

Brexit – what now?

Six things to know about the legal process of leaving the EU

27 June 2016

The political implications of the referendum result have been seismic and sudden, both domestically and internationally.

However, legally speaking, the referendum result has no immediate effect. It is only advisory in nature. The UK continues to be a member of the EU today. As a matter of EU law, it is still bound by the EU Treaties and subject to the jurisdiction of the Court of Justice of the European Union. And as a matter of UK law, the European Communities Act 1972 – which gives domestic legal effect to the UK’s membership of the EU, including giving EU law precedence over UK law in the UK courts – remains in force.

Although there has been some suggestion of UK legislation prior to Brexit to limit the jurisdiction of the European Courts (among other things), the UK’s legal relationship with the EU will not change until the UK formally withdraws from the EU. The only legal mechanism for withdrawal is that set out in Article 50 of the Treaty on the European Union (“TEU”). This requires the UK to issue a formal notice to the European Council

(the Heads of State and Governments of the EU Member States). There is no mechanism for the EU (or remaining Member States) to expel the UK or suspend its membership.

The ordinary treaty revision procedure and the provisions for the accession of new Member States might also become relevant in the event of an initiative for an independent Scotland to remain with the EU. However, for the UK to withdraw using any other mechanism would require unanimous agreement among the remaining 27 Member States of the EU.

In practice, it is likely that the UK’s exit will be a matter of political negotiation and to that extent the formal Article 50 procedure may be invoked only if, and in the manner that, it is seen as helpful in the context of those negotiations.

So what does the Article 50 TEU process look like? Here are six things to know:

1. When does the UK have to notify the EU of its decision to leave?

While there is undoubtedly a political imperative, the UK Government has no domestic legal obligation to commence the Brexit process by any date (or at all). Under EU law, notification pursuant to Article 50 is unilateral. It is up to the UK when it notifies the European Council of its decision to leave; no timeframe for notification is provided under Article 50. The EU has indicated that the Article 50 notice can be served in writing, or orally at a meeting of the Council and noted in the formal minutes.

Article 50 provides that a member state can decide to withdraw from the EU “in accordance with its own constitutional requirements”. As a matter of UK constitutional law, the act of triggering Article 50 is an exercise of the royal prerogative, a collection of powers held by the UK Government on behalf of the Crown. It is therefore a matter of discretion for the Prime Minister when to invoke Article 50. However, as pointed out by Sir Paul Jenkins KCB QC (former head of the UK Government Legal Service from 2006-2014) in an [opinion](#) published on 26 June 2016, the exercise of the royal prerogative in these circumstances may be subject to the constitutional convention, known as the Ponsonby Rule, that government proposals for international acts (such as major Treaty change) are brought before Parliament and debated before any formal executive action is undertaken. Others have [suggested](#) that the Prime Minister cannot exercise the prerogative without parliamentary approval.

The UK may wish to delay formal notification to allow time for informal initial negotiations with Member States to take place outside the formal timeframe. Prime Minister David Cameron has indicated that this will be a matter for his successor, so we can expect notification not to be given until October 2016, at the earliest, and the UK Government may wish to create as much breathing space as possible before the process kicks off. However, the remaining 27 Member States, the European Commission and the European Parliament may not be prepared to engage in informal negotiations until notice has been given and the UK can expect to come under growing pressure to serve notice sooner.

2. How would the withdrawal negotiations work?

By contrast to notification, the act of withdrawal from the EU is not unilateral: once notification is given, the process is determined by the procedure set out in Article 50 TEU, which provides for the negotiation of a withdrawal agreement between the withdrawing Member State and the EU.

Once the UK gives formal notification of its intention to leave and the Article 50 TEU process is commenced, the countdown to Brexit begins in earnest. This period can only be extended by a unanimous decision of the European Council. Depending on the progress and content of negotiations, it is possible that other Member States could threaten to veto a possible extension in order to strengthen their own bargaining position.

As to the conduct of the negotiation process itself, under Article 50 TEU, the European Council, after having received a recommendation from the European Commission, will first adopt a decision authorizing the opening of negotiations and nominating a head of the EU negotiating team. Conduct of the negotiations will be the responsibility of the Commission negotiation team, but is likely to be closely overseen by the European Council and subject to informal comment by the European Parliament throughout the process.

The withdrawal agreement is subject to specific procedures different from those used, for example, for trade agreements. Once the negotiations are complete, the European Parliament must consent to the draft withdrawal agreement by a majority of votes, after which it is signed and concluded by the Council (if agreed by Qualified Majority Voting, which effectively amounts to 20 out of the 27 remaining Member States, representing 65% of the total population of the EU). If the withdrawal agreement is a “mixed” agreement, in that it engages Member State as well as EU competences, it will also need to be ratified by each of the remaining Member States as well.

Can the UK change its mind? Article 50 TEU does not make provision for the UK to retract its notification once given. On its face, the ultimate effect of the notification (that is, termination of membership) is automatic. However, it is likely that retraction would be legally possible, at least if the political will existed. However, the political implications of doing so would be significant for

the UK's future status in the EU, and it might require the consent of the remaining 27 Member States – especially if the retraction takes place after conclusion of the withdrawal agreement. However, once the withdrawal agreement takes effect, the UK will have left and there would be no going back.

In the event that the withdrawal agreement takes effect such that the UK leaves the EU and the UK subsequently decides that it wishes to re-join, any request to re-join the EU would be subject to the procedure outlined in Article 49 TEU, in the same way as a new applicant. As such, it is entirely plausible that the EU, as part of any accession negotiation, might be unwilling to permit the UK to opt out of certain policy areas as it does currently, such as in relation to the Schengen Area or the euro.

3. What will the negotiations cover?

Article 50 TEU provides that the EU will negotiate an agreement “setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union”. The content and scope of the withdrawal agreement is not defined by Article 50 TEU and will not become clear until the nature of the UK's future relationship emerges in the early stages of the negotiations. It is therefore not clear whether the future relationship of the UK with the EU will be covered by the terms of the withdrawal agreement or negotiated as a separate agreement. At a minimum, the withdrawal agreement will need to take account of the framework for the UK's future relationship and provide for transitional provisions, where necessary.

If the terms of the UK's future relationship are negotiated as a separate agreement, this could be an Association Agreement under EU law, entered into by the UK, the EU and the remaining Member States and requiring unanimity in the European Council and consent of the European Parliament.

In addition to its negotiation with the EU in relation to withdrawal and future relationship, the UK will also need to negotiate Free Trade Agreements with non-EU states that have such deals with the EU. It is possible that these negotiations could take place at the same time at the EU negotiations. However it is more likely that non-EU states would be reluctant to agree to anything until they knew what the UK's future relationship with the EU would look like.

4. Can the negotiations realistically be completed within the period specified by Article 50 TEU and what are the consequences if no agreement is reached?

It is unclear at this stage whether negotiating the UK's withdrawal is achievable within the two year period under Article 50 TEU. The UK Government has stated that “due to the complexity of the negotiations” it would be difficult to complete the negotiations before the two year deadline. However, there is likely to be pressure to complete negotiations before the current term of the European Parliament and European Commission ends in 2019. Such time pressure might itself lead to the UK's withdrawal being separated from the negotiation of the definitive replacement arrangements. It may be that a provisional regime would be put in place while the latter negotiations are completed.

If the UK were to reach the end of the two year period specified by Article 50 TEU without having reached an agreement, and if one or more of the 27 other Member States vetoed an extension of this period, the UK would leave the EU automatically, without a replacement agreement in place. In these circumstances, the UK would cease to have access to the single market and would no longer benefit from its current trade relationship with the EU, nor the free trade agreements from which the UK benefits by virtue of its EU membership. The UK's trade relations would instead rely on the default position under applicable World Trade Organisation rules until new agreements could be reached.

5. How will the withdrawal negotiations affect the UK's continuing participation in the EU prior to withdrawal taking effect?

During the negotiation period, the UK's position and influence within the EU will undoubtedly be affected by its pending departure. While the UK would remain a full member of the EU over the course of the negotiations, its credibility as an active member would be undermined and its ability to affect EU decision making would be lessened. The resignation of Lord Hill as Member of the European Commission on 25 June is indicative of the immediate impact on the UK's involvement in EU decision-making.

In particular, the UK is scheduled to hold the presidency of the European Council from July to December 2017. Triggering Article 50 TEU would mean that the UK would be disqualified from participating in European Council meetings on the

negotiation of the UK's withdrawal, a matter that is likely to be a key concern of the European Council during this period. As a result, the Chairman of the House of Lords EU Committee has already urged the UK and EU to seek alternative arrangements "as a matter of urgency".

6. Can the UK seek to disapply aspects of its EU membership before formally withdrawing?

Some in the Vote Leave campaign have suggested that the UK could alter its relationship with the EU unilaterally before the withdrawal agreement takes effect by amending domestic legislation that incorporates EU law into UK law. Such legislative changes could include, for example, amending the European Communities Act 1972 so as to unilaterally allow the Government to remove EU citizens whose presence is deemed not conducive to the public good, provide that the EU Charter of Fundamental Rights does not prevail over UK law, or restrict recognition of rulings of the Court of Justice of the EU in national security matters.

Any such move unilaterally to disapply aspects of the UK's EU membership before it has negotiated the terms of its withdrawal from the EU could have unpredictable results. In particular, it is not clear how UK judges would respond to conflicting demands from UK and EU law while the UK is still a Member State of the EU. Paradoxically, any such legislation would be susceptible to legal challenge on the basis that it is incompatible with EU law but for any provision in it precluding such a challenge. This would be likely to give rise to litigation and legal uncertainty one way or another.

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