



Closing note on the Strategic Initiative with the European Commission on the negotiations on the UK withdrawal from the EU (SI/1/2017/KR)

Correspondence - 11/02/2019

Case SI/1/2017/KR - Opened on 28/02/2017 - Decision on 11/02/2019 - Institution concerned European Commission |

The withdrawal of the United Kingdom from the European Union has serious and wide-ranging implications for millions of EU citizens and businesses. They should, to the appropriate extent, be kept informed about developments in the withdrawal process, as well as the subsequent process for deciding upon the future relationship between the EU and the UK.

The European Commission has been mandated by the European Council to represent the EU in the negotiations leading to the withdrawal of the UK from the EU. Weeks before the UK invoked Article 50 to begin the process, the Ombudsman suggested practical ways to President Juncker to ensure appropriate transparency throughout the negotiations, and to secure the necessary input from citizens and others. The Ombudsman also wrote to the Secretary General of the Council of the EU.

The level of transparency achieved thus far has been very high, when compared to for example international negotiations that the EU has conducted in the past.

This transparency has served to enhance the legitimacy of the Commission and the EU in these negotiations. It has also helped keep the EU united as all key stakeholders were informed at every step. As the Ombudsman said in her letter of March 2017, the EU side could only benefit from transparency, as the reality of the negotiations sets in on the UK side.

The Ombudsman also notes the early call of the European Parliament for “full transparency” [1] in the negotiations.

The Ombudsman now encourages the European Council and European Commission to continue to ensure that the future relationship negotiations are as transparent and participative as possible.

1. Background

1. The withdrawal of the United Kingdom from the European Union has serious and wide-ranging implications for millions of EU citizens and businesses. They should, to the appropriate extent, be kept informed about developments in the withdrawal process, as well



as the subsequent process for deciding upon the future relationship between the EU and the UK. The public interest may be best served by choosing carefully *when* information on the negotiations can be released, so as not to disrupt, at critical junctures, the successful outcome of the negotiations.

2. The European Commission has been mandated by the European Council to represent the EU in the negotiations leading to the withdrawal of the UK from the EU. When carrying out this role the Commission should be open to obtaining the views of all relevant stakeholders. Citizens are particularly important stakeholders, as their rights will be affected by Brexit.

3. In this context, the Ombudsman has suggested practical ways to ensure the appropriate transparency of the negotiations, and to secure the necessary input from citizens throughout the negotiations.

4. The Ombudsman wrote to the Council [2] on this matter and to the Commission twice [3]. At the beginning of 2017, the Ombudsman asked the Commission to ensure sufficient information for the public during the Brexit negotiations. At the beginning of 2018, when the Commission initiated a scoping exercise on the future relationship between the EU and the UK, the Ombudsman encouraged the Commission to find ways of ensuring that stakeholder input be representative of a wide-range of relevant viewpoints and be as inclusive as possible. She also asked the Commission at that stage to consider a number of additional ways of informing the public of its work. (See Annex 1.) The Ombudsman's staff also met with the Commission's Brexit Taskforce ("the Taskforce") a number of times.

2. EU Brexit openness

Information for the public on the Brexit negotiations

5. Before the Brexit negotiations started, the Ombudsman wrote to the Commission and the Council [4] calling for the proactive publication of key negotiating documents. In the weeks and months that followed the Commission published its recommendation for a Council decision authorising the Commission to open withdrawal negotiations (including draft negotiating directives), and the Council its guidelines, setting out core principles for Brexit negotiations. The Council also published the negotiating directives and guiding principles on transparency [5]. (See Annex 2 for a description and time-line of key publications.)

6. The Commission committed to ensuring a maximum level of transparency " *[w]ithin the framework of the European Council's Guidelines..* "

7. The Taskforce has proactively published many key documents, throughout the negotiations. In total, **106 negotiating documents**, including a draft of the Withdrawal Agreement with colour-coding to indicate progress in the talks, were published.

8. To keep citizens informed, EU and UK negotiators published tables ("joint technical notes"), detailing progress on citizens' rights in the withdrawal negotiations.

9. The Taskforce published the official calendar of the EU's Chief Negotiator, Mr Michel



Barnier, as well as an overview of his meetings with organisations and individuals. [6]

10. The Ombudsman welcomed the EU's commitment to openness, as well as the publication of a wide range of negotiating documents on the website of the Taskforce. [7] The Ombudsman also welcomed the Taskforce's practices of only accepting meeting requests from interest representatives that are registered in the EU Transparency Register, and of publishing some details of the meetings between the Chief Negotiator and interest representatives.

Brexit Taskforce interaction with stakeholders

11. The Chief Negotiator has had around 100 meetings with organisations and individuals, while other members of the Taskforce have had around 500 such meetings. The Taskforce also worked with delegations in EU Member States to organise stakeholder events. The Commission has also supported events in the UK for citizens from remaining EU Member States.

12. The Taskforce dealt with **70 requests for public access to documents**, with only three cases escalated to the Ombudsman. (See Annex 3 for a short description of the two complaints that led to an Ombudsman inquiry.)

13. The Taskforce, by its own count, **replied to about 10 000 messages from the public**.

14. The Commission answered requests for details of all the meetings with interest representatives by making available lists of all who met with the Taskforce, including the names of companies.

15. The Ombudsman has suggested that the Commission take a more pro-active approach by releasing more documents regarding meetings with interest representatives (for example the minutes of such meetings). The Taskforce indicated that it would be difficult to adopt such a proactive approach for all documents, especially since it would require consultation with the interest representatives referred to in the documents with a view to assessing if the documents contained commercially confidential information. [8]

16. The Ombudsman has asked the Commission whether it thought it would be useful to also specify meetings with stakeholders or activities of the Deputy Chief Negotiator, Ms Sabine Weyand. The Commission explained that the activities of the Deputy Chief Negotiator are mainly of an institutional nature, and predominantly concern the negotiations with the UK and exchanges and discussions with EU institutions, EU Member States and Commission services.

17. As regards the Ombudsman's suggestions on structural and inclusive stakeholder engagement, the Taskforce indicated that it would revisit these suggestions once talks on the future relationship between the EU and UK start.



18. The level of transparency achieved thus far is very high when compared to for example international negotiations that the EU has had, and served to enhance the legitimacy of the Commission and the EU in these negotiations. As the Ombudsman said in her letter of March 2017, the EU side could only benefit from transparency, as the reality of such negotiations set in on the UK side. The Ombudsman will continue to work with the Commission to ensure that the future relationship negotiations are as transparent and participative as possible.

Annexes

Annex 1 - Ombudsman suggestions for improvement and Commission replies

'Letter to President Juncker concerning information for the public on the upcoming negotiations aimed at reaching agreement on the UK's withdrawal from the EU'

On 28 February 2017, the European Ombudsman asked the European Commission to set out the arrangements that it envisaged putting in place to ensure transparency and to secure appropriate stakeholder input, and in particular the types of information and documents the Commission intended to publish and when.

She also, at that stage, asked how the Commission planned to secure and structure the input it needed from stakeholders to inform its negotiating position throughout the process.

The Ombudsman also drew attention to the role that the European Network of Ombudsmen could be called upon to play to respond to citizens' questions, complaints and concerns and mentioned the procedure that her office makes available to obtain answers to questions on EU law posed by national ombudsmen.

Commission's reply

On 28 April 2017, the Commission answered , that:

- *"[w]ithin the framework of the European Council's Guidelines, the Commission's aim will be to ensure a maximum level of transparency ."*
- *"[t]he Commission will communicate on its policy in this respect once the Council has adopted its decision authorising the opening of the negotiations ."*
- *it will explain " the timeline and governance structure of the negotiations as soon as they start ", and update this information so that " stakeholders and citizens will be able to inform themselves about the issues being discussed and negotiated at all times. "*
- *"[a]ll meetings of the Chief Negotiator are published online ", and that the Commission's Brexit Taskforce will " only accept meeting invitations with interest representatives that are registered on the Transparency Register ."*
- *"[a]t this stage, the Commission is interested mainly in meeting European associations " and " there are no specific topics on which [the Commission] would want to launch a formal open public*



consultation .”

Regarding the procedure through which answers are obtained to questions on EU law, the Commission wrote that the Ombudsman “ *can count on the Commission to respond to such queries swiftly and with great care .”*

‘Letter to President Juncker concerning securing appropriate stakeholder input in the Brexit negotiations and potential for further progress on transparency’

On 23 February 2018, the Ombudsman wrote to the Commission’s President drawing its attention to:

- the usefulness of public joint technical notes at working group level (detailing progress after each negotiating round) and expanding this practice beyond citizens’ rights;
- the taskforce’s reactive (as opposed to a pro-active) approach to releasing the full list of meetings with interest representatives, suggesting that an updated list could be released periodically such as after each negotiating round;
- the fact that the personal page of the Deputy Chief Negotiator does not list any meetings or activities, suggesting that her activities could be listed;
- the level of detail that is provided on meetings between the taskforce and interest representatives, suggesting that the Commission could provide more context on the meetings, for example by publishing: participant lists, agendas, minutes or other documents exchanged during the meetings;
- the usefulness of stakeholder input and encouraging the Commission to find ways to ensure that stakeholder input represents a wide-range of relevant viewpoints and is as inclusive as possible.
- her view that it would be desirable and appropriate for the Commission to allow relevant stakeholders to look at specific parts of the draft Withdrawal Agreement – notably those that concern citizens’ rights – as it might be helpful to the Commission and add to the overall legitimacy of the exercise.

Commission’s reply

On 16 April 2018, replied to these points, saying (following the order above):

- *“the need for publishing tables summarising progress has been superseded by the Commission/United Kingdom joint colour-coded text of the draft Withdrawal Agreement (published on 19 March 2018). This text clearly indicates all areas of agreement, areas where further clarifications are needed, and issues on which discussions are ongoing on the text presented by the Union.”*
- *“the Commission has disclosed the list of meetings in reply to requests filed on the basis of Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents.”*
- *“that the activities of the Deputy Chief Negotiator are mainly of an institutional nature, and are*



dominated by negotiations with the United Kingdom and exchanges and discussions with other EU institutions. Member States and Commission services.”

- that “[m]inutes of meetings cannot be published while negotiations are ongoing. Moreover, such meeting reports may contain sensitive information and commercial data, as well as personal data, disclosure of which is subject to exceptions laid down in [1049/2001] Regulation. Finally. I would like to inform you that the Commission’s representatives at these meetings have not shared any other documents with stakeholders than those already published on our website.”

- that “[i]n line with the European Council Guidelines of 23 March 2018, the EU is planning to scope the framework of the future relationship with the United Kingdom. Given that this exercise will lead to a political declaration and not yet to actual negotiations, the Commission is reflecting on whether additional ways of organising stakeholder input are needed at this stage. I would like to make a general observation related to the fact that the negotiations on the United Kingdom’s withdrawal are of an unusual nature. The process is not about designing new policies but managing the disentanglement of the United Kingdom from the EU. Usually, the purpose of stakeholder consultation - together with impact assessments and evaluations - is to inform policy making. In the case of the United Kingdom’s withdrawal from the EU, the scope for stakeholder input on the policy approach chosen is limited, since EU’s approach for the framework of the future EU United Kingdom relationship is being defined by European Council Guidelines. Such Guidelines have been adopted on several occasions and most recently on 23 March 2018.”

- “that the Commission has already implemented [the Ombudsman’s] proposal to allow stakeholders to look into specific parts of the draft Withdrawal Agreement, including those that concern citizens’ rights. The Commission published the whole text of the draft Withdrawal Agreement on 28 February 2018 and, since then, has received several position papers, in particular concerning the protection of citizens’ and workers’ rights. The Commission has also taken into account comments from the European Parliament and Member States. Subsequently, the Commission and United Kingdom negotiators worked intensively in the run up to the March European Council in order to identify the state of play on all issues as explained above and as clearly set out in the colour-coded draft Withdrawal Agreement of 19 March 2018.”

Annex 2 - Time-line of publication of key documents for the withdrawal negotiations and on citizens’ rights

Institution

Title

Timing

European Council (EU27)

European Council's guidelines , setting out core principles for Brexit negotiations, including the phased approach of the negotiations (first phase of withdrawal on 3 main disentanglement issues (citizens, financial settlement, land border) and second phase of the withdrawal negotiations, then trade negotiations)



29 April 2017

Commission

Recommendation for a Council decision authorising the Commission to open withdrawal negotiations (including draft negotiating directives)

3 May 2017

Council (EU27)

Adoption of negotiating directives , authorising the opening of the negotiations and nominating the Commission as EU negotiator.

22 May 2017

General Secretariat of the Council (TFUK)

Guiding principles for transparency in Brexit negotiations.

22 May 2017

Commission (jointly with UK)

Joint technical notes detailing progress on citizens' rights.

2017

Commission (jointly with UK)

Joint report detailing the progress made during the first phase of the negotiations

8 December 2017

Commission

Q&A document on the rights of EU27 and UK citizens after the UK has withdrawn from the EU (in all official EU languages);

12 December 2017

European Council (EU27)

Guidelines setting out core principles for the Brexit negotiations as regards the second phase related to transition and the framework for the future relationship.



15 December 2017

Commission

Draft Withdrawal Agreement with colour-coding to indicate (the absence of) progress in the negotiations.

19 March 2018

Commission

Proposal for a Council decision on the signing of the Withdrawal Agreement.

5 December 2018

Annex 3 - Brexit transparency related complaints that led to an Ombudsman inquiry

Mapping table on North-South cooperation on the Island of Ireland

Case 1413/2018/KR concerned the refusal of the European Commission to grant the complainant public access to a document drawn up in the context of the on-going Brexit negotiations. The document relates to a “mapping exercise” that seeks to identify the EU legal and policy framework relevant for North-South cooperation on the island of Ireland.

The Ombudsman closed the case finding no maladministration but urged the Commission to **publish the mapping table after the conclusion of the negotiations on the Withdrawal Agreement, and before the elected representatives of EU and UK citizens would vote on the text**. This was not done unfortunately.

The Taskforce stated it intends to publish the EU report on North-South cooperation on the Island of Ireland “at the appropriate time”.

The UK has published a list of areas of North-South cooperation that are linked to EU regulatory frameworks [9]. The Taskforce confirmed to the Ombudsman that the areas of cooperation it identified are the same as in the UK’s document.

The Commission’s Brexit Taskforce’s interactions with the finance industry



Case 1946/2018/KR concerns the Commission Brexit Taskforce's interactions with financial organisations.

The case team has inspected the documents in question and is analysing the Commission's reasoning for refusing to disclose some of the documents in full or in part.

The Ombudsman will set out her view as regards this complaint in due course.

11 February 2019

[1] See:

<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P8-TA-2017-0102+0+DO>

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[2] See: <https://www.ombudsman.europa.eu/en/correspondence/en/77306> .

[3] "Information for the public on the upcoming negotiations aimed at reaching agreement on the UK's withdrawal from the EU." (28 February 2017):

<https://www.ombudsman.europa.eu/en/correspondence/en/76528> , with press release ("Ombudsman urges appropriate Brexit transparency"), and "Securing appropriate stakeholder input in the Brexit negotiations and potential for further progress on transparency." (23 February 2018)

<https://www.ombudsman.europa.eu/en/correspondence/en/90192> .

[4] On 24 March 2017 the Ombudsman wrote to the Council of the EU, asking whether the guidelines from the European Council would be made public, and whether the Council would commit to timely publication of the negotiating directives:

<https://www.ombudsman.europa.eu/en/correspondence/en/77306> .

[5] The Council responded to the EO on 6 June 2017:

<https://www.ombudsman.europa.eu/en/correspondence/en/80065> . The European Council has produced a timeline with all of its publications:

<https://www.consilium.europa.eu/en/policies/eu-uk-after-referendum/> .

[6] See:

https://ec.europa.eu/info/departments/taskforce-article-50-negotiations-united-kingdom_en (last consulted on 30 January 2019).

[7] Besides the negotiating documents mentioned in the body text this includes, but is not limited to: position papers on all disentanglement issues, meeting agendas for the negotiation rounds, and EU/UK joint technical notes in which progress on citizens' rights after each negotiation round is described.



[8] The Ombudsman's services have had sight of various minutes of such meetings. They often seem to contain information that is commercially confidential. It is reasonable to assume that proactively disclosing all such documents would involve a significant administrative effort.

[9] See:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/7622