, if the deal is to be confirmed within two years its terms must be thrashed out in something closer to eighteen months to allow scrutiny and approval by the European Parliament.²² Many in the UK parliament are pressing for a similar degree of involvement (see section 4). Barnier's remarks assumed only a narrow divorce deal. If a comprehensive deal requiring ratification by all member states is sought, then even six months may be insufficient: in the Netherlands, for example, a referendum could be called on the matter and this – as in the case of the vote on the EU–Ukraine Association Agreement in April 2016 – could block (or at least delay) ratification.

The probability that the government will not in fact secure the deal it wants within two years therefore looks high. If that happens, it will have two options: either to seek an extension to the negotiations or to shift from the first to the second of the five possible deal structures listed above – to seek a transitional deal under which the UK leaves the EU but retains many of the provisions of EU membership while further negotiations continue. If neither of these things happens, then the UK is down to option 3 or 4: either a pure divorce deal is concluded; or no deal at all is done and the UK leaves the EU under the two-year rule.

The possibility of extending the negotiating period is considered below. As regards option 2 – agreeing a transitional arrangement – this is certainly possible, but the difficulties even here should not be underestimated. Many might either fear or hope that such an arrangement would stick: that the UK would enter a supposedly temporary arrangement and then find itself unable to move out of it because of all the complications and disagreements involved. This possibility will make people and governments in the UK and around the EU care about the content of this arrangement. It would require the unanimous consent of all twenty-seven remaining member states, and they might not give that lightly.

On the other hand, what might force agreement of some kind would be recognition that reversion to option 3 or 4 would be deeply damaging to all concerned.

Option 3 entails a divorce deal, but no deal on trade or other crucial aspects of future cooperation. This would be the hardest of 'hard' Brexits. As is now well known, if the UK is not in a free trade zone with the EU then, under World Trade Organization rules, it has to impose the same tariffs on imports from the EU as it does on imports from all other WTO members with which it has no trade deal: this is the essence of the WTO's 'most favoured nation' system. In this scenario, the UK might conclude that its best course of action is to reduce its tariffs to zero for all countries around the world. But it is very unlikely that the EU would reciprocate, which would oblige the EU to impose tariffs on many UK exports to the EU. Theresa May's focus on the need for a good trade deal emphasises how damaging this would be to the economy.

Option 4 is worse still: this is 'disorderly' Brexit. Not only would there be no free trade deal; in addition, there would be no divorce deal either. This would cause destabilising uncertainty on

²² Alex Barker, '[Brussels on Brexit: What Michel Barnier said and what he meant](#)', *Financial Times*, 6 December 2016.

many fronts, including, potentially, for all the UK citizens resident in the EU and EU citizens resident in the UK. The House of Commons Committee on Exiting the European Union has listed the issues that it believes a divorce deal ought to cover; it is clear that failure to address these would be very damaging.²³ Theresa May said on 17 January that she would prefer no deal to 'a bad deal'. But no deal is a bad deal – in fact, it is one of the worst deals imaginable.

The fifth option, finally, is that the UK might decide not to leave the EU after all. Whether this is feasible depends on whether Article 50 notification, once made, can be retracted. This is discussed in section 2.4 below. Whether it is actually likely to happen depends on how public opinion towards the EU evolves over the coming years and how politicians respond. We examine that question in section 7.

To conclude this initial overview, once Article 50 has been triggered, one of the first issues that Theresa May will need to discuss with other European heads of government/state will be the question of what they are actually discussing: whether just the withdrawal deal or also the deal on future relations. However that debate concludes, it is very unlikely that both tracks will be completed within two years. At that point, all will want to avoid options 3 and 4: very hard and disorderly Brexit. One option will be that a withdrawal deal is concluded and that some kind of transitional arrangement is found while detailed negotiations on future relations continue. Another option will be an extension of the negotiations – which is the possibility that we turn to now.

2.3 Could the Negotiation Period Be Extended?

As set out above, Article 50 allows two years for the withdrawal negotiations, but also provides that that period can be extended by unanimous agreement of all twenty-eight member states. Given that the government wants a comprehensive deal both on withdrawal terms and on future relations, and that many think it highly unlikely that this will be achieved within two years, the question arises of whether agreement to an extension is in fact likely.

Many presume that such extension will not be possible. The respected UK in a Changing Europe programme, says, 'Despite provisions for the rest of the EU (rEU) to prolong the negotiations by unanimous agreement, most commentators consider it unlikely that they would be willing to do so.'²⁴ But it is difficult to predict how events might unfold over these years, so the possibility should not be ruled out.

Extension would require the agreement of the UK and of all the other EU member states. On the UK side, Brexit supporters and the government will clearly want to avoid any further delay. If the government does not get what it wants within two years, however, it will have to consider the alternatives just set out: if it does not seek an extension, it will have to pursue either a transitional arrangement while talks on the future relationship continue or accept the hardest of hard Brexits. No one serious wants the latter. And Brexiteers dislike transition at least as much as they dislike extension: all of the members of the Commons Committee on Exiting the EU who supported Brexit in the referendum voted against inclusion of a paragraph favouring transitional arrangements in the committee's January report.²⁵ Particularly if a deal is close,

²³ House of Commons Exiting the European Union Committee, *The Process of Exiting the European Union and the Government's Negotiating Objectives*, First Report of Session 2016-17, HC815, 14 January 2017, p. 31.

²⁴ UK in a Changing Europe, *Brexit and Beyond: How the United Kingdom Might Leave the European Union* (London: Political Studies Association, November 2016).

²⁵ House of Commons Exiting the European Union Committee, *The Process of Exiting the European Union and the Government's Negotiating Objectives*, First Report of Session 2016-17, HC815, 14 January 2017, p. 53.

or if the negotiations have been concluded but the approval of the UK parliament or the European Parliament has not yet been won, extension might well look like the best option. On the other hand, if it has become apparent that a detailed deal on future relations will in fact take much longer, then the preference might be a formal Brexit into a transitional arrangement that maintains many aspects of membership.

There have been few hints so far from the European side on whether they would countenance an extension, because they have focused instead on pursuing a withdrawal deal within the two-year period. In the scenarios just set out, they would likely face similar incentives to those driving the UK. But they might also seek to extract concessions in return for their agreement.

2.4 Can Article 50 Notification Be Revoked?

The focus in recent months has been on the process through which the UK can trigger Article 50: whether the government can do that on its own under the powers of the royal prerogative, or whether this requires the consent also of parliament. Now that that matter has been settled by the Supreme Court, the major unanswered question relating to Article 50 concerns whether the UK (or any other member state), having triggered Article 50, can revoke that decision. This matters for at least two reasons:

- Most obviously, the UK might change its mind about leaving the EU. Various prominent figures – including John Major, Tony Blair, Owen Smith, and Tim Farron – have suggested that a second referendum might be appropriate once the Brexit deal has been done, allowing voters to decide whether they still want to leave once the terms are known (see section 7.1). But that would be very difficult if revocation of Article 50 notification is not possible.
- In addition, the UK might be tempted to use a right to revoke notification to game the system: if it was not getting a deal it was satisfied with, it might be able to revoke and then retrigger that notification, thereby buying extra negotiating time without needing the unanimous agreement of other member states. Such a manoeuvre would, however, be unpopular both with Brexit supporters and with other EU countries, so, quite apart from its moral dubiousness, the circumstances in which it might constitute a productive course of action may be very limited.

Article 50 says nothing about revocability, which leads some to conclude that, once a member state has triggered it, there is no going back.²⁶ But many legal authorities disagree.²⁷ There is general consensus that, if other EU member states unanimously agree, then a way of turning back can certainly be found. The question is whether the UK has a right to turn back unilaterally: that possibility would greatly strengthen the government's negotiating hand.

One argument for saying that it does have such a right is that Article 68 of the Vienna Convention on the Law of Treaties says that a notification from a country that it intends to withdraw from a treaty 'may be revoked at any time before it takes effect',²⁸ and that this applies to a notification of intent to leave the EU.²⁹ Another argument is that, just as Article 50

²⁶ E.g., Jake Rylatt, '[The Irrevocability of an Article 50 Notification: Lex Specialis and the Irrelevance of the Purported Customary Right to Unilaterally Revoke](#)', UK Constitutional Law Association blog, 27 July 2016.

²⁷ For more detailed, discussion see Piet Eeckhout and Eleni Frantziou, '[Brexit and Article 50 TEU: A Constitutionalist Reading](#)', working paper, UCL European Institute, December 2016, pp. 38–41.

²⁸ [Vienna Convention on the Law of Treaties](#), Article 68.

²⁹ E.g., Charles Streeten, '[Putting the Toothpaste Back in the Tube: Can an Article 50 Notification Be Revoked?](#)', UK Constitutional Law Association blog, 13 July 2016.

says that a member state ‘may decide to withdraw from the Union in accordance with its own constitutional requirements’ and then trigger the withdrawal process, so, it follows, if the member state changes its mind, such that ‘the decision to withdraw is no longer compatible with its constitutional requirements’, it may stop that process.³⁰ A House of Commons Library briefing paper summarising this debate cites multiple political figures and legal authorities supporting the revocability thesis, and concludes that ‘a preponderance of academic opinion’ agrees that unilateral revocation is possible.³¹ Lord Kerr – who, as Secretary-General of the European Convention of 2002–3 played a leading role in drafting Article 50 – takes the same view. Speaking to the BBC, he said:

It is not irrevocable. You can change your mind while the process is going on. During that period, if a country were to decide actually we don't want to leave after all, everybody would be very cross about it being a waste of time. They might try to extract a political price but legally they couldn't insist that you leave.³²

Still, two qualifications are required. First, Eeckhout and Frantziou argue that this right of revocation is not unlimited. A member state can retract its notification of intent to withdraw only if it has genuinely reversed its decision to withdraw. It cannot use this merely as a manoeuvre to buy extra negotiating time.³³ If correct, this rules out the game-playing use of revocation noted above.

Second, while there is wide agreement that unilateral revocation is possible, this is not a consensus view, and, Article 50 never having been used before, there is no existing legal ruling on the matter. This being a matter of the interpretation of EU law, only the European Court of Justice could issue such a ruling. Whether and how that could happen is considered in section 5.4 below.

³⁰ Eeckhout and Frantziou, [op. cit.](#), p. 39.

³¹ Vaughne Miller, Arabella Lang, and Jack Simson-Caird, ‘[Brexit: Article 50 TEU and the EU Court](#)’, House of Commons Library Briefing Paper no. 7763, 14 November 2016, quotation from p. 4.

³² Glenn Campbell, ‘[Article 50 author Lord Kerr says Brexit not inevitable](#)’, BBC News online, 3 November 2016.

³³ Eeckhout and Frantziou, [op. cit.](#), pp. 40–41.

3. The Role of Government

Having set out the basics of the withdrawal process in the preceding section, we now consider the roles that will be played by the key actors in that process. Notwithstanding the decision of the Supreme Court that parliamentary approval is required before the process can begin, the most important actor on the UK side will be the government. It is here, therefore, that we will start.

3.1 What Government Will Do

The government has three primary roles in the Brexit process:

- First, it has primary responsibility for deciding the UK's initial negotiating position and objectives. These were left indeterminate by the referendum, in which voters were asked only about the general principle of Brexit, not about the specific form it should take. The UK constitution gives power over most aspects of foreign policy to the government, exercising the powers held formally by the monarch under the royal prerogative. That is not changed by the Supreme Court's ruling, which is limited only to the triggering of Article 50. Nevertheless, parliament does have the ultimate power to intervene if it wishes. The degree to which it will do so – either by amending the legislation to trigger Article 50 or by other means – will rapidly become clear in the coming weeks. The government has already had to reveal its hand to some degree in response to political pressure, culminating in the White Paper published on 2 February.³⁴
- Second, it is for the government formally to trigger Article 50 by writing to the President of the European Council, Donald Tusk. The Supreme Court's ruling means that it can do this only after parliament has passed enabling legislation. The government has said that it intends to trigger Article 50 before the end of March, a timetable that was endorsed by an overwhelming vote of the House of Commons on 7 December.³⁵ If the government secures passage of its legislation on Article 50, as it hopes, in early March, it may pull the trigger as early as the European Council meeting on 9–10 March.
- Third, the government will conduct the negotiations with the EU member states, the European Commission, and the European Parliament. Primary responsibility, both for the terms of withdrawal and for the nature of the UK's future relationship with the EU, lies with the new Department for Exiting the European Union (DExEU), led by Secretary of State David Davis. But all other departments will be involved to some degree, given that the EU has at least some influence across a great range of policy areas. Those most involved will include the Treasury (given Brexit's major implications for the economy and public finances), the Foreign Office and Department for International Trade (given their focus on international matters), the Department for Business, Energy, and Industrial Strategy (given the need to provide a secure transition for business), the Department for Environment, Food, and Rural Affairs (given the EU's central role in agriculture, fisheries, and environmental regulation), and the Home Office (given the Prime Minister's stated desire to maintain close cooperation in areas such as policing and security).

³⁴ HM Government, *The United Kingdom's Exit from and New Partnership with the European Union*, White Paper, Cm 9417, 2 February 2017.

³⁵ '[MPs debated the Government's plan for Brexit](#)', UK Parliament, 7 December 2016.

The government is currently engaged in the first of these tasks. It has repeatedly said that it does not wish to give ‘a running commentary’ on its negotiating stance. Nevertheless, Theresa May set out the broad principles for the deal she wants in her Lancaster House speech on 17 January.³⁶ The principal features of the future relationship with the EU that the UK government will seek include the following:

- The government sees it as paramount that the UK should be able to control migration from EU countries and that the European Court of Justice (ECJ) should not have jurisdiction in the UK. The Prime Minister said that these desiderata are incompatible with continued membership of the single market (a claim that is not quite correct, as explained, for example, by EU law expert Steve Peers³⁷). Rather, the government will seek ‘a new, comprehensive, bold and ambitious free trade agreement’ with the EU.³⁸
- The government wants to secure free trade deals with countries outside the EU as well. This will require that the UK leave at least aspects of the EU customs union. At the same time, the government wants to avoid customs friction in trade with the EU as far as possible. It will therefore pursue some form of customs agreement with the EU.
- The government wants to continue cooperation with the EU in a variety of areas, including scientific research, foreign and defence policy, and crime-fighting.
- The government will seek to maintain the Common Travel Area with the Republic of Ireland.
- The government will seek early agreement on protections for the rights of EU nationals in the UK and UK nationals in the EU.
- As discussed in section 2.2 above, the government wishes to complete a deal on all these matters within the two-year timeframe set out by Article 50. But it wants the implementation of the deal thereafter to be phased in order to avoid ‘a cliff-edge for business or a threat to stability’: to give time, for example, for new arrangements at borders to be put in place.³⁹

On 2 February, the government reiterated these goals in a White Paper.⁴⁰ This retained the same structure of principles as Theresa May had introduced in her speech. It offered some elaborations, but no substantially new content.

3.2 Can Whitehall Cope?

The Brexit process will impose very considerable burdens on the machinery of government. Several senior figures, including Lord O’Donnell (former Cabinet Secretary) and Lord Kerslake (former Head of the Civil Service) have voiced grave doubts about the ability of the civil service to deliver Brexit successfully while continuing the regular business of government without an increase in resources.⁴¹ Lord O’Donnell comments, ‘Nobody should be under any illusions,

³⁶ Theresa May, ‘[The Government’s Negotiating Objectives for Exiting the EU](#)’, speech delivered in Lancaster House, London, 17 January 2017.

³⁷ Steve Peers, ‘[Brexit: The Prime Minister Sets the Wrong Course](#)’, EU Law Analysis blog, 17 January 2017.

³⁸ Theresa May, op. cit.

³⁹ Ibid.

⁴⁰ HM Government, [The United Kingdom’s Exit from and New Partnership with the European Union](#), White Paper, Cm 9417, 2 February 2017.

⁴¹ Sam Macrory, ‘[Gus O’Donnell Interview: “Be under no illusions – Brexit is an enormous challenge for the civil service”](#)’, *Civil Service World*, 17 November 2016; [oral evidence from Lord Kerslake](#) to the House of Commons Public Administration and Constitutional Affairs Select Committee’s inquiry on *The Work of the Civil Service* (HC253), 22 November 2016.

this is an enormous job.’ The Chief Executive of the Civil Service, John Manzoni, says Brexit is probably ‘the hardest thing any of us have had to deal with’.⁴² Much has been made, in particular, of the UK’s lack of experienced trade negotiators: in his leaked letter to staff sent after he resigned as the UK’s EU Permanent Representative, Sir Ivan Rogers said, ‘Serious multilateral negotiating experience is in short supply in Whitehall, and that is not the case in the Commission or in the Council.’⁴³ Giving evidence to the Commons European Scrutiny Committee on 1 February, Sir Ivan said the negotiations will be on ‘a humungous scale’ and unparalleled by any previous process in their breadth across all policy areas.⁴⁴

In a recent report, the Institute for Government finds that DExEU ‘has established itself quickly’ and that ‘Teams working across government are doing so with energy, optimism and professional dedication.’⁴⁵ By early December, DExEU had ‘just over 300 staff’ (from an intended total of around 400) and was ‘growing fast’.⁴⁶ In addition, the UK Permanent Representation to the EU has around 130 staff based in Brussels.⁴⁷ The Autumn Statement in November announced extra funding for DExEU and the Department for International Trade (DIT). A new cabinet committee, the European Union Exit and Trade Committee, has been established under the Prime Minister’s chairmanship to coordinate activities.⁴⁸

Nevertheless, the Institute for Government also concludes that Whitehall currently lacks the capacity to deliver Brexit. It notes, ‘The Autumn Statement announced new funding for the Foreign Office, DIT and DExEU, but other departments were told they must keep working to spending settlements that were decided before Brexit.’⁴⁹ That is particularly challenging for the Department for Environment, Food, and Rural Affairs, whose budget has already been cut substantially since 2010, and which faces significant further reductions in the coming years. Its staff numbers are already more than a third down on those in 2010.⁵⁰

As noted in section 2.2, Theresa May has outlined a highly ambitious plan to negotiate not only narrow withdrawal terms from the EU, but also complex and innovative trade and customs arrangements and forms of cooperation in a variety of other areas, all within the space of two years. She also wants to make substantial progress towards free trade agreements with other countries in the same period. It is difficult to find any independent expert who views this as deliverable. There is every reason to expect that government will be able to deal with the negotiations over a longer timeframe. Even this, however, will be a severe stretch on current resources, and attention will be drawn away from many other matters that might otherwise receive high priority.

⁴² Suzannah Brecknell, ‘[Civil service leaders must re-prioritise for Brexit, says chief John Manzoni](#)’, *Civil Service World*, 9 November 2016.

⁴³ Sir Ivan Rogers, [letter to staff](#), as printed by BBC News online, 4 January 2017.

⁴⁴ House of Commons European Scrutiny Committee, ‘[Sir Ivan Rogers gives evidence on EU–UK relations](#)’, 1 February 2017.

⁴⁵ Joseph Owen and Robyn Munro, [Whitehall’s Preparation for the UK’s Exit from the EU](#), Institute for Government briefing paper, December 2016, p. 3.

⁴⁶ House of Commons, ‘[Written Question: Department for Exiting the European Union: Recruitment](#)’, 5 December 2016, 55266; Jill Rutter and Hannah White, [Planning Brexit: Silence Is Not a Strategy](#) (London: Institute for Government), p. 6.

⁴⁷ Rutter and White, [op. cit.](#), p. 6.

⁴⁸ [Cabinet Committees](#) list, accessed 20 December 2016. For further details, see Eren Waitzman, ‘[Leaving the European Union: Machinery of Government Changes](#)’, House of Lords Library Note, 16 December 2016.

⁴⁹ Owen and Munro, [op. cit.](#), p. 4.

⁵⁰ Gavin Freeguard, Robert Adam, Emily Andrews, and Adam Boon, [Whitehall Monitor 2017: The Civil Service as It Faces Brexit](#) (London: Institute for Government), January 2017, p. 9.

4. The Role of Parliament

The Supreme Court has determined that parliament's consent is required before Article 50 can be triggered. The first question regarding the role that parliament will play in the Brexit process therefore concerns how it will perform that function: how likely is parliament in fact to give its consent, and what conditions might it demand be met along the way? The answers here are already becoming clear. More important in the long term, however, will be parliament's role once the negotiations have begun: in scrutinising the negotiation process, ratifying the deals that are done, and making the requisite adjustments to UK domestic law.

4.1 Triggering Article 50

The Supreme Court ruled on 24 January that parliamentary approval is needed before Article 50 can be triggered. It said that that approval must come in the form of legislation, but it did not offer any stipulations regarding the content of that legislation.

Two days after the ruling, on 26 January, the government published the European Union (Notification of Withdrawal) Bill. This two-clause bill said simply, 'The Prime Minister may notify, under Article 50(2) of the Treaty on European Union, the United Kingdom's intention to withdraw from the EU'. It added that this power holds notwithstanding the provisions of the European Communities Act of 1972 and of other legislation.⁵¹

Parliamentary examination of this bill began with the second reading debate in the House of Commons on 31 January and 1 February, providing an opportunity to debate and decide upon the general principle of the bill. The House supported that general principle – the principle, that is, of triggering Article 50 – by a large margin, of 498 votes to 114. The Conservatives, the bulk of the Labour Party, the Democratic Unionists (DUP), the Ulster Unionists (UUP), and the one UKIP MP voted for the bill, while the SNP, forty-seven Labour rebels, the Liberal Democrats, Plaid Cymru, the SDLP, the one Green MP, and one Conservative rebel – Kenneth Clarke – voted against.⁵²

Immediately following this vote, the House also voted to accept the government's proposed timetable for the remaining stages of Commons debate on the bill. Detailed scrutiny in 'Committee of the Whole House' takes place on 6- 8 February, and Commons processes will be concluded on the last of these days. The bill will then go to the House of Lords. The government has proposed that the Lords should hold its second reading debate, following the 'half-term' recess, on 20 and 21 February, that the committee stage will take place on 27 February and 1 March, and that Lords scrutiny will be completed on 7 March.⁵³ While the government cannot control the Lords timetable as it can the Commons timetable, the ease with which it won the Commons votes increases the likelihood that it will be able to hold to this plan. If the Lords amends the bill, the Commons will have to look at those amendments, and a period of 'ping pong' may ensue until the versions of the bill agreed by both chambers are identical. The government will want this to take place very quickly, possibly on 7 March.⁵⁴

⁵¹ [European Union \(Notification of Withdrawal\) Bill](#).

⁵² House of Commons, [Division 135](#), 1 February 2017; '[Brexit vote: How did your MP vote on the bill?](#)', BBC News online, 1 February 2017.

⁵³ HL Deb, [30 January 2017](#), c. 977.

⁵⁴ For a discussion of what can be expected for the remaining stages of the bill's passage through parliament, see Meg Russell, '[What might parliament do with the Article 50 bill?](#)', Constitution Unit blog, 31 January 2017.

Many commentators over recent months have treated the question of how Article 50 could be triggered as a matter of great importance that could have a major effect on the course of Brexit. The Constitution Unit's October newsletter challenged that view: it said, 'this has been something of a sideshow: even if the courts deem that parliament's consent is needed, it is all but certain to be granted'.⁵⁵ These words now appear very likely to prove accurate. Parliament is all-but-certain to approve the bill on triggering Article 50. The only remaining question concerns whether it will significantly amend the legislation before granting that approval. By the end of the second reading debate on 1 February, 128 pages of amendments, comprising 276 separate proposals, had been tabled in the Commons,⁵⁶ and more could be expected, in both chambers, during the process of parliamentary scrutiny.

Many of these proposed amendments would place extra requirements on the government to report its position to parliament or to seek parliament's approval before acting. Others relate to consultations with the devolved administrations, a requirement to hold a referendum on the withdrawal deal (see section 7.1), a requirement for consent from the devolved legislatures, requirements on the government to conduct a range of impact assessments, stipulations regarding the objectives that the government should pursue through the negotiations, protections on the rights of EU nationals resident in the UK, protections of other rights once the UK has left the EU, and assurances on maintaining the provisions of the Good Friday Agreement.

Before proposed amendments can be debated, they must be judged to be within the 'scope' of the bill. In addition, as Meg Russell explains, 'The bill ... lacks a 'money resolution', and amendments with significant financial implications (perhaps, for example, those committing to an additional referendum) may be considered out of order for that reason.'⁵⁷ Professor Russell continues, 'Decisions on which amendments are eligible for debate in Committee of the whole House are taken by the Chairman of Ways and Means (senior Deputy Speaker), Lindsay Hoyle, with advice from neutral Commons clerks.'⁵⁸

It is clear that the great majority of amendments will not be agreed. The Labour frontbench will concentrate on its core amendments. Some amendments will gain very broad support from the opposition parties, but they will pass only if they attract significant numbers of Conservative rebels. By the end of the second reading debate in the Commons, it appeared that the appetite for rebellion among Conservatives is likely to be limited: many of those who are uneasy about the present course apparently intend to wait until further into the Brexit process before speaking up.

In this context, one of the most significant amendments may prove to be a Labour proposal that ministers should not be able to conclude an agreement on withdrawal arrangements with the European Commission until the terms of that agreement have been approved by both chambers of parliament – thereby moving parliament's involvement at the end of the negotiations from ratification of what might then seem to be a 'done deal' to approval before the deal is done.⁵⁹ This is discussed in section 4.3. Whether even this amendment will be approved in the Commons and how far the Lords will seek to amend the bill remains unclear.

⁵⁵ 'Brexit and the Transformation of British Politics', *Constitution Unit Monitor 64* (October 2016), p. 1.

⁵⁶ European Union (Notification of Withdrawal) Bill, [Notices of Amendments given up to and including Wednesday 1 February 2017](#).

⁵⁷ Meg Russell, *op. cit.*

⁵⁸ *Ibid.*

⁵⁹ European Union (Notification of Withdrawal) Bill, [Notices of Amendments given up to and including Wednesday 1 February 2017](#), amendment NC1, p. 26.

4.2 Scrutiny of the Negotiations

Though the negotiations on Brexit will be conducted, on the UK side, by the government, parliament will have an important role in scrutinising the process. The Commons had already held several major debates on the matter before the Supreme Court's ruling. On 12 October 2016, it passed a motion stating that it 'believes that there should be a full and transparent debate on the Government's plan for leaving the EU'. It called on the Prime Minister 'to ensure that this House is able properly to scrutinise that plan for leaving the EU before Article 50 is invoked' while not doing anything that might 'undermine the negotiating position of the Government as negotiations are entered into'.⁶⁰ On 7 December, it further called 'on the Prime Minister to commit to publishing the Government's plan for leaving the EU before Article 50 is invoked'.⁶¹ The government agreed to these commitments, and the Secretary of State for Exiting the EU, David Davis, repeated an earlier undertaking 'that British parliamentarians would be at least as well served, in terms of information, as the European Parliament'. He added: 'we will provide as much information as possible – subject, again, to that not undermining the national interest. This is a substantive undertaking, but it must be done in a way that will not compromise the negotiation.'⁶² The import of these commitments has been considered by the Lords EU Committee, which describes them as 'significant'.⁶³ They imply that parliament will receive and have time to discuss 'all relevant documents, ... including draft negotiating texts' ahead of any key decisions.⁶⁴

There are three principal mechanisms through which scrutiny of the government's plans and conduct of the negotiations can occur: questions; debates and statements; and the work of select committees.

Questions

Parliamentary questions come in two basic types: *oral questions* are asked during regular question sessions in the parliamentary chamber; *written questions* normally receive a reply, in writing, within a week.

Ministers from different departments answer oral questions in the Commons according to a regular rota. By the end of January 2017, DExEU ministers had fielded three such question sessions, and ministers from many other departments had answered Brexit-related questions too. There had also been numerous questions in the Lords. By the same time, DExEU ministers in both chambers had been asked 570 written questions, of which they had answered 550.⁶⁵

Debates and Statements

Debates can take place on motions or in relation to statements made by ministers. The debates on 12 October and 7 December were both on 'opposition day' motions put down by the Labour Party. The Backbench Business Committee can also choose to schedule debates on EU-related matters after hearing (generally cross-party) applications from MPs – as it did,

⁶⁰ HC Deb, [12 October 2016](#), c. 145.

⁶¹ HC Deb, [7 December 2016](#), c. 336.

⁶² *Ibid.*, c. 235.

⁶³ House of Lords European Union Committee, *Brexit: Parliamentary Scrutiny*, 4th Report of Session 2016–17, HL 50, 20 October 2016, p. 17.

⁶⁴ *Ibid.*, pp. 20–21,

⁶⁵ [Written Questions and Answers](#), accessed 1 February 2017.

for example, for a debate in the Commons chamber on 3 November on the effects of Brexit on financial services.⁶⁶ The government can choose to facilitate debates in its own assigned time in parliament too, as it has done so far for debates on the implications of Brexit for workers' rights, transport, science and research, and security, law enforcement and criminal justice.⁶⁷ Backbench MPs can propose short debates at the end of the sitting day. Finally, matters can be proposed for debate through e-petition.

Ministers frequently give statements, after which detailed questioning can take place: in the Commons, the Speaker usually calls every MP who wants to ask a question, which in exceptional cases can take two or more hours. It is normal for the Prime Minister to make a statement after European Council meetings, and statements might be expected after major rounds of the Brexit negotiations. Ministers are also free to make statements at other times when they see fit: for example, David Cameron made a statement to the Commons on 27 June on the outcome of the EU referendum,⁶⁸ and David Davis gave statements on 7 November and 24 January on the triggering of Article 50, following the High Court and Supreme Court rulings on this matter.⁶⁹ It is, however, a matter entirely of ministerial discretion as to when statements are made, and there are few conventions as to when they are expected.

Urgent questions, despite their name, are best considered here too. They provide a mechanism through which, in effect, ministers can be called to parliament to provide a statement and answer follow-up questions. The current Commons Speaker (though not his Lords counterpart) has allowed many more of them than his predecessors. By the end of January 2017, there had been two urgent questions on Brexit-related matters in the Commons.⁷⁰ The low number reflects the fact that ministers have generally chosen to make a statement after major events pertaining to Brexit, so the urgent question mechanism has not been needed.

Select Committees

Finally, the negotiations will be scrutinised closely by select committees, which are the venues where parliament can explore matters in the greatest depth. The Commons system of departmental select committees has been revised to accommodate the new government departments. Most notably, an Exiting the European Union Committee has been established, chaired by Hilary Benn. It has unusually many members (twenty-one) in order to accommodate all sizeable parties and all parts of the UK. Given that Brexit will have at least some effects in all policy areas, however, virtually all select committees can be expected to take an interest. By the end of January 2017, forty-four committee inquiries relating to Brexit had been launched by twenty-eight different committees and subcommittees of the two chambers; fifteen of these had already reported.⁷¹ In the House of Lords, the Liaison Committee has established an Informal Brexit Liaison Group to (in its chair's words) 'help to bring as much coherence as possible to Brexit-related scrutiny by House of Lords Committees'.⁷²

⁶⁶ HC Deb, [3 November 2016](#), cc. 1093–1121.

⁶⁷ HC Deb, [7 November 2016](#), cc. 1302–64; [23 November 2016](#), cc. 950–1000; [19 December 2016](#), cc. 1229–83; [18 January 2017](#), cc. 955–1023.

⁶⁸ HC Deb, [27 June 2016](#), cc. 22–63.

⁶⁹ HC Deb, [7 November 2016](#), cc. 1255–85; HC Deb, [24 January 2017](#), cc. 620–92.

⁷⁰ HC Deb, [4 July 2016](#), cc. 607–21, and [11 July 2016](#), cc. 23–35.

⁷¹ Drawn from information on [Parliament's website](#).

⁷² House of Lords Liaison Committee, '[First Informal Brexit Liaison Group Meeting Held](#)', 22 November 2016.

In part, the select committees will seek to exercise influence by launching inquiries (as enumerated above) leading to reports. These reports may directly influence ministers. They may also shape how MPs and peers approach the issues, and they can attract significant media attention. In some cases, select committee reports lead to debates in the chamber. In others, they are simply cited in debates. During the second reading debates on the bill to trigger Article 50 on 31 January and 1 February, for example, MPs drew on the work not just of the Committee on Exiting the European Union, but also on that of the International Trade Committee, Treasury Committee, Science and Technology Committee, Justice Committee, Work and Pensions Committee, and Culture, Media, and Sport Committee.⁷³

In addition, committees can exert influence by calling ministers, officials, or others to give evidence in one-off sessions. The Commons Liaison Committee quizzed the Prime Minister on Brexit (and other matters) for approaching two hours on 20 December.⁷⁴ The government reports that DExEU ministers have so far appeared before committees twelve times,⁷⁵ including an appearance by David Davis before the Exiting the EU Committee on 14 December.⁷⁶ On 1 February, Sir Ivan Rogers, until early January the UK's Permanent Representative to the EU, provided revealing insights into preparations for the Brexit negotiations in an evidence session with the Commons European Scrutiny Committee while, simultaneously, Liam Fox, the Secretary of State for International Trade, gave evidence to the International Trade Committee.⁷⁷

Formal Scrutiny Powers?

The paragraphs above suggest that parliament will have the ability to influence the Brexit negotiations primarily by exerting political pressure: though questions, motions, and committee reports all have the capacity to extract ministerial explanations and to shape the political mood both inside and outside parliament, they are not officially binding. The question arises of whether parliament has – or might secure – any more formal power to force ministers in particular directions. Ultimately, the Commons always has that power, for it can always withdraw its confidence from a government that it deems to be acting inappropriately. But is there a binding power short of this nuclear option?

On normal EU matters, parliament does hold some extra cards, in the form of the 'European scrutiny reserve'. Under this procedure, which applies to a wide range of EU business, ministers cannot agree to a proposal in the Council of the European Union until the Commons European Scrutiny Committee (ESC) has considered the matter and 'cleared' it, or, if ESC considers further discussion is required, the matter has been debated and a resolution agreed, either in committee or on the floor of the House. Similar procedures also exist in the House of Lords.⁷⁸ Though ministers can exempt themselves from these procedures, the European

⁷³ HC Deb, [31 January 2017](#), cc. 818–995; HC Deb, [1 February 2017](#), cc. 1030–1144.

⁷⁴ House of Commons Liaison Committee, '[Prime Minister Questioned on EU Exit](#)', 20 December 2016.

⁷⁵ HM Government, [The United Kingdom's Exit from and New Partnership with the European Union](#), White Paper, Cm 9417, 2 February 2017, p. 11.

⁷⁶ Commons Exiting the EU Committee, '[Oral evidence: The UK's negotiating objectives for its withdrawal from EU, HC 815](#)', 14 December 2016.

⁷⁷ House of Commons European Scrutiny Committee, '[Sir Ivan Rogers gives evidence on EU–UK relations](#)', 1 February 2017; House of Commons International Trade Committee, '[Dr Liam Fox questioned on UK–EU trade following Brexit](#)', 1 February 2017.

⁷⁸ For details of the Commons system, see House of Commons, [The European Scrutiny System in the House of Commons: A Short Guide by the Staff of the House of Commons European Scrutiny Committee](#), May 2015. On the Lords, see [The Scrutiny Reserve Resolution and Scrutiny Overrides](#), accessed 20 December 2016.

scrutiny reserve is generally seen as providing an important mechanism through which parliament can ensure effective oversight over what ministers agree to at the European level.⁷⁹

There have been some suggestions that these provisions should be applied – or even strengthened – in relation to Brexit scrutiny. Indeed, advocates of a strong parliamentary role in the Brexit process have pointed out that Theresa May, speaking in 2008 when she was Shadow Leader of the House, advocated a stronger, exemption-free version of the scrutiny reserve: ‘We should have a statutory scrutiny reserve so that Ministers would have to gain parliamentary approval before negotiations in the Council of Ministers.’⁸⁰ The current scrutiny reserve procedures do not, however, apply to the Brexit negotiations.⁸¹ The Lords EU Committee has considered whether a new scrutiny reserve resolution should be adopted that would extend existing procedures to the Brexit negotiations, but it concluded, ‘On balance, however, we are persuaded that a formal and prescriptive scrutiny reserve could restrict the Government’s room for manoeuvre, thereby acting against the national interest.’⁸²

The relevant Commons committees – the Exiting the EU Committee and the European Scrutiny Committee – have not raised the issue of whether the scrutiny reserve procedure should be extended. The Exiting the EU Committee has, however, set out its expectations for the information that the government will make available to parliament:

- ‘Appropriate access to relevant documents, including draft negotiating objectives, draft amendments to those objectives, draft negotiating texts, agreed articles and draft agreements;
- Provision of these documents in sufficient time for the Committee to be able to express its view (or elicit views from other Committees), and for the Government to take account of the Committee’s views;
- The Government to respond to Committee recommendations in a timely manner and to explain fully where any recommendations are not accepted; and
- Consideration to be given to information being provided on a confidential basis to the Committee.’⁸³

Many of the amendments proposed to the legislation on triggering Article 50 make requirements regarding the provision of information to parliament. Whether parliament agrees to any of these amendments remains to be seen. In addition, parliament will exert binding power over aspects of Brexit through legislation, as discussed in section 4.4.

How Much Influence Will Parliament Really Have?

Flowing from this analysis of procedures, we can ask what power parliament is likely to be able to exert over the course of the negotiation process. Evidence from recent months

⁷⁹ Commons European Scrutiny Committee, *Reforming the European Scrutiny System in the House of Commons*, 24th Report of Session 2013–14, HC109-I, 20 November 2013, pp. 45–50.

⁸⁰ HC Deb, [7 February 2008](#), c. 1190. This has been picked up, for example, by Open Europe: ‘[Theresa May has previously supported a parliamentary vote on the government’s negotiating position with the EU](#)’, 12 October 2016.

⁸¹ Note, for example, the comments by Christopher Johnson, the Principal Clerk of the House of Lords European Union Committee, as reported in Toby Shevlane, ‘[Democracy Means Democracy: Parliament’s Role in Brexit Negotiations](#)’, Constitution Unit blog, 29 September 2016.

⁸² House of Lords EU Committee, *Brexit: Parliamentary Scrutiny*, 4th Report of Session 2016–17, HL 50, 20 October 2016, p. 21.

⁸³ House of Commons Exiting the European Union Committee, *The Process of Exiting the European Union and the Government’s Negotiating Objectives*, First Report of Session 2016–17, HC815, 14 January 2017, p. 17.

suggests that, even without formal powers, the various informal sources of influence are considerable. The government backed down in December on publishing its Brexit plan before triggering Article 50. It backed down again in January before the bill on triggering Article 50 had even been published, saying that it would publish its plans as a White Paper. It published that paper on 2 February.⁸⁴ The government will be conscious of its small Commons majority and the divisions on its own benches, as well as of the danger of defeat in the Lords, where it has no majority. It will be wary of the political costs of appearing to ignore parliament. Just how much influence parliament might be able to exert is, however, impossible to predict.

4.3 Agreeing the Deal and Ratifying Treaties

The deal or deals that emerge from the Brexit negotiations – the withdrawal deal itself and any deals on transitional arrangements and/or future relationship – will be international treaties. Agreeing a treaty was formerly a matter for the executive under the powers of the royal prerogative. It has long been convention, however, that parliament should normally have an effective veto, and this convention was enshrined in law in 2010. Section 20 of the Constitutional Reform and Governance Act, passed in the dying days of the government of Gordon Brown, gives the Commons the ability to block treaty ratification. The Lords can voice its dissent, but this can be overridden by ministers provided they have Commons support.⁸⁵

Nevertheless, the Constitutional Reform and Governance Act contains some wiggle room: section 22 says, ‘Section 20 does not apply to a treaty if a Minister of the Crown is of the opinion that, exceptionally, the treaty should be ratified without the requirements of that section having been met.’⁸⁶ No limitations are stated on the circumstances in which this exemption can be used. The only condition is that the minister concerned must give parliament an explanation. This provision is sometimes used, giving rise to questions over whether ministers might seek to deploy it in relation to the Brexit treaties.

The government initially gave mixed signals on how it would treat this matter. During the Commons debate on Brexit on 7 December, David Davis came close to ruling out any recourse to the exception clause. Asked whether ‘when we have a final deal, the matter will come to this House for ratification?’, he replied, ‘In fact there is a law that applies to this – the Constitutional Reform and Governance Act 2010 – so we are, in effect, bound by that.’ Pressed further to confirm ‘that there will be a vote on the final deal in this House?’, he said, ‘All I can say is what I have said before: that is what I expect. It is as simple as that.’ Pushed again, he added, ‘it is inconceivable to me that if the European Parliament has a vote, this House does not. It is as simple as that.’⁸⁷ While these statements fell short of a formal commitment, they were taken by many at the time as amounting to the same thing: parliament would be able to vote on the deal that is done. Speaking before the Liaison Committee on 20 December, by contrast, the Prime Minister refused to give any such commitment despite repeated questions.⁸⁸

⁸⁴ HM Government, *The United Kingdom’s Exit from and New Partnership with the European Union*, White Paper, Cm 9417, 2 February 2017.

⁸⁵ [Constitutional Reform and Governance Act 2010](#), section 20.

⁸⁶ *Ibid.*, section 22. For discussion, see Jill Barrett, ‘[The United Kingdom and Parliamentary Scrutiny of Treaties: Recent Developments](#)’, *International and Comparative Law Quarterly* 60, no. 1 (January 2011), pp. 229–31.

⁸⁷ HC Deb, [7 December 2016](#), cc. 234–5.

⁸⁸ House of Commons Liaison Committee, [Oral Evidence: The Prime Minister](#), HC833, 20 December 2016, Q16–18.

In her speech on 17 January, however, the Prime Minister confirmed that parliament will indeed have a vote on the final deal.⁸⁹ Assuming this vote takes place under the terms of the 2010 Act, the Commons will have the power to block that deal, while the Lords will be able only to express a view.

This is a significant power: given the government's slender Commons majority and the deep divisions within the Conservative Party on EU relations, victory for the government's preferred option, whatever that may be, is far from guaranteed. As the debate currently stands, given the position of the Labour Party, it appears that the government probably would win a vote if it managed to secure a deal close to the terms set out by Theresa May on 17 January. It would probably also secure ratification for a withdrawal deal combined with transitional arrangements that retained substantial elements of the status quo. On the other hand, a deal on any harder form of Brexit would be likely to meet stiffer opposition.

There is no guarantee, however, that the terms of debate will not shift significantly over the next two or more years. This is particularly the case if public opinion begins to change – a point that we explore in section 7. Making predictions is therefore unwise.

Though the ratification power undoubtedly matters, there is concern in parliament that a vote at the ratification stage will not give an opportunity for meaningful parliamentary involvement: parliament cannot amend a treaty, but can only agree it or block it; if the Commons chose to block the deal with little time left in the two-year window created by Article 50, that could lead to disorderly Brexit, which few are likely to be willing to countenance. Whether refusal to ratify would really lead inevitably to disorderly Brexit is considered in the next subsection. But the fear that it might is enough to have prompted the tabling of several amendments to the Article 50 bill calling for a binding parliamentary vote at an earlier stage. Specifically, as explained in section 4.1, Labour has put forward an amendment stipulating that both parliamentary chambers will need to accept the terms of a deal before ministers can agree the deal with the European Commission. Thus, rather than just deciding whether to ratify the deal that has been agreed, parliament would be involved in determining whether – and perhaps, to some degree, on what terms – that deal would be signed in the first place.

As with all other amendments to the Article 50 legislation, it is unclear at the time of writing that sufficient dissent will emerge on the Conservative benches in the Commons to allow this proposal to go through. Even if the amendment fails, however, it is possible that a similar requirement will emerge later, either formally – for example, in an amendment to the Great Repeal Bill – or informally, in an undertaking made by the government in response to political pressure.

What if Parliament Refuses to Ratify?

The implications of a refusal to ratify depend, first, on the rules under Article 50 and, second, on domestic politics.

Under Article 50, assuming the negotiations will go down to the wire and that the ratification vote will come only shortly before the two-year deadline, there are three options for how the government could react to a failure to ratify:

- first, it might allow the provision for automatic withdrawal after two years to take effect, such that the UK would leave the EU having done no deal;

⁸⁹ Theresa May, '[The Government's Negotiating Objectives for Exiting the EU](#)', speech delivered in Lancaster House, London, 17 January 2017.

- second, it might seek an extension to the negotiation window in order either to pursue a revised deal or to put the matter to voters in a referendum;
- third, it might seek to revoke its Article 50 trigger – but only if it is decided that this can be done unilaterally or if it can secure the agreement of all other member states.

The government insisted in the hearings before the High Court and the Supreme Court that Article 50 notification is irrevocable. Presumably it did so, in part at least, because it wants to retain the option of holding a gun to parliament's head at the time of ratification – saying that failure to ratify may force the UK into 'disorderly Brexit'. Given the general agreement that such Brexit would be highly damaging, parliament would certainly want to avoid this. On the other hand, precisely because of the perception that this option would be so harmful – for both the UK and the rest of the EU – failure to ratify would almost certainly be followed by a concerted effort to patch things up, at least temporarily, in order to avoid it. We know from the Eurozone crisis the skill with which the EU is capable of teetering on cliff edges without quite falling off.

In domestic politics too, ministers would seem to have three options in the event of a ratification defeat:

- to plough on, seeking a better deal or attempting to ride through the storm of disorderly Brexit;
- to resign and seek an early election, in which acceptance or rejection of the deal on the table would be the main issue;
- to call a second referendum, on whether to accept the deal or not.

Each of these options is fraught with difficulties: the government might lack credibility to carry on in these circumstances; an early election focused on the terms of the deal would split both the Conservative and Labour parties; a second referendum would open divisions at least as deep. What would actually happen would depend crucially on why parliament had refused to ratify: whether because the terms of the deal were inadequate or because parliament or the public had come to the view that it would be better to remain in the EU after all. This far out, it would be foolish to attempt to predict the course of events.

4.4 Legislation

Leaving the EU will involve changes not just to the UK's international treaty commitments, but also to domestic UK law. Legislation will come in at least two main phases. First, legislation will be required ahead of withdrawal from the EU to give effect to that withdrawal in domestic law and to make transitional arrangements. Second, very considerable subsequent legislative effort will be needed to review all the EU law that is initially carried over post-Brexit.

There will be additional legislation beyond these two main elements: aspects of the deal that is done with the EU will require legislation as well as ratification; the White Paper published on 2 February acknowledges this and indicates that the government expects to bring forward separate legislation on, for example, immigration and customs.⁹⁰ Uncertainty around such possibilities is, however, high at present; we concentrate here on what is currently knowable.

⁹⁰ HM Government, *The United Kingdom's Exit from and New Partnership with the European Union*, White Paper, Cm 9417, 2 February 2017, pp. 10–11.

The Great Repeal Bill

The government has said that it intends to complete the first of these steps through what it currently calls a 'Great Repeal Bill' (though that will not be its formal title), which it will introduce in parliament following this year's Queen's Speech and seek to enact well before Brexit itself takes place. Taking effect from the moment of Brexit, this will do three things.

First, it will repeal the European Communities Act of 1972 (ECA), which is the legislative underpinning of the UK's EU membership. ECA repeal on its own would, however, create chaos. Much UK law is derived from EU membership, and ECA repeal would render much of that law null. Given that such law regulates many important matters – including, for example, product standards, many aspects of workers' rights, and environmental standards – simply allowing it to lapse without replacement would cause innumerable problems.

Second, therefore, the Great Repeal Bill will also contain a 'savings provision' that will transpose the great bulk of this EU law (the *acquis*, as it is known) into domestic UK law, pending detailed review at a later date. EU law comes in two main forms: *regulations*, which apply directly in member states without need for translation into the domestic law of those states; and *directives*, which apply in a member state only after they have been enacted into law in that state. Repeal of the ECA, on its own, would nullify all regulations in the UK as well as all directives that have been translated into UK law by ministers under specific powers conferred upon them by the ECA. The savings provision will apply to all – or at least the great bulk – of both categories.

Third, it will give power to ministers to alter the transposed *acquis* to render it meaningful in a post-Brexit context. This was explained by David Lidington, Leader of the House of Commons, in evidence before the European Scrutiny Committee on 18 January: the Great Repeal Bill, he said, 'will propose a power—which will be defined; it will not be an unlimited power—for Ministers, by means of secondary legislation, to modify those *acquis* obligations to ensure that they can continue to operate in a coherent fashion on the day we leave'. He continued: 'To take the most obvious example, there will be many directives and regulations that make reference to a named EU-level regulator. Clearly, the name of a UK regulator will need to be substituted for the EU regulator.'⁹¹

Most people agree that the government's approach here is sensible. Nevertheless, ministers will face a range of problems. An excellent paper from the House of Commons Library reviews many of these in detail.⁹² Here we briefly mention three:

- First, the bill, as just indicated, will seek to empower ministers to alter the *acquis* in the process of transposition: some elements may be amended; it is possible that others might not be transposed at all. Parliament may be reluctant to confer such wide-ranging powers, particularly at a stage when the terms of Brexit are unknown. One option that has been mooted is that the ability of ministers to amend the *acquis* by secondary legislation might be limited to making those changes that are strictly necessary to reflect the fact that the UK will no longer be part of the EU.⁹³ Whether

⁹¹ European Scrutiny Committee, [Oral evidence: Government's Approach to European Scrutiny](#), HC 953, 23 January 2017, Q22. See also HM Government, [The United Kingdom's Exit from and New Partnership with the European Union](#), White Paper, Cm 9417, 2 February 2017, p. 10.

⁹² Jack Simson Caird, [Legislating for Brexit: The Great Repeal Bill](#), House of Commons Library Briefing Paper no. 7793, 21 November 2016.

⁹³ Dr Paul Daly, [written evidence](#) to the House of Lords Constitution Committee's inquiry on The Legislative Process, 13 January 2017.

this is what David Lidington's words, quoted above, imply is not yet wholly clear. Another suggestion is that sunset clauses might be attached at least to parts of the *acquis*, so that decisions made in haste ahead of Brexit are not set in stone.⁹⁴

- Second, repeal of the ECA and transposition of laws will alter the powers of the devolved assemblies in Scotland, Wales, and Northern Ireland. That, by convention, requires the consent of those assemblies, and it is uncertain whether this will be forthcoming, particularly in Scotland. Indeed, the Scottish Secretary acknowledged on 26 January that the Great Repeal Bill is very likely to trigger the 'legislative consent' process.⁹⁵ We discuss this further in section 6.1.⁹⁶
- Finally, whatever the specifics of the bill, its passage through parliament will be no easy matter. Many MPs and peers are likely to resist giving the government what it wants until the terms of Brexit are clearer. While most MPs have decided not to contest the principle of Brexit by opposing the bill on triggering Article 50, many are likely to take a much more activist approach to the detailed arrangements for a post-Brexit future. With a slender majority in the Commons and no majority in the Lords, there is no guarantee that ministers will secure even a relatively innocuous version of the bill at such an early stage.

The Review of EU-Derived Law

The second stage will be to review all UK law that derives from EU membership and decide what should be kept as it is, what should be amended, and what should be repealed. This will apply not just to the provisions that will be transposed into UK law by the Great Repeal Bill, but also to other EU law that would survive simple ECA repeal, including EU measures that have been enacted into UK law by primary legislation. As we have noted, these laws cover a huge variety of policy areas. There is general agreement that the review process will take many years. Indeed, it is quite possible that it will never be done comprehensively.

The government will be primarily responsible for conducting the review, but parliament will want to be closely involved: parliamentary select committees will carry out their own reviews and make recommendations that they will want government to listen to; there will be pressure for parliament to have an opportunity to set general principles in each policy area before details are decided. The degree to which government will in fact heed such calls is unclear.

Once the law in any particular area has been reviewed, it will be necessary to legislate for any changes. Given the number of changes likely to be involved and, often, their technical nature, this will happen, in many cases, through secondary legislation, rather than through primary Acts of parliament. Secondary legislation is, however, subject only to limited parliamentary scrutiny: much of it is never voted on at all in parliament; and parliament has the power only to agree it or to veto it, not to amend it. The Lords Constitution Committee is currently conducting an inquiry into the legislative process,⁹⁷ and it has brought forward the section dealing with secondary legislation in order to inform discussions around the review of EU-derived law. In particular, its call for evidence asks whether 'there [is] a case for making secondary legislation amendable in certain circumstances' and whether there should be 'greater use of an enhanced scrutiny process that allows Parliament to scrutinise draft

⁹⁴ Baroness Fookes, in oral evidence to the House of Lords Constitution Committee: [Uncorrected Oral Evidence The Legislative Process, 25 January 2017](#), p. 9.

⁹⁵ 'Mundell: Holyrood to be consulted on Great Repeal Bill', BBC News online, 26 January 2017.

⁹⁶ See also *ibid.*, pp. 41–51.

⁹⁷ House of Lords Constitution Committee, [Legislative Process Inquiry](#).

instruments before a final version is introduced for approval'.⁹⁸ It also specifically asks whether 'changes will be required to procedures related to the delegation of powers or secondary legislation, to cope with the legislation likely to be required as a result of Brexit'.⁹⁹ The committee will report later in the year. As indicated above, the government might try to resolve this tussle through the Great Repeal Bill but find it impossible to secure parliament's acquiescence. It could become a longstanding point of contention between ministers and other MPs and peers.

⁹⁸ House of Lords Constitution Committee, Inquiry into the Legislative Process, 'Call for Evidence on the Delegation of Powers',

⁹⁹ Ibid.

5. The Role of the Courts

The courts – the traditional third branch of government, alongside the executive and the legislature – have clearly already had and may well continue to have an important role in the Brexit process. This section outlines that role. After briefly sketching the part we already know – relating to the triggering of Article 50 – we go on to consider whether other Brexit-related matters might also end up in the hands of the judges.

5.1 Triggering Article 50

The Supreme Court ruled on 24 January that the government cannot initiate the Brexit negotiations by triggering Article 50 without parliament's approval, thereby confirming the ruling made by the High Court in November. Parts of the press expressed great indignation, particularly in the wake of the first of these judgements, suggesting that a cadre of unelected, elitist judges were seeking to subvert the will of the people as expressed in the referendum. Though it has been said many times before,¹⁰⁰ it is worth while to reiterate why such claims are not only wrong-headed, but also damaging to the democratic system:

- First, the courts have not expressed any view at all on whether Brexit should take place or not. They have merely clarified the law as to the proper processes through which such a change can occur. As we saw above, it is overwhelmingly likely that parliament will give its consent to triggering Article 50.
- Second, the reasoning the courts have followed to reach their conclusion is fairly straightforward and based on longstanding principles. The government argued that it could trigger Article 50 using its powers with respect to foreign policy within the royal prerogative. The royal prerogative powers are those that reside formally with the monarch, rather than with parliament, and which are mostly exercised in practice by the government. It is a centuries-old principle, however, that the royal prerogative cannot be used to change primary legislation. The courts have concluded that departure from the EU will have the effect of changing primary legislation in the UK. Triggering Article 50 can, under the two-year rule, potentially lead to departure from the EU without any further reference to parliament: Brexit just automatically happens after two years if no deal has been done and the negotiating window has not been extended. Given these premises, it follows that the prerogative powers cannot be used to trigger Article 50: parliament must pass legislation first.¹⁰¹
- Third, it is entirely appropriate and normal that the courts should do this. The courts have been policing the boundaries of the prerogative powers for centuries.¹⁰² It is a fundamental protection of democratic freedoms that the government should not be able to overturn laws agreed by parliament through executive fiat. Some say that the referendum should override that. But the courts can work only on the basis of the law, not according to what some people might happen to find intuitively appealing. The legislation that allowed the referendum to happen did not say that a Leave vote in the

¹⁰⁰ For further discussion, see Alan Renwick and Meg Russell, '[We Need to Talk about Our Democracy](#)', Constitution Unit blog, 6 November 2016.

¹⁰¹ For the Supreme Court's full reasoning, see Supreme Court, [R \(on the application of Miller and another\) v Secretary of State for Exiting the European Union](#), 24 January 2017. This is outlined briefly in a [press summary](#) produced by the Supreme Court.

¹⁰² See, e.g., Nick Barber, Tom Hickman, and Jeff King, '[Pulling the Article 50 "Trigger": Parliament's Indispensable Role](#)', UK Constitutional Law Association blog, 27 June 2016.

referendum would empower the government to trigger Article 50. The necessary parliamentary approval, therefore, was not given.

- Finally, and more broadly, democracy rests upon the foundation of the rule of law. Democracies make decisions, which are then enshrined in law so that they are plain for all to see. If the rules that have been decided democratically are ignored, we no longer have democratic decision-making. If the government is allowed to do what it wants without respecting the law, it can all too easily subvert the checks and balances that keep the democratic arena pluralistic and healthy. Those who equate democracy with unadulterated majority rule fail to appreciate the importance in a complex and diverse society of checks and balances. Newspapers that trash judges unfairly risk undermining understanding of and confidence in this system.

The government did win in the Supreme Court on two points, both relating to devolution. One of these points concerned whether the consent of the devolved legislatures would be needed before Article 50 could be triggered. The Court rejected this, saying that the ‘Sewel convention’ on such consent is what its name implies: a non-justiciable convention (see section 6.1).¹⁰³ The other point related to an argument that, under the Belfast Agreement and the legislation underpinning the Northern Ireland Assembly, Northern Ireland cannot be taken out of the EU without the consent of its people at a referendum. Northern Ireland having voted by 56 per cent to 44 per cent to remain in the EU, this consent has not been given. The Court rejected this too and agreed with the UK government that such consent is not required.¹⁰⁴

5.2 Assessing the Legality of the Referendum

We now turn to potential further legal rulings relating to Brexit or the Brexit process. Three main actions are currently being contemplated or pursued.

The first takes us back to the referendum in June. Many (including the present author) have argued that the campaign that preceded the referendum was marred by widespread misinformation and sometimes outright lying.¹⁰⁵ Some have sought to challenge the legality of the referendum result on this basis. Most recently, in October, a group calling itself Restoring Integrity to Democracy, led by Professor Bob Watt of the University of Buckingham, made a formal referral to the Director of Public Prosecutions alleging that the two main Leave campaign groups had breached the rules on ‘undue influence’ upon the vote at least six times by making claims that they knew to be false.¹⁰⁶

The fundamental problem faced by any such case is that lying is not explicitly outlawed by the legislation that exists on referendum campaigns, and there is no precedent for interpreting the provisions regarding ‘undue influence’ as Professor Watt proposes. The Representation of the People Act (RPA) of 1983 (section 106), in relation to election campaigns, does outlaw ‘false statement[s] of fact’ relating to a ‘candidate’s personal character or conduct’.¹⁰⁷ This provision is, however, very narrowly drawn: it does not rule out lying relating, for example, to

¹⁰³ Supreme Court, [R \(on the application of Miller and another\) v Secretary of State for Exiting the European Union](#), 24 January 2017, para. 136–51.

¹⁰⁴ *Ibid.*, para. 134–5.

¹⁰⁵ See, for example, a letter to the *Telegraph* signed by over 250 political scientists and academic lawyers: Alan Renwick et al., ‘[Both Remain and Leave are propagating falsehoods at public expense](#)’ *Telegraph*, 14 June 2016.

¹⁰⁶ Jessica Elgot, ‘[Brexit: CPS Considers Complaint that Leave Campaigns Misled Voters](#)’, *Guardian*, 7 November 2016. Further information is available on the [Restoring Integrity to Democracy](#) website.

¹⁰⁷ [Representation of the People Act 1983](#), section 106.

policy proposals or to the effects of such proposals. A recent failed case against the MP Alistair Carmichael illustrates that the courts have been very reluctant to countenance any more expansive interpretation.¹⁰⁸ The ‘undue influence’ section of the RPA (section 115), meanwhile, is about attempts to force people to vote or not vote. As summarised by the Electoral Commission in their guidance to EU referendum campaigners, it provides that ‘A person is guilty of undue influence if they directly or indirectly make use of or threaten to make use of force, violence or restraint, or inflict or threaten to inflict injury, damage, harm or loss upon or against any person in order to induce or compel that person to vote or refrain from voting.’¹⁰⁹ It would be very surprising if any court were to interpret this as banning misleading statements about options.

It appears vanishingly unlikely, therefore, that any challenge to the legality of the referendum will be successful.

5.3 Leaving the EU and Leaving the EEA

The next issue concerns whether an additional strand of negotiation and decision-making is needed alongside the EU membership negotiations in order to determine whether the UK should leave the European Economic Area (EEA).

Lawyers for British Influence, a pro-single-market think tank, has said that it will launch legal proceedings to challenge the government’s stated position that the UK’s EEA membership will automatically lapse when it leaves the EU.¹¹⁰ Media reporting suggests that an initial hearing is expected in February.¹¹¹ The Irish case discussed in section 5.4, below, also seeks a ruling on the same matter.¹¹² If the courts rule that leaving the EU does not automatically mean leaving the EEA as well, then the UK government will have to begin that withdrawal process by giving notification under Article 127 of the EEA Agreement. Under the terms of Article 127, this would take at least twelve months to come into effect.¹¹³ A further issue may then arise, namely whether the government may give Article 127 notice without parliamentary authority, much as in the case of Article 50.

As the proceedings are embryonic at the time of writing, it is unclear whether they will succeed. If they do, the effect will be simply to create an extra step in the process by which the government pursues its Brexit goals, with the possibility that parliament could refuse to give its consent.

5.4 The Revocability of Article 50 Notification

The final matter relates to whether, once Article 50 has been triggered, it is possible to revoke that trigger. This could become important if public opinion shifts away from supporting Brexit

¹⁰⁸ See Philip Sim, [‘Why the Election Court Case against Alistair Carmichael Failed’](#), BBC News online, 9 December 2015.

¹⁰⁹ Electoral Commission, [Campaign Dos and Don’ts for EU Referendum Campaigners](#), p. 14, accessed 23 December 2016.

¹¹⁰ [‘Smart Brexit’](#), British Influence, 28 November 2016. See also the [Article 127 Campaign](#) website.

¹¹¹ Katie Forster, ‘Article 127: Court hearing on single market legal challenge postponed’, *Independent*, 16 January 2017.

¹¹² Gavin Barrett, [‘Tackling Brexit in the Irish courts is a long shot. But sometimes long shots work’](#), *Guardian*, 26 January 2017.

¹¹³ [Agreement on the European Economic Area](#), Article 127.

and pressure for a rethink begins to grow. As explained in section 2.4 above, there is no doubt that Article 50 notification can be reversed if all other member states agree. But if unanimous agreement among the EU-27 is necessary, the UK might be forced into unwelcome concessions in order to obtain it. Whether Article 50 notification can also be revoked unilaterally by the UK might, therefore, make a difference: the UK government would probably wish to avoid the confrontationalism of unilateral revocation, but the possibility would, at least, strengthen its negotiating hand. As section 2.4 also explained, there is wide agreement among legal scholars that Article 50 notification can be revoked unilaterally, but this view is not held unanimously and the matter has not been subject to judicial ruling.

The question therefore arises of whether a ruling might be forthcoming. Because the issue at stake is the interpretation of EU law, the ruling has to be made by the European Court of Justice (ECJ) in Luxembourg. Referral to the ECJ has to come from another court, but it can be from any court in any EU member state.

At present, the likeliest source of such a reference appears to be through the Irish courts. In early December, a British lawyer launched a crowd-funding appeal to enable a court case that was intended to generate a referral to the ECJ on the revocability question.¹¹⁴ The funding target was reached within forty-eight hours, and the case was filed in the High Court in Dublin on 27 January.¹¹⁵ The case is, on the surface, about whether the Irish government has acted unlawfully by colluding in the exclusion of the UK from European Council meetings while the UK is still in the EU, and about whether Article 50 has in fact already been triggered by the UK government's statements on Brexit. These arguments are intended, however, merely to create an opportunity for referring the revocability question to the ECJ.

Whether the case will succeed in extracting a referral to the ECJ and then a ruling from the ECJ on the revocability question is far from clear. The potential barriers are set out by Professor Gavin Barrett of University College Dublin's Law School.¹¹⁶

- First, the litigants will need to show that they have standing and that there is a 'justiciable controversy' to be resolved: 'a large question mark must hang over the appropriateness of proceedings that really appear to be to about getting the Irish courts to ask for advice rather than to succeed against the defendant'.¹¹⁷
- Second, the Irish court will have to agree to refer the matter to the ECJ. As Eoin O'Dell of the Law School at Trinity College Dublin puts it, 'The issue of EU law must be unclear, and resolving it must be necessary to the resolution of the case. Even then, the High Court and the Court of Appeal have discretion in this decision. Only the Supreme Court must refer'.¹¹⁸
- Third, if referral does take place, the ECJ itself will have to agree to answer the question: 'It has in the past declined to answer questions it considers contrived or hypothetical. There is more than a touch of that in this case'.¹¹⁹

¹¹⁴ Jo Maugham, '[A Brexit for the 100%](#)', Crowd Justice, accessed 23 December 2016.

¹¹⁵ Siobhan Fenton, '[Brexit: New Article 50 Court Challenge to Go Ahead after Thousands Back Campaign](#)', *The Independent*, 11 December 2016; '[Brexit Papers Lodged in High Court](#)', RTÉ News online, 27 January 2017.

¹¹⁶ Gavin Barrett, '[Tackling Brexit in the Irish courts is a long shot. But sometimes long shots work](#)', *Guardian*, 26 January 2017.

¹¹⁷ *Ibid.*

¹¹⁸ Eoin O'Dell, '[There's no guarantee Ireland's new Brexit case will get the referral it wants](#)', *Cearta.ie* blog, 11 December 2016.

¹¹⁹ Barrett, *op. cit.*

The lawyer leading the case, Jolyon Maugham, hopes that referral to the ECJ might occur in April and that a ruling could be reached in the summer.¹²⁰ Only time will tell whether he succeeds in these aims.

5.5 Other Judicial Involvement?

As is readily apparent, the Brexit process will be complex, lengthy, and contested. That further matters will end up in the judges' laps therefore appears very likely. In particular, claims that Brexit leads to the violation of various kinds of individual rights can be expected. Ultimately, the deal or deals done between the UK and the EU may also be subject to judicial review: speaking to the *Financial Times*, Koen Lenaerts, the President of the European Court of Justice (ECJ), has pointed out that, when doing any deal with another country, the EU must ensure it does not 'breach its own law'. The ECJ has ruled against aspects of such agreements in the past, as in a case in 1991 regarding the court created for the European Economic Area.¹²¹

At each stage, it should be remembered that the courts will not take a view on Brexit itself, but will rather seek to ensure that the rule of law is upheld.

¹²⁰ Jolyon Maugham, '[Is Article 50 Reversible? A Primer on the Dublin Case](#)', *Waiting for Godot* blog, 17 January 2017.

¹²¹ Duncan Robinson and Alex Barker, '["Many ways" Brexit may go to EU courts, top ECJ judge says](#)', *Financial Times*, 21 November 2016.

6. The Role of the Devolved Administrations and Local Authorities

The referendum result divided the UK. Majorities in England and Wales voted to Leave, while most voters in Scotland and Northern Ireland opted for Remain. Within England, London stood out for its strong Remain vote. In Northern Ireland, the nationalist community voted overwhelmingly for Remain, while the unionist community voted largely (though much less decisively) for Leave.¹²²

It has been apparent since the moment the referendum result was known that the devolved administrations would have a role in the ensuing processes. In his Downing Street statement on 24 June, David Cameron said, 'We must now prepare for a negotiation with the European Union. This will need to involve the full engagement of the Scottish, Welsh and Northern Ireland governments to ensure that the interests of all parts of our United Kingdom are protected and advanced.'¹²³ On the same day, the Scottish First Minister, Nicola Sturgeon said:

I have made clear to the prime minister this morning that the Scottish government must be fully and directly involved in any and all decisions about the next steps that the UK government intends to take. We will also be seeking direct discussions with the EU institutions and its member states, including the earliest possible meeting with the President of the European Commission. I will also be communicating over this weekend with each EU member state to make clear that Scotland has voted to stay in the EU – and that I intend to discuss all options for doing so.¹²⁴

Within forty-eight hours of becoming Prime Minister, Theresa May travelled to Edinburgh to meet Nicola Sturgeon, where she said she was 'willing to listen to options' for Scotland's future relationship with the EU.¹²⁵ The Joint Ministerial Committee, with gathers representatives of the UK and devolved governments, met in plenary for the first time in October in almost two years. It agreed the creation of a subcommittee, which would:

- '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.'¹²⁶

This subcommittee has met monthly since November 2016.¹²⁷ In her speech on 17 January, Theresa May said, 'We won't agree on everything, but I look forward to working with the

¹²² For detailed analysis of the voting patterns, see Elise Uberoi, *European Union Referendum 2016*, House of Commons Library Briefing Paper, no. CBP 7639, 29 June 2016; Matthew Goodwin and Oliver Heath, '[Brexit Vote Explained: Poverty, Low Skills and Lack of Opportunities](#)', Joseph Rowntree Foundation, 31 August 2016; John Garry, '[The EU Referendum Vote in Northern Ireland: Implications for Our Understanding of Citizens' Political Views and Behaviour](#)', Knowledge Exchange Seminar Series briefing paper, Queen's University Belfast.

¹²³ David Cameron, '[EU Referendum Outcome: PM Statement, 24 June 2016](#)', accessed 22 December 2016.

¹²⁴ BBC News online, '[Brexit Vote: Nicola Sturgeon Statement in Full](#)', 24 June 2016.

¹²⁵ BBC News online, '[Brexit: PM is "willing to listen to options" on Scotland](#)', 15 July 2016.

¹²⁶ [Joint Ministerial Committee Communiqué](#), 24 October 2016.

¹²⁷ [Joint Ministerial Committee \(EU Negotiations\) Communiqué](#), 9 November 2016; [Joint Ministerial Committee \(EU Negotiations\) Communiqué](#), 7 December 2016; no communiqué has followed the January meeting, but see,

administrations in Scotland, Wales and Northern Ireland to deliver a Brexit that works for the whole of the United Kingdom.¹²⁸

These various statements and activities reflect the fact that Brexit will have major implications for the populations of the nations and for their governance arrangements.

Just how far the devolved institutions have a right to be consulted has been a matter of some dispute. This section begins by considering that question. We then consider the dynamics in each of the devolved nations separately. The role that each might in practice play in the Brexit process depends on four primary factors: the nature of their governance arrangements; the position taken by the devolved government in the referendum; the direction of the referendum vote in that nation; and the underlying political situation. Each nation has a different combination of these factors and therefore requires separate attention. In addition, the final subsection considers the possible roles for London and for local authorities.

6.1 How Much Consultation Is Required?

As just indicated, the UK government has acknowledged that the devolved institutions should have a role in the Brexit process. From the UK government's perspective, however, that role is purely consultative. While the terms of reference of the JMC subcommittee, quoted above, express a desire to 'agree a UK approach' to the Brexit negotiations, Theresa May and David Davis have made it abundantly clear that they see the decisions on the UK's approach to the negotiations as lying firmly in their own hands. Indeed, the UK government appears to take a minimalist view of what 'consultation' means: Theresa May apparently did not consult with the devolved governments ahead of her Lancaster House speech on 17 January.

The Scottish government is most vociferous in taking a different view, arguing that the UK authorities are constitutionally obliged to pay heed to the will of the Scottish Parliament. One of the basic tenets of the devolution arrangements as they have operated since 1999 is that the UK parliament will not interfere with the areas of responsibility that lie within the remits of the devolved bodies (in Scotland, Wales, or Northern Ireland) without those bodies' consent. This is summed up in the so-called Sewel convention:

the UK Government will proceed in accordance with the convention that the UK Parliament would not normally legislate with regard to devolved matters except with the agreement of the devolved legislature.¹²⁹

In practice, the Sewel convention has been extended also to decisions that alter the scope of the devolved powers, such that, in addition, the Westminster Parliament will not normally change the powers of a devolved legislature without its consent. In Scotland's case, the original version of the Sewel convention is enshrined in statute law by section 2 of the Scotland Act of 2016:

for example, Aidan Kerr, 'Brexit: UK Government warned Scotland "must be equal partner"', STV News online, 19 January 2017.

¹²⁸ Theresa May, '[The Government's Negotiating Objectives for Exiting the EU](#)', speech delivered in Lancaster House, London, 17 January 2017.

¹²⁹ [Memorandum of Understanding and Supplementary Agreements between the United Kingdom Government, the Scottish Ministers, the Welsh Ministers, and the Northern Ireland Executive Committee](#), last updated October 2013, para. 14.

it is recognised that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament.¹³⁰

A similar provision appears in the Wales Act of 2017, which receive royal assent on 31 January.

Brexit clearly engages the Sewel convention. EU competences extend into many areas of policy-making where responsibility within the UK is devolved – agriculture being perhaps the deepest. The Great Repeal Bill will involve legislation in all matters of EU competence, including those that are devolved. How powers are transferred back to the UK – and which level of government they move to – is likely to prove highly controversial. As was explained in section 4.4, the government proposes that, in cases where functions are currently performed by EU agencies, UK ministers will have powers to decide by secondary legislation what UK-based body will assume those functions. The devolved administrations will want to be fully involved in those decisions. Furthermore, in order to effect Brexit cleanly, it will be necessary to amend the devolution statutes, which currently constrain the devolved assemblies to operate within the confines of EU law.¹³¹

There is every reason to expect the Scottish Parliament to refuse its consent to any arrangement that does not deliver its red lines for Scotland's future relationship with the EU. Difficulties are entirely possible in Wales and Northern Ireland too. The key question is what will happen after that.

In law, the matter is clear: as the Supreme Court confirmed in its ruling on 24 January, the Sewel convention does not give the devolved institutions any justiciable rights.¹³² Even the legally codified form of the convention contains the words 'will not normally', without defining what 'normally' means; it therefore gives Westminster the power to make an exception if it chooses. The UK government could readily argue that decision-making on Brexit is far from normal, and that, if overriding the will of one or other devolved institution is necessary in order to implement the result of the Brexit referendum, then that is what must happen.

In constitutional and political terms, however, such a move would be highly controversial. For the UK government and parliament to ignore a refusal to grant consent from one of the devolved assemblies would clearly violate the spirit of the convention: it would be very odd to argue that the normal safeguards are not relevant when the biggest policy issues for decades are at stake. In Scotland and in parts of the community in Northern Ireland, such action could be greeted very unfavourably by public opinion.

How this bites is likely to vary across the Brexit process:

- The first test comes with the bill on triggering Article 50. The UK government's view is that the bill 'does not contain any provision which gives rise to the need for a legislative consent motion in the Scottish Parliament, the National Assembly for Wales or the Northern Ireland Assembly'.¹³³ The SNP takes a different view and has tabled an

¹³⁰ [Scotland Act 2016](#), section 2.

¹³¹ Sionadh Douglas-Scott, '[Brexit, devolution and legislative consent: what if the devolution statutes were left unchanged after Brexit?](#)', Constitution Unit blog, 15 June 2016.

¹³² Supreme Court, [R \(on the application of Miller and another\) v Secretary of State for Exiting the European Union](#), 24 January 2017, para. 148.

¹³³ [European Union \(Notification of Withdrawal\) Bill: Explanatory Notes](#), p. 2.

amendment to the bill requiring such consent before Article 50 is triggered.¹³⁴ That will not pass, but the Scottish government will presumably not change its view, and the Presiding Officer of the Scottish Parliament might allow a debate anyway on whether the Parliament gives its consent. But a refusal of consent on this point is unlikely to have immediate consequences: the UK government will ignore it; the political case for saying the devolved legislatures cannot block the Brexit decision itself is strong; and, as discussed below, it is too early for Nicola Sturgeon to push matters further.

- When it comes to the Great Repeal Bill and other decisions on the form of Brexit, by contrast, it will be much harder for UK ministers to suggest that the Sewel convention is not relevant: the powers of the devolved legislatures will clearly be affected and it will be impossible to argue that the referendum last June decided the form that Brexit should take or the ways in which EU powers should revert back to the UK.

This latter point was acknowledged by the Scottish Secretary, David Mundell, on 26 January, when, following discussions with Scottish ministers, he said in relation to the Great Repeal Bill (see section 4.4, above), ‘it’s fair to anticipate that it would be the subject of a legislative consent process’. He added:

I think there are really big issues that will be in the Great Repeal Bill, there will be issues around the powers for this parliament [i.e., the Scottish Parliament] and issues around whether we have a hole in our law because the body of European law hasn't been adopted. So not agreeing to the Great Repeal Bill would have very significant consequences.¹³⁵

Notwithstanding these comments, it appears inconceivable that the UK government would allow a refusal of consent in the Scottish Parliament or one of the other devolved assemblies to derail its Brexit plans. But overriding a refusal to grant consent could have profound implications for the future of the UK.

6.2 Scotland

The Scottish government has been most vocal since the referendum in pressing its case for a major say over the Brexit process. That reflects its own strong support for Remain, the substantial (though hardly overwhelming) vote for Remain in Scotland in the referendum, and the strength of the Scottish independence movement. Two principal questions need to be addressed. First, what does the Scottish government want? Second, what will happen if it does not get it?

What the Scottish Government Wants

As regards the Scottish government’s wishes, we can look both at its preferences for Scotland’s future relationship with the EU and at its goals for the distribution of power within the UK.

In setting out its goals for Scotland’s future relationship with the EU, the Scottish government initially aimed high. In her statement on 24 June, Nicola Sturgeon said: ‘I want to make it absolutely clear that I intend to take all possible steps and explore all options to give effect to how people in Scotland voted – in other words, to secure our continuing place in the EU and

¹³⁴ House of Commons, European Union (Notification of Withdrawal) Bill: [Notices of Amendments](#) given up to and including Tuesday 31 January 2017, amendment 46, p. 59.

¹³⁵ ‘[Mundell: Holyrood to be consulted on Great Repeal Bill](#)’, BBC News online, 26 January 2017.

in the single market in particular.¹³⁶ She thus held out the possibility that Scotland might, by some mechanism, retain its EU membership, whatever might happen in the rest of the UK. But she also placed particular emphasis upon Scotland's membership of the single market.

The Scottish government set out its considered, and somewhat moderated, position in a detailed policy paper published in December 2016.¹³⁷ While restating its optimal preference of an independent Scotland within the EU, this emphasised the negotiating objective, rather, of Scotland's continued membership of the single market. There is recognition here that Scottish independence any time soon looks unlikely (see below) and that it is not feasible for Scotland to be in the UK and the EU while the rest of the UK (or at least England and Wales) is outside the EU.

The paper explores two ways in which Scotland might remain within the single market: first, if the UK as a whole remains within the single market; second, if Scotland remains within the single market even when the rest of the UK leaves. Of these two options, the Scottish government prefers the first: 'we believe Scotland's interests would be best served if the UK retained its membership of the EEA. ... We also believe that it is in the UK's and Scotland's interests to stay within the EU Customs Union.' On the second, it says, 'this paper argues that the UK should support Scotland remaining within the European Single Market, even if the outcome for the rest of the UK is to leave the EEA.'¹³⁸

Theresa May has now ruled out the first of these options. She appears not to be considering the second either, and, indeed, several experts have expressed grave doubts as to its viability.¹³⁹ The chances that the Scottish government will get what it has been calling for therefore look bleak.

Turning to the Scottish government's preferences regarding the distribution of powers within the UK, it naturally wants the greatest possible devolution of those powers. It proposes the transfer of EU powers to Scotland not only in existing areas of devolved responsibility, but also in additional areas, such as employment law.¹⁴⁰

This contrasts, at least to a degree, with the more cautious approach expressed so far by the UK government. The White Paper published on 2 February sets out basic principles. On the one hand, it says, 'We have already committed that no decisions currently taken by the devolved administrations will be removed from them and we will use the opportunity of bringing decision making back to the UK to ensure that more decisions are devolved.'¹⁴¹ This chimes with the Scottish government's agenda. On the other hand, it also says, 'We will maintain the necessary common standards and frameworks for our own domestic market, empowering the UK as an open, trading nation to strike the best trade deals around the world and protecting

¹³⁶ BBC News online, '[Brexit Vote: Nicola Sturgeon Statement in Full](#)', 24 June 2016.

¹³⁷ Scottish Government, '[Scotland's Place in Europe](#)', 20 December 2016.

¹³⁸ *Ibid.*, p. 3.

¹³⁹ Jim Gallagher, '[The Scottish Government's Brexit Paper Suggests that the Last thing Nicola Sturgeon Wants Is an Independence Referendum](#)', Constitution Unit blog, 21 December 2016; Daniel Kenealy, '[The Scottish Government's Brexit Proposals Are Politically Savvy and All-but-Impossible](#)', LSE Brexit blog, 22 December 2016; Thomas Colson, '[Nicola Sturgeon's Brexit adviser told us why her single market plans are "politically, technically, and legally" unviable](#)', *Business Insider UK*, 20 December 2016.

¹⁴⁰ Scottish Government, '[Scotland's Place in Europe](#)', 20 December 2016, pp. 39–44.

¹⁴¹ HM Government, '[The United Kingdom's Exit from and New Partnership with the European Union](#)', White Paper, Cm 9417, 2 February 2017, p. 18.

our common resources.¹⁴² Here, the emphasis is clearly on the retention of power in Westminster.

As noted in section 6.1 above, this is likely to lead to considerable dissent over the content of the Great Repeal Bill, which is likely to include refusal on the part of the Scottish Parliament to grant measures within that bill legislative consent.

What Will Happen?

We have seen that the Scottish government is very unlikely to secure the objectives it has set out, and that the Scottish Parliament is likely to refuse its consent to important Brexit-related legislation that, by convention, ought to require it. So what will happen then?

Disregard for public opinion in Scotland, and, in particular, the override by Westminster of a refusal on the part of the Scottish Parliament to grant its consent for the Great Repeal Bill and other subsequent legislation, will further fuel resentments north of the border. The entrenchment of the Sewel convention in statute law was one of the commitments in the ‘vow’ made by the leaders of the three main unionist parties days before the Scottish independence referendum in September 2014.¹⁴³ If refusals to grant consent, now that this entrenchment has taken place, turn out in fact to have no consequence, then it will appear to many that this commitment meant nothing.

Further consequences, however, remain far from clear. Nicola Sturgeon has been walking a tightrope. On the one hand, she needs to push Scotland’s corner and argue that, if Scotland does not get what it wants, it can walk away from the UK. On the other hand, she knows that there is no certainty she could win a referendum on Scottish independence in the near future: the polls on that question have not yet shifted,¹⁴⁴ and the uncertainties created by Brexit are very great. Sturgeon will probably try to forestall any final decision till the terms of Brexit are clearer. Even thereafter, however, it is impossible to predict what will happen. On the one hand, the harder the Brexit deal is, the further it will deviate from the EU referendum result in Scotland and the position of the Scottish government, and the more, therefore, it might spur calls for independence. On the other hand, the harder the deal, the harder would be the Scotland–England border if Scotland sought independence within the EU, and the more economic damage, at least in short term, such independence would cause. Scotland and many Scots will remain impaled on the horns of a very unwelcome dilemma.

6.3 Wales

Wales, like England and the UK as a whole, voted in June last year to leave the EU. As a result, though the Welsh government supported Remain, it has not contested the validity of Brexit. It does, however, criticise the UK government’s approach to Brexit. In a White Paper published jointly on 23 January, the Welsh government and Plaid Cymru set out their objectives for the negotiations. They want continued membership of the single market, though, in recognition of Wales’s vote to leave the EU, they also argue for controls to ensure that the principle of free movement of labour is used only for the purposes of employment or education.¹⁴⁵ In addition, they advocate the transfer of powers to the devolved administrations,

¹⁴² Ibid., p. 19.

¹⁴³ ‘[The Vow](#)’, *Daily Record*, 16 September 2014.

¹⁴⁴ [What Scotland Thinks](#).

¹⁴⁵ Welsh Government, [Securing Wales’ Future: Transition from the European Union to a New Relationship with Europe](#), White Paper, 23 January 2017.

but in the context of enhanced inter-governmental cooperation within the UK to ensure ‘the smooth working of the UK market’.¹⁴⁶

Given that Wales voted to leave the EU, however, and given that support for independence is minimal, the Welsh government will have little ability to exert leverage over the negotiations.

6.4 Northern Ireland

Brexit poses great challenges to politics in Northern Ireland for four principal reasons:¹⁴⁷

- First, Northern Ireland is the only part of the UK that will have a land border with the EU. Free trade across that border is essential for economic prosperity on both sides. Free movement is also a cornerstone of the peace settlement: the defusing of the border as an issue in Northern Irish politics has been one of the key achievements of the peace process; if the border became more tangible again, that could be very damaging. Theresa May has acknowledged this by making maintenance of the Common Travel Area with Ireland one of her core negotiating objectives.¹⁴⁸ The nature of any future customs agreement with the EU will also be crucial.
- Second, the shared EU membership of the UK and the Republic of Ireland has been an important part of the backdrop to the peace process. The Good Friday Agreement refers to the British and Irish governments as ‘partners in the European Union’.¹⁴⁹ The EU, through its PEACE programme funds substantial efforts ‘to support peace and reconciliation and to promote economic and social progress in Northern Ireland and the Border Region of Ireland’. Funding for this programme totalled €1.3 billion between 1995 and 2013; the EU contribution to the current phase (2014–20) is €229 million.¹⁵⁰ These matters look soluble in principle. But that will require goodwill on all sides, which may not be forthcoming. Speaking on 22 January, Sinn Féin’s Gerry Adams said, ‘Brexit is a hostile action – the British government’s decision to drag the North out of the EU against the wishes of the electorate is a hostile action. This and the indifference of the Tory Government in London toward Ireland, North and South, will destroy the Good Friday Agreement.’¹⁵¹
- Third, Brexit divided the parties at the heart of the now-collapsed Northern Ireland Executive: the Democratic Unionists (DUP) supported Leave, while Sinn Féin advocated Remain. Disagreement on this issue was one of the sources of underlying tension between the parties and meant that the Executive had been unable to agree a common approach towards Brexit beyond a letter setting out priorities sent to the Prime

¹⁴⁶ Ibid., p. 26.

¹⁴⁷ For much more detailed discussion, see Alan Whysall, ‘[Brexit and Northern Ireland: Key Issues and Possible Consequences](#)’, Constitution Unit blog, 15 July 2016; House of Lords European Union Committee, [Brexit: UK–Irish Relations](#), 6th Report of Session 2016–17 (HL Paper 76), 12 December 2016.

¹⁴⁸ Theresa May, ‘[The Government’s Negotiating Objectives for Exiting the EU](#)’, speech delivered in Lancaster House, London, 17 January 2017.

¹⁴⁹ ‘[Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland](#)’, 10 April 1998, preamble.

¹⁵⁰ ‘[Northern Ireland PEACE Programme](#)’, European Parliament Fact Sheet, September 2016.

¹⁵¹ ‘[Brexit risks destroying the Good Friday Agreement – Adams](#)’, Sinn Féin press release, 22 January 2017.

Minister in August.¹⁵² This divide is one issue that may make it very difficult to re-establish effective government in Northern Ireland after the elections on 2 March.¹⁵³

- Fourth, to an important degree, the referendum last June divided the community in Northern Ireland down the same lines that generated decades of violence in the all-too-recent past. Detailed polling conducted over the summer of 2016 found that 85 per cent of Catholics willing to reveal their position and 88 per cent of respondents calling themselves nationalists voted Remain. The unionist side – reflecting the fact that, while the DUP supported Leave, the Ulster Unionists (UUP) opted for Remain – was less united: 60 per cent of Protestants and 66 per cent of self-described unionists voted Leave.¹⁵⁴ The gap between the two groups is, nonetheless, large. The structures created by the Good Friday Agreement are designed to ensure that major change happens only with broad support in both main parts of the community. Brexit will challenge that severely.

As noted above, the UK government clearly takes the need for a good settlement for Northern Ireland – particularly in respect of the border issue – very seriously. It reiterated this in the White Paper published on 2 February.¹⁵⁵ The assurances offered by the White Paper are, however, notably cautious: they might be taken as implying that the government is not confident of finding a way to keep the border entirely free of red tape.

Beyond the UK government's genuine desire to find solutions, it is unclear whether actors from Northern Ireland will be able to exert any specific influence over the Brexit process. On the legal side, claimants in several court cases sought to argue that the consent either of the Northern Ireland Assembly or of the people of Northern Ireland is legally required before Brexit can occur. The Supreme Court on 24 January put these matters to bed and determined that no such consent is required in law (see section 5.1).¹⁵⁶ In politics, meanwhile, the divisions between the main parties and the likelihood of ongoing struggles in constituting an effective Northern Ireland Executive after the elections on 2 March may leave Northern Ireland without a strong voice.

In short, given the binary nature of Brexit itself as well as the particular difficulties around maintaining a fully open border, the UK government, try though it might, may find it very difficult both to pursue its wider negotiating objectives and to avoid doing any harm to the process of peace and reconciliation in Northern Ireland.

6.5 Local Authorities and London

Local government leaders have argued that they too should play a role in the Brexit process. The Local Government Associations of England, Wales, and Northern Ireland and the Convention of Scottish Local Authorities issued a joint statement in November arguing that a principle of subsidiarity should be applied as powers are returned from the EU to the UK. They

¹⁵² Alan Whysall, '[Northern Ireland: Where Now?](#)', Constitution Unit blog, 16 January 2017; Arlene Foster and Martin McGuinness, [letter to Theresa May](#), 10 August 2016.

¹⁵³ Alan Whysall, [op. cit.](#)

¹⁵⁴ John Garry, '[The EU Referendum Vote in Northern Ireland: Implications for Our Understanding of Citizens' Political Views and Behaviour](#)', Knowledge Exchange Seminar Series briefing paper, Queen's University Belfast.

¹⁵⁵ HM Government, [The United Kingdom's Exit from and New Partnership with the European Union](#), White Paper, Cm 9417, 2 February 2017, pp. 21–3.

¹⁵⁶ Supreme Court, [R \(on the application of Miller and another\) v Secretary of State for Exiting the European Union](#), 24 January 2017, para. 126–35.

also called for wider constitutional talks to strengthen ‘the legal position of local government’ and provide ‘greater fiscal autonomy for local government’.¹⁵⁷

The London Mayor and London Assembly have also been active. In November, the London Assembly’s Economic Committee issued a report emphasising the need to protect the capital’s economy. It suggested, among other options, that ‘London could look to develop its own visa system to allow skilled workers to work freely in the capital’.¹⁵⁸ In December, London Mayor Sadiq Khan appointed a Brexit Expert Advisory Panel and emphasised his intention to work for ‘privileged access to the single market’.¹⁵⁹

Such participants will, however, have no formal role in the Brexit process. They will be able to exert influence only if their purposes align with the government’s or if they can sway public opinion in a way that government feels it has to respond to.

¹⁵⁷ [‘UK local government leaders unite in Brexit devolution call’](#), Local Government Association media release, 16 November 2016.

¹⁵⁸ London Assembly Economic Committee, [‘EU Exit and Financial Services’](#), November 2016, p. 6.

¹⁵⁹ [‘Mayor unveils panel of experts to advise on Brexit talks’](#), Mayor of London press released, 19 December 2016.

7. The Role of the Public

We have examined the respective roles in the Brexit process of the various institutions of the state. But what of the role of the public? Few commentators are willing to argue that public opinion should not matter in this process. But there are two sharply contrasting views on how it should be taken into account.

The first says that the public have already spoken and the task ahead is simply to implement the popular will to leave the EU. The continuing role of the public is simply to remain vigilant against elite attempts at backsliding. This view relates closely to a populist conception of democracy: public opinion is straightforward; the majority has spoken, and that is an end to it; any suggestion that things might be more complicated is no more than an elite manoeuvre intended to subvert the will of the people. This view is overwhelmingly voiced by supporters of Brexit, though some who supported Remain in the referendum have since argued something similar.

The second view is that public opinion should be regarded as more nuanced and contingent. On this view, voters expressed their judgement on Brexit at one point in time, but they are entitled to change their minds. Furthermore, voters expressed a view only on one issue – whether to remain in or to leave the EU – not on the form that Brexit should take. We know that different Brexit supporters have very different views of what Brexit should look like. The referendum result tells us that, on 23 June, most voters preferred some form of Brexit over the status quo. But it is entirely possible that the status quo could have won out against any particular Brexit alternative.¹⁶⁰ On this view, if public opinion is truly to be respected, then additional opportunities for its expression ought to be allowed. The purest way to do that might be through a second referendum.

The second of these views is much more solidly grounded than the first. First, it is manifest that the referendum question that was put to voters in June asked about the general principle of Brexit: it did not specify any particular form. Whether the majority would prefer whatever deal is struck over the status quo is simply not knowable from the referendum outcome. Second, we will know much more by the time a deal is struck not just about the content of the deal, but also about its likely consequences. Even voters who get the deal they were expecting might by then have changed their minds on whether they like it. Of course, for some voters the detailed consequences do not matter: what they care about is the principle of whether the UK is in the EU or not. But that cannot be said of all voters, many of whom are much more concerned about the practical implications of EU membership in their daily lives. Third, more generally, we know that voters' – humans' – views and perceptions are always highly contingent, depending on how issues are framed at any point in time. While sometimes it is reasonable to characterise a 'settled will' that is likely to remain steady for a considerable time, there is no evidence yet of a longstanding majority view in favour of Brexit.

This section first looks at the possibility of a second referendum. What form might such a referendum take? What would its effects be? What are the arguments for and against holding one? Then it looks at other potential mechanisms through which the voice of public opinion might be heard in the Brexit process.

¹⁶⁰ Albert Weale, '[The Democratic Duty to Oppose Brexit](#)', *Political Quarterly*, advance online publication.

7.1 The Possibility of a Second Referendum

There was talk of a second referendum even before the result of the June referendum was known. In the days immediately following that vote, more than four million people signed a petition favouring a repeat poll.¹⁶¹ Many signatories cited the close result and the widespread misinformation during the campaign as justifications for their view.

The idea of a straightforward rerun was neither sensible nor feasible. The vote was fought according to the rules set in advance, which included no special threshold requirements and which contained safeguards on the balance of campaigning, but not on its quality. Some of these arrangements were certainly ill-advised, but they cannot be changed after the fact. Most voters consider that the vote has given the government a mandate to initiate Brexit negotiations, and that should be respected.¹⁶²

Much more interesting is the idea that there should be a second referendum that would ask a different question from the first: whether voters accept the Brexit deal once it has been negotiated between the government and other EU member states. This is the official position of the Liberal Democrats¹⁶³ and was advocated by Owen Smith during his campaign for the leadership of the Labour Party.¹⁶⁴ Others who say at least that it is an option that should be kept open include former prime ministers John Major and Tony Blair.¹⁶⁵ This is a serious idea: given the considerations noted in the introduction to this section, the democratic case for it is strong.

There are no restrictions in the UK on when parliament can call a referendum or what the subject matter can be. But a referendum can be held only with the approval of parliament: the government cannot initiate such a vote on its own. Any referendum must be authorised in parliament through specific primary legislation.

Four principal questions about a second EU referendum need to be asked. First is the key question of what it would actually be about – we need to know more than that it would be on the terms of the Brexit deal. Second is the equally important question of what the effect of any given outcome in the referendum would be: there is no guarantee that the outcome would always straightforwardly be what is on the ballot paper. Third, we can ask what the likelihood is that a referendum of any given form will actually take place. Finally, we can consider what can be said at present about the likely referendum result.

The Subject Matter of a Second Referendum

As just indicated, any second referendum is likely to be on the terms of the Brexit deal that are negotiated over the next few years (though it is not impossible that developments over the coming years might generate conditions favouring another sort of referendum). One option in

¹⁶¹ [‘EU Referendum Rules triggering a 2nd EU Referendum’](#), petition opened on 26 May 2016.

¹⁶² Anthony Wells, [‘Where Public Opinion on Brexit Stands’](#), UK Polling Report blog, 31 December 2016.

¹⁶³ Jessica Elgot, [‘Lib Dems “will vote against article 50 if there is no new referendum”’](#), *Guardian*, 11 November 2016.

¹⁶⁴ Anushka Asthana and Heather Stewart, [‘Owen Smith to offer referendum on Brexit deal if elected Labour leader’](#), *Guardian*, 13 July 2016.

¹⁶⁵ Laura Hughes, [‘Sir John Major says there is a “perfectly credible” case for a second referendum’](#), *Telegraph*, 25 November 2016; Joe Watts, [‘Brexit: Tony Blair says there must be a second vote on UK’s membership of EU’](#), *Independent*, 28 October 2016.

any such referendum would therefore be to accept the terms of that deal and proceed towards Brexit on that basis.

But what would be the alternative on the ballot paper for voters who dislike the deal? There are three basic options:

- First, voters might be asked whether they want to accept the deal or to remain in the EU after all. In essence, voters would be asked to consider whether, now that the nature of Brexit is clear, they still want it or not.
- Second, voters might be asked whether to accept the deal or to leave the EU without a deal. Article 50, as explained in section 2.1, offers two routes to withdrawal from the EU: either withdrawal terms can be negotiated; or, if no deal is done and the negotiating deadline is not extended, the withdrawing country automatically leaves after two years. The referendum would essentially allow voters to choose which of these routes the UK will take.
- Third, voters might be asked whether to accept the deal on offer or mandate the government to go back to the EU in search of a better deal. The government might be interested in seeking such a referendum if it finds that other EU countries are refusing to concede negotiating terms that the government finds satisfactory.

One possibility is that parliament would set a question that does not make the alternative explicit: it would set a yes/no question where voters are asked to accept the terms of the deal or not accept them. Parliament might take this course in order genuinely to keep its options open in the event that the deal was rejected, or in order to use the uncertainty such a question would generate to drive voters towards accepting the deal on offer. But such a question would rightly be criticised for failing to give voters a clear choice. Referendum questions are assessed by the Electoral Commission, which might well express grave concerns about such vagueness. It is ultimately for parliament to decide whether to accept the Electoral Commission's advice or not, but it has done so every time the Commission has proposed changes to question wording to date. A government or parliament that went against that advice would not be acting in the interests of effective democracy.

That being the case, it would be necessary to specify one of the alternatives above. But which would it be? It would be almost without precedent for a referendum to be held in which the status quo was not available as an option.¹⁶⁶ Given that the UK is currently in the EU, that would seem strongly to favour the first option. On the other hand, once Article 50 has been triggered, there is a good case for saying that the course that the country is on is towards Brexit, and that the default – what automatically happens if nothing else is done – is Brexit without a deal. Or it could be said that triggering Article 50 puts the UK in the EU's departure lounge and that the options should be to stay in that departure lounge, seeking to negotiate a better deal, or to leave the departure lounge (and the EU) with the terms that are on offer. Thus, while a referendum that did not offer the status quo of EU membership as an option would be highly unusual, it could be said to be justified by the equally unusual circumstances created by the Article 50 trigger.

Whatever options might be put on the ballot paper, the next question concerns what would actually happen once any of these options had been voted for: putting an option on the ballot

¹⁶⁶ The only referendum I am aware of that broke that rule was a referendum on the electoral system in the Australian Capital Territory in 1992. A new electoral system was adopted in 1989, but there was universal agreement that it was deeply flawed. The referendum therefore gave voters a choice between two possible replacements.

paper does not necessarily mean that it will actually happen in the form suggested by the ballot paper. The next subsection addresses this.

The Effects of Each Possible Referendum Outcome

It appears very likely that a vote for the Brexit deal that has been negotiated would mean that the UK would indeed leave the EU according to the terms of that deal. But questions can be asked about the realisability of any of the alternatives to that option:

- A vote to stay in the EU after all might lead straightforwardly to that outcome if the ECJ has by then ruled that a country can unilaterally revoke its triggering of Article 50. If the ECJ has by then ruled the opposite, staying in the EU would require the unanimous consent of all the member states (which they might be willing to grant only in return for certain concessions). If the ECJ has not yet ruled, then the UK might seek unanimous agreement for its continued EU membership or it might declare its unilateral revocation of the Article 50 trigger and wait to see whether anyone challenged that.
- A vote to reject the deal and withdraw with no deal would certainly be deliverable. The question is whether it would actually be delivered. If ministers had recommended acceptance of the deal, they would presumably resign having lost the vote. It would not be surprising if this forced an early election. Both the Conservative and Labour parties would likely be in turmoil, and it is impossible to predict the public mood. Much would depend on what the deal's opponents had argued during the referendum campaign: if they had argued for Brexit without a deal, that might well happen; if they had argued, notwithstanding the words on the ballot paper, that rejection of the terms on offer could lead to a better deal (or possibly even continued EU membership), such a revised deal might be pursued – though whether other European governments would play along with this might not be clear. In all likelihood, different campaigners would have argued many different things, so subsequent developments would depend heavily on who managed to win the post-referendum scramble for power.
- If the government has called the referendum in order to seek public rejection of the deal on the table and a mandate for pursuing better terms, it would presumably, if it won that vote, then seek such terms. What would happen then would lie in the hands of other EU governments: they might offer very little else; they might refuse to extend the negotiating time, thereby pushing the UK either into disorderly Brexit without a deal, or into an ignominious climb down and acceptance of the withdrawal terms it has just rejected. This could be avoided, at least for a time, if it has been determined that the UK can unilaterally revoke and then re-invoke the Article 50 trigger. Even this manoeuvre, however, might not yield substantially better terms – and might, indeed, only antagonise the UK's European neighbours.

Thus, there is much uncertainty as to what would happen in a second referendum if the deal on the table were rejected by voters. Some of that uncertainty might have been cleared up before any such vote could happen: specifically, an ECJ ruling might by then have made it clear that a vote to stay in the EU after all is entirely deliverable. Other sources of uncertainty are likely to remain until after the vote has taken place.

How Might a Second Referendum Come About?

The next question to consider is how – indeed, whether – a referendum taking any of the forms we have outlined might come about. The government regards the result of the 2016 referendum as a mandate for Brexit: it currently strongly opposes the idea of any second referendum. Given this, there are three main scenarios that might raise the likelihood of such

a referendum: government defeat in parliament; government defeat in a general election; or a government calculation that a second referendum could help it secure its desired outcome.

Government defeat in parliament. The first scenario is that the government might fail to secure parliamentary approval for the withdrawal deal that it negotiates. In that case, it might decide to appeal over the heads of parliamentarians in a referendum. Theresa May has said that she intends to negotiate a deal that involves withdrawal from the single market. Given the current positions of the Labour Party, SNP, and Liberal Democrats, as well as of some Conservatives in both the Commons and the Lords, she might struggle to win parliamentary support for this, especially if the free trade deal that is negotiated does not live up to the government's current expectations. The government would presumably seek a referendum that pits the deal on the table against the option of leaving the EU with no deal.

The problem for the government is that, as mentioned above, it can call a referendum only by passing fresh legislation through parliament. If parliament has rejected 'hard Brexit' it is very unlikely to accept a referendum that pits hard Brexit against even harder, disorderly Brexit. It might seek to amend the proposed vote to a choice between the deal that has been struck and continued EU membership. Whether parliament would really pursue such a vote – and how the government would react – would depend, first, on any ECJ ruling that has taken place on Article 50 revocability and, second, on the state of public opinion at the time. If there was a widespread public desire for a second look at the issue of EU membership, such a vote would be possible. But another option might be for the government to seek not a second referendum, but rather an early election. Theresa May might see her chances of winning an election as higher than her chances of winning a referendum. We consider the possibility of an early election in the following section, on other mechanisms of public influence.

On the other hand, we saw in section 2 that the most likely outcome of the negotiations may be a limited divorce deal plus a transitional arrangement that maintains single market membership in the short term. If that is indeed the outcome, parliamentary defeat looks much less likely: there would be much less of a 'cliff-edge moment' that might rouse opposition. In that scenario, it may be difficult for Brexit's opponents to force a second referendum. Crucial, again, would be the state of public opinion at the time.

Government defeat in an election. The second possibility is that a general election might intervene before a deal is struck: either because the negotiations prove difficult and the two-year period is extended beyond the scheduled May 2020 election; or because an early election is called before May 2020. If the current government were re-elected, it would presumably treat this as strengthening its mandate to complete Brexit without any further direct reference to the people. But it is possible it could be defeated by a party or grouping of parties committed to a second referendum. In that case, the referendum would, in all likelihood, pit the deal that has been (or is subsequently) negotiated against the option of maintaining EU membership. Again, we consider possible election scenarios further in the following section.

Referendum to strengthen the government's negotiating hand. The third scenario is that the government finds it is not getting the deal that it wants from the negotiations and seeks a popular mandate to pursue a better deal. It might hope that, faced with a strong statement of popular will, European governments would agree to make additional concessions. As we saw above, however, this would be a dangerous strategy, which could lead to a worse rather than a better outcome: if other European governments refused to offer a better deal, the government would be forced either to accept disorderly Brexit or climb down and accept the deal that has just been rejected. Whether the government would ever want to take this risk –

and whether it would be able to persuade parliament to join it in doing so – is therefore highly questionable.

With all of these options, an additional point to be factored in is the length of time that a referendum would take. The Electoral Commission recommends that the detailed legislation on any given referendum should be in place at least six months before the vote is held.¹⁶⁷ That would clearly require considerable patience on the part of the EU-27; it would also raise many eyebrows within the UK.

Ultimately, whether a second referendum might happen and what form it might take depends above all on the state of public opinion at the time. If public opinion has turned against Brexit or is hostile to the deal that is struck, the government's argument that the vote in the 2016 referendum is final may become unsustainable. On the other hand, if public opinion is mellow or if polls suggest that a clear majority support the deal, then the route to a second referendum may be much harder.

Can We Predict the Result of a Second Referendum?

The simple answer to this question is 'no'. There are many imponderables: what kind of deal (if any) might be struck; how the economy might perform over the next few years; whether any economic problems arise that are attributable to the prospect of Brexit; how far confidence in the government is maintained; whether the opposition parties manage to cut through with an alternative message. It is possible that voters will come to feel they were duped by the Brexit campaigners in 2016: that a series of promises were made that turn out to have been undeliverable. It is also possible that voters might increasingly think that the Remain campaigners' scare stories have proved untrue and might be reassured by the terms of the concrete deal. And it is possible that little will happen to change public opinion in either direction: that the main uncertainties around the effects of Brexit will remain unresolved by the deal that is struck.

What we can say is that opinion polls have shown no substantial shift in public opinion since the 2016 referendum. A detailed recent survey of such polls is provided by Anthony Wells.¹⁶⁸

7.2 Other Mechanisms of Public Influence

This section has focused on the possibility of a second EU referendum. But public opinion will matter greatly to the Brexit process even without a second referendum. Here we briefly consider two additional mechanisms of such influence. The first is the inevitable impact that public opinion will have (and is already having) because MPs want to be responsive to their constituents and are concerned about their own re-election prospects. The second is the possibility that a general election might take place before the Brexit negotiations have concluded.

The Day-to-Day Impact of Public Opinion

Public discourse often bemoans a perceived elite disregard for the views of ordinary people. Indeed, such perceptions played at least some role in the vote for Brexit. Yet the process of Brexit itself shows this perception – at least in relation to an issue on which public opinion is

¹⁶⁷ Electoral Commission, [Report on the 23 June 2016 Referendum on the UK's Membership of the European Union](#), September 2016, p. 33.

¹⁶⁸ Anthony Wells, '[Where Public Opinion on Brexit Stands](#)', UK Polling Report blog, 31 December 2016.

strongly roused – to be incorrect. As is well known, a large majority of MPs – 479 out of 650, according to the BBC¹⁶⁹ – supported Remain in the 2016 referendum. Yet in the Commons vote on 7 December, 448 of the 650 MPs endorsed the principle of invoking Article 50 by the end of March and only 75 voted against.¹⁷⁰ On 1 February, 498 MPs voted for the principle of triggering Article 50 and only 114 voted against. MPs have voted in this manner not, on the whole, because they have changed their personal views about the UK's EU membership, but rather because they respect public opinion as it was reflected in the referendum result. We might ask whether that respect is genuine or simply reflects a desire for re-election. But, either way, it has a big effect on MPs' behaviour.

Public opinion will continue to matter as the negotiations proceed. If support for Brexit appears to remain steady or to rise, that will greatly constrain any efforts from MPs and peers to forestall it. If public opinion appears to shift away from Brexit (or at least from hard Brexit), however, MPs whose instincts favour continued EU membership (or continued membership of the single market) could well be emboldened to assert themselves more strongly – particularly if the views of voters in their own constituencies appear to be shifting.

The Dynamics of a General Election

Finally, we have already mentioned several times the possibility that a general election might intervene in the Brexit process. There are two possible versions: that the negotiations extend beyond the time of the scheduled election on 7 May 2020; or that an early election is called before that.

There was much speculation in autumn 2016 that the Prime Minister might seek an early election in the spring of this year. The time for that would seem to have passed, but the possibility of an early election in 2018 or 2019 remains. If the opinion polls stay more or less as they are today, Theresa May would hope that such an election would increase the Conservatives' majority. It could also strengthen her electoral mandate for the Brexit negotiations and for parliamentary ratification of the deal that is done.

Under the 2011 Fixed-Term Parliaments Act (FTPA), calling an early election is no longer straightforward: the decision does not lie solely in the Prime Minister's hands. The FTPA prescribes two routes to such an election: either if two-thirds of all MPs vote for it; or if the government loses a vote of no confidence and no new government can be formed within fourteen days. Alternative routes to an early election involve either repeal of the FTPA or the passage of legislation saying that, notwithstanding the FTPA, an election will be held on a specified date.

Given the polls, we might think it would be rational for the Labour Party to do everything in its power to forestall an early election. Yet it claims to be ready to fight such a contest, so might find it difficult not to help one happen.¹⁷¹ That being the case, it might be feasible for Theresa May to seek a two-thirds majority for early dissolution. If not, she could engineer defeat in a confidence motion through Conservative abstention.

On the other hand, Theresa May might not be as keen on an early election as the polls suggest she should be. Such an election would be fought overwhelmingly on the issue of Brexit and

¹⁶⁹ 'EU Vote: Where the Cabinet and Other MPs Stand', BBC News online, 22 June 2016.

¹⁷⁰ 'MPs debated the Government's plan for Brexit', UK Parliament, 7 December 2016; House of Commons, [Division 135](#), 1 February 2017.

¹⁷¹ Ashley Cowburn, 'Jeremy Corbyn: If Theresa May wants an early election, Labour will vote for it', *Independent*, 22 December 2016.

would therefore lay bare Conservative divisions on this issue. The Labour Party's divisions are probably more serious, but those within the Conservative Party are nevertheless deep too – not just between the leadership and those opposed to hard Brexit,¹⁷² but also, potentially, between the government and the hard-line Brexiteers: if the negotiations drag on or prove otherwise difficult, those keenest on swift withdrawal from the EU might begin to depart from the government line more than is evident at present. Even without such divisions, the outcome of an early election could be less clear-cut than the polls imply. There is general agreement that the Liberal Democrats would likely do better than national polling figures currently indicate, as they have repeatedly done in local and parliamentary by-elections since June. Some Labour MPs would also likely benefit from an incumbency bonus.

The option of an election in 2017 appears now to be off the agenda, but an election in 2018 or 2019 cannot be ruled out. The government wants the UK to leave the EU in 2019. As we saw in section 2, however, it might not get its way on that. We know for sure that the next general election will come no later than May 2020. It remains a possibility that no deal will have been concluded by then and that the UK will still be in the EU. Perhaps a stronger possibility is that the UK will have left the EU but entered a transitional phase while negotiations on the terms of the future relationship continue. In either case, the nature of future UK–EU relations could be expected to dominate the campaign.

¹⁷² Steven Swinford, '[Up to 40 Tory MPs could rebel and back move to force Government to reveal plan for Brexit](#)', *Telegraph*, 5 December 2016.

8. The Role of EU Institutions and EU Member States

This paper has primarily set out how the process of Brexit will unfold within the UK political system. We will not here attempt an equivalent analysis of the EU side of the negotiations, which will involve twenty-seven member-state governments, as well as the European Commission, European Parliament, and, at some stages, thirty-four national and regional parliaments. There is, in fact, considerable uncertainty as to how the dynamics among these actors will develop over the course of the negotiations. European leaders, holding to the principle that negotiations cannot begin until Article 50 has been triggered, have so far signalled only the broad outline of their negotiating aims. By the end of the negotiations, some of those leaders will in any case have been replaced. Many member states will see elections during the negotiation period, the results of which are not all by any means predictable.

Nevertheless, as is obvious, the UK cannot determine the outcome of the negotiations on its own. Understanding of EU processes and goals is therefore essential. This section examines these two elements.

8.1 The Brexit Process in the EU

The negotiating process set out in Article 50 (on which, see section 2.1) has been further elaborated in statements made by the heads of government/state of the remaining twenty-seven member states following their meetings in June and December 2016:

- EU member states and EU institutions will wait for the UK to notify its intention to withdraw under Article 50. ‘There can be no negotiations of any kind before this notification has taken place.’¹⁷³
- Once Article 50 notification has taken place, the European Council minus the UK – that is, the gathering of the heads of government/state of the twenty-seven remaining member states – will adopt ‘guidelines that will define the framework for negotiations under Article 50 TEU and set out the overall positions and principles that the EU will pursue throughout the negotiation’.¹⁷⁴
- The negotiations will thereafter be conducted by the European Commission, led by the Commission’s appointed chief negotiator, Michel Barnier. The European Council will, however, keep a close eye on proceedings: it ‘will remain permanently seized of the matter’, updating its guidelines as necessary.¹⁷⁵ Its representatives – in the form of its own Brexit Task Force, headed by Didier Seeuws – will take part in all negotiating sessions and the chief negotiator will ‘systematically’ report back to the European Council.¹⁷⁶
- The European Parliament will be kept informed and allowed to express its views: ‘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

¹⁷³ [Statement after the Informal Meeting of the 27 Heads of State or Government, 29 June 2016](#), European Council, para. 2.

¹⁷⁴ [Statement after the Informal meeting of the Heads of State or Government of 27 Member States, as well as the Presidents of the European Council and the European Commission, Brussels, 15 December 2016](#), Annex, para. 1.

¹⁷⁵ *Ibid.*, para. 1.

¹⁷⁶ *Ibid.*, para. 3.

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.¹⁷⁷

- As explained in section 2.1, if the deal that is done is simply a withdrawal deal, it will require the approval of at least twenty of the twenty-seven member-state governments, comprising at least 65 per cent of their population, and the approval of the European Parliament. It will not require further ratification by member-state parliaments. If, on the other hand, the deal also sets out the future relationship between the UK and the EU, including a deep free trade agreement, this will require unanimous agreement and ratification by all the member states. In some member states, it will require approval by regional as well as national parliaments; in some, the matter will also be open to petition for a citizen-initiated referendum.

The member states and the Commission have been in full agreement so far about this process. The one point of controversy concerns the European Parliament. Following the publication of the December 2016 statement of the twenty-seven heads of government/state quoted above, the (now former) President of the European Parliament, Martin Schulz, wrote to Donald Tusk (President of the European Council) on behalf of the Parliament's political group leaders. He expressed disappointment that the Parliament had been relegated 'to a secondary position in the Brexit negotiation process' and pointedly reminded Mr Tusk that the Parliament has the power to reject the outcome of the negotiations.¹⁷⁸ Clearly, many in the European Parliament intend to flex their muscles during the negotiations. The degree to which they will be able to affect the process and outcome remains to be seen.

Besides the European Council, European Commission, and European Parliament, it should be remembered that the European Court of Justice (ECJ) might also play a role. Section 5.4 considered its potential involvement in the determination of the question of whether a notification under Article 50 can be revoked. Section 5.5 pointed out that the ECJ could decide other matters too, including whether any deal done between the UK and the EU in fact conforms to EU law.

8.2 What Can We Expect?

The outcome of the Brexit talks will depend crucially on how the member-state governments, the European Commission, and the members of the European Parliament choose to approach them. It is possible to say no more about this with any confidence at this stage than is already well known:

- First, European governments and EU institutions have said that they are determined to protect the EU and the integrity of the European project. They do not want to water down the ideals of that project or give the UK a deal that might attract other countries down the same path. In their first post-referendum statement, the twenty-seven heads of government/state affirmed their insistence that 'Access to the Single Market requires acceptance of all four freedoms.'¹⁷⁹ They reiterated this in December.¹⁸⁰ Speaking at

¹⁷⁷ Ibid., para. 7.

¹⁷⁸ ['Grave consequences if Parliament is all but excluded from EU Brexit talks'](#), European Parliament press release, 14 December 2016.

¹⁷⁹ [Statement after the Informal Meeting of the 27 Heads of State or Government, 29 June 2016](#), European Council, para. 4.

¹⁸⁰ [Statement after the Informal meeting of the Heads of State or Government of 27 Member States, as well as the Presidents of the European Council and the European Commission, Brussels, 15 December 2016](#).

a press conference in December 2016, Michel Barnier said that all member states are united in their approach. He added that the UK will not be able to receive all the benefits of EU membership: 'Being a member of the European Union comes with rights and benefits. Third countries can never have the same rights and benefits since they are not subject to the same obligations.'¹⁸¹

- Second, however, all European leaders know that a hard or disorderly Brexit would damage their own economies and citizens, not just those of the UK. As their responses to Theresa May's speech on 17 January make clear, they want to engage constructively to secure the best deal possible.
- Third, all sorts of particular interests among the member-state and the EU institutions may also come into play. While it will be important to follow the signals coming particularly from Berlin, given Germany's position as *primus inter pares* within the European Council, other states may have their own agendas. For example, the four Visegrad states – the Czech Republic, Slovakia, Hungary and Poland – might use the negotiations to seek a new approach to European integration. The EU will necessarily change following Brexit: there will be alternations to matters such as the EU budget, staffing, and qualified majority voting rules; more broadly, the centre of power within the Union may also shift. The European Parliament's tough approach to Brexit may reflect a fear that the large member states could reach a deal with the UK that would signal a move away from the EU's supranational institutions towards a more intergovernmental arrangement. Some member states may also see radical shifts in upcoming elections: the ultra-nationalist PVV, led by Geert Wilders, could gain significant power in the Dutch general election on 15 March; Marine Le Pen could win the French presidency on 7 May (though the polls still suggest this is unlikely¹⁸²); Angela Merkel could be weakened or even deposed by the German elections in the autumn. The dynamics among the EU-27 are an important reminder of two things: first, the possibilities that the UK government may seek to drive wedges between their soon-to-be former partners in their efforts to achieve leverage in the negotiations; and, second, how easily the Brexit process could become a hostage to a range of other internal EU debates and disagreements.¹⁸³

How these competing imperatives will add up remains to be seen. The European Council seeks in general to work by consensus. But that will certainly be no easy task.

¹⁸¹ [Press briefing by Michel Barnier](#), 6 December 2016.

¹⁸² Gregory Viscusi, '[This Is How You Should Read French Election Polls](#)', Bloomberg, 30 January 2017.

¹⁸³ For further discussion of such issues, see Tim Oliver, '[Understanding Non-British Views of Brexit](#)', UK in a Changing Europe blog, 5 December 2016.

9. Conclusion

There can be no doubt that the process of Brexit will be complex. The UK government has acknowledged that failure to deliver a deal involving a deep free trade agreement, close customs association, and extensive ongoing cooperation between the UK and the EU in a range of areas would do great damage to interests throughout the UK. But securing such a deal will not be straightforward. It may be impossible for the UK to get all that it wants. Even if the government does secure all its desired negotiating objectives, it is very unlikely to do so within the two-year timeframe that it says it aspires to. More likely will be either an extension to the negotiation period or a move after two years into a transitional phase, when the UK will have left the EU but retain many aspects of membership while a comprehensive deal on future relations is completed.

A wide range of actors will influence the final outcome. On the UK side, the government – including the Prime Minister, the Secretary of State for Exiting the European Union, other ministers, and hundreds of officials in London and Brussels – will take central stage, setting objectives and conducting the negotiations. But others – parliament, the devolved administrations, perhaps the courts, and certainly public opinion – will play crucial roles too. Ultimately, the public mood will determine the fundamental direction of travel. If the majority remains behind Brexit, then Brexit will happen. If public opinion shifts, it is possible (though not certain) that the outcome might be different. The exact form of Brexit, meanwhile, will depend not only on the many voices within the UK, but also on the negotiations between the UK and the EU, and therefore also on the negotiations within the EU among the twenty-seven remaining member states.

Many questions remain unanswered: how public opinion will evolve; how much influence parliament will exert; whether notification under Article 50 can be revoked unilaterally; whether and how the Scottish government will maintain its present balancing act; what will happen to devolved government and the wider peace process in Northern Ireland; how the EU-27 will respond to the multiple pressures that face them. More broadly, the Brexit process is taking place at a time of exceptional uncertainty and turbulence in global affairs. Changing priorities across the Atlantic may create their own unexpected dynamics.

The coming years will be full of deep challenges and considerable opportunities. It will be important for all involved – from prime ministers and presidents to ordinary citizens – to engage honestly and constructively in this process.

Acknowledgements

The foundations for this report were laid during the EU referendum campaign, when the UCL Constitution Unit and UCL European Institute jointly held a series of seminars and prepared a series of briefing papers on *Brexit: Its Constitutional Consequences for Britain and Europe*. The author is grateful to the ESRC's UK in a Changing Europe programme for funding this series, to all who took part for their many insights, and to Oliver Patel for his excellent research assistance.¹⁸⁴

Subsequent research has been aided by Harmish Mehta, Alex Quirk, and Heather Wilson. The author is grateful to them and to Jim Gallagher, Robert Hazell, Tim Oliver, Oliver Patel, Christine Reh, Meg Russell, Jack Sheldon, Uta Staiger, Alan Whysall, and Nick Wright, who all offered very valuable feedback on earlier drafts. All errors remain, of course, his own.

The paper has been made possible through a generous grant from the UCL Global Engagement Office.

¹⁸⁴ The briefing papers and videos of the seminars are available on the [Constitution Unit website](#).

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