

Legal aspects of Brexit¹

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Abstract

The Brexit referendum vote has mainly political implications and no direct legal effect. The article 50 of the Treaty on European Union allows member states to withdraw from the European Union in accordance with its own constitutional requirements. After the referendum is a period of two years from the british notice of intention to withdraw to negotiate terms of exit unless all the other member states agree to extend it. Article 50 put the balance of power firmly in the hands of the 27 other states more than the leaving state. After the time limit in article 50 is expiring, European Union in theory law ceases to apply in the United Kingdom. In the same time, separating European law from british national law will be an complicated process.

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1. Introduction

Currently, the following points arise from a legal standpoint.

Due to the lack of a written constitution classic, Britain could join and withdraw from the European Union using a simple law passed by Parliament without any need for changes to the Constitution, a process more difficult.

Even after the referendum, there are a number of options in terms of legal and procedural framework through which Parliament can be involved.

2. General aspects

The lenght of Brexit process will depend on when the article 50 process is started and if it takes longer than the two years specified in the article 50. The incertitude over Parliament's role in pushing forward article 50 and the consequent legal process in the United Kingdom and possibly the EU might delay the start of negotiations and prolong the withdrawal process. ³

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³ Miller, V, *Brexit Unknowns*, House of Commons Library Briefing Paper 7761, 2016, p. 5.

Article 50 TEU provides that a Member State may decide to withdraw from the EU “according with its own constitutional requirements”.⁴

The present difficulty is that it is not clear what those constitutional requirements are in relation to push forward article 50 TEU. This will be the task of the UK Supreme Court to decide.⁵

The Government has said that it intends to begin the process of article 50 under prerogative powers, without any involvement from Parliament. But many specialists consider that the involvement of Parliament is necessary or at least desirable.⁶

The High Court decided on 3 November 2016 that the Government could not push forward the article 50 process without parliamentary approval. The Government will challenge this decision at the Supreme Court.

Treaty negotiations are undertaken by the Government under the Royal Prerogative. The UK Parliament has no formal role in scrutinising the negotiation of treaties (although it can delay or even, in the case of the House of Commons, block ratification).⁷

Article 50 TEU does not specify anything in this matter. It means that notification could not be withdrawn, because it has some specific provisions on when the treaties cease to apply, and how a former Member State could join again. Parties to the High Court case in October-November 2016 assumed that article 50 is irrevocable, but this is disputed.

According to the 1969 Vienna Convention on the Law of Treaties, a notification of intention to withdraw from a treaty ‘may be revoked at any moment before it takes effect’ (article 68).⁸

It might be the task of the Court of Justice of the European Union to decide if article 50 is revocable or not.⁹

However, from a political point of view it is likely that if the United Kingdom and other member states agreed that the notification should be withdrawn, it could happen.¹⁰

If the UK Government is pushing forward Article 50 by the end of March 2017, in theory the two years of negotiations should end by the end of March 2019.¹¹

European Parliament elections will be held in May or June 2019, so the United Kingdom would no longer be a member of the EU if the two-year deadline remains the same. But if the negotiations continue beyond March 2019 following a

⁴ Newson, N, *Leaving the EU: Parliament's Role in the Process*, House of Lords Library Note 034, 2016., p. 4.

⁵ Miller, V, *op. cit.*, p. 5.

⁶ Newson, N, *op. cit.*, p. 5.

⁷ Miller, V, *op. cit.*, p. 5.

⁸ Gordon R, Moffatt, R, *Brexit: The immediate legal consequences*, Report, The Constitution Society, 2016, p. 18.

⁹ Miller, V, *op. cit.*, p. 6

¹⁰ *Idem*, p. 6.

¹¹ *Idem*, p. 8.

unanimous decision to extend them, or because triggering article 50 is delayed beyond March 2017, the UK might still be in the EU at the time of the elections, and eligible, if not required, to participate in them.¹²

It seems unlikely that the UK would do so if it was very close to leaving the EU, but the situation is unclear. There is no Treaty provision for a member state to not participate in the EP elections.

3. Institutional aspects

The Government wants to introduce a 'Great Repeal Bill' in 2017, in order to convert (transform) the EU *acquis* into UK law. The decision what to keep, repeal or amend will belong to the Government or Parliament.¹³

We must take into consideration the following aspects:¹⁴

- to what amplitude legislation currently in force that gives effect to EU law will be repealed or amended;
- how big proportion European Union law will be transposed into domestic law after the UK leaves the European Union;
- where EU legislation is transposed into domestic law, whether the law will be kept in concordance with any changes made by the EU;
- the proportion to which changes to legislation to give effect to Brexit will be set out in primary legislation.
- whether the 'Great Repeal Bill' will simply transpose EU law into domestic law or include substantive changes to the law to come into force after Brexit;
- if the UK courts will continue to enforce the jurisprudence of the CJEU when interpreting EU law after it has been transposed into domestic law.

Another unclear problem is the future of UK staff in the EU institutions.

The European Parliament will not hire national experts from states outside EU. The Rules governing the secondment of national experts to the European Parliament, were set out in an EP Bureau Decision of May 2009.¹⁵

The UK will remain a Member of the EU until its departure and will continue to give funds to the EU budget at least until this point.¹⁶

After a negotiated departure, the UK may still make contributions to the European budget. Any future contributions will depend on the arrangements set up for the UK's future relationship with the EU. Members of the European Economic Area (EEA) contribute to the EU Budget, as does Switzerland; so if the UK negotiates a similar relationship with the EU it is likely to pay into the EU

¹² *Idem*, p. 8.

¹³ *Idem*, p. 7.

¹⁴ *Idem*, p. 7.

¹⁵ *Idem*, p. 8.

¹⁶ *Idem*, p. 9.

Budget. In the situation of a 'hard Brexit' it is unlikely that there would be a UK contribution.

In general lines EU law has operated directly in the United Kingdom in one of two ways, by direct effect and by direct applicability.¹⁷

The negotiations are taking place according to article 218(3) of the Treaty on the Functioning of the European Union (TFEU). The European Commission, taking into account the European Council's guidelines, submits a recommendation to the Council, which adopts a Decision authorising the opening of the negotiations and nominates the Union negotiator or the head of the EU's negotiation team.¹⁸

During the negotiation, the withdrawing Member State is continuing to participate in other EU business as normal.

The EU Council, after obtaining the consent of the EP, concludes the agreement, voting by a double Qualified Majority Vote (QMV – 20 out of the 27 other EU Member States).¹⁹

Under Article 50(5), if the UK wants to rejoin the EU in the future, it will have to re-apply under the procedure referred to in article 49 TEU. In other words, it will be dealt with as if it were a new applicant, with no automatic right to rejoin and no special advantages.

There is no provision in article 50 TEU of ratification of the withdrawal agreement by EU Member States, but this might be necessary under international legal norms.²⁰

The withdrawal agreement, will not be subject to any of the constitutional safeguards in the European Union Act 2011, but, following the usual procedures for ratification, it will be laid before Parliament with a Government Explanatory Memorandum for a period of 21 sitting days before it can be ratified, in which time either House could resolve that it should not be. If the House of Commons is voting against ratification, the agreement can still be ratified if the Government lays a statement explaining why it should nonetheless be ratified and the House of Commons does not vote against ratification a second time within 21 days (this process can in theory be repeated ad infinitum).²¹

4. Alternatives to EU

4.1. *European Free Trade Association (EFTA)*

EFTA has four members, Iceland, Norway, Switzerland and Liechtenstein. The original 1960 agreement was signed between countries that sought the benefits of trade without full membership of the then EEC.²²

¹⁷ Gordon R, Moffatt, R, *op. cit.*, p. 19.

¹⁸ Bowers, P, Lang, A, Miller, V, Smith, B, Webb, D, *Brexit: some legal and constitutional issues and alternative to EU membership*, House of Commons Library Briefing Paper 07214, 2016, p. 6.

¹⁹ *Idem*, p. 6.

²⁰ *Idem*, p. 7.

²¹ *Idem*, p. 9.

²² *Idem*, p. 26.

EFTA countries first time reduced tariffs between themselves, and then signed bilateral free trade agreements (FTA) with the EEC beginning with 1973. A number of countries that are now EU member states were before formerly EFTA members. The UK was a founder EFTA member, together with Denmark, Norway, Sweden, Austria, Switzerland and Portugal.

EFTA is a free trade area, rather than a customs union like the EU. The EFTA states currently have 27 free trade agreements (covering 38 countries outside the EU). EFTA Member States can pursue bilateral trade agreements if they want.

There are some of the advantages of joining EFTA:²³

- a far smaller UK financial contribution, which would exclude the CAP;
- the UK Government would be free to set its VAT level;
- the capacity to ratify free-trade agreements faster and with more partners than the EU and greater freedom of manoeuvre to sign free trade agreements worldwide;
- UK bilateral agreements with the EU would better protect British sovereignty, without speaking a loss of influence.

4.2. The Norwegian option

The European Economic Area (EEA) is made up of the EU Member States together with Norway, Iceland and Liechtenstein. EEA membership confers substantial, but not complete, access to the single market. There is limited access to the single market in agriculture and fisheries.

The treaty was signed in 1992 and was operational from 1994. The EEA Agreement extends the EU single market and free movement of goods, services, people and capital, together with laws in areas such as competition policy, state aid, consumer protection and environmental policy to include Norway, Iceland and Liechtenstein. In addition, the EEA Agreement is dealing with cooperation in policies such as research and technological development, education, training and youth, employment, tourism, culture, civil protection, enterprise, entrepreneurship and small and medium-sized enterprises.

The Agreement does not include the following EU policies:²⁴

- Common Agriculture and Fisheries Policies (CAP and CFP, although the Agreement contains provisions on various aspects of trade in agricultural and fish products)
- Customs Union
- Common Trade Policy
- Common Foreign and Security Policy
- Justice and Home Affairs (even though the EFTA countries are part of the Schengen area)
- Monetary Union (EMU).

²³ *Idem*, p. 27.

²⁴ *Idem*, p. 28.

Liechtenstein, Norway and Iceland have no representation in any of the EU institutions and only indirect influence (including the right to be consulted) on EU proposals influencing them.

4.3. The Swiss model

Switzerland is in EFTA and Schengen but is not a member of the EU or the EEA. Switzerland has negotiated over 100 separate agreements with the EU governing market access.²⁵

Switzerland has limited access to the single market. Access is a good solution for trade in goods, but tariffs remain on some agricultural goods. There is limited access for trade in services and according to the UK Government, “no general access to the EU market in financial services”.

Switzerland is not member of the EU Customs Union and, as a result, does not benefit from the EU’s trade agreements with other countries. Being outside the Customs Union also means exports of goods to the EU must comply with potentially costly customs procedures.

Switzerland is able to follow and to enforce an independent trade policy with countries outside the EU.²⁶

Relations between the EU and Switzerland were made more difficult after a 2014 vote in Switzerland to impose immigration quotas with the EU. The European Commission said at the time that this did not respect the principle of free movement of people between Switzerland and the EU. If Switzerland went ahead with migration quotas, the EU could end its privileged access to the single market. The EU is continuing to warn Switzerland with it will lose access to the single market if it goes ahead with plans to impose controls on the free movement of EU citizens by February 2017.²⁷

Switzerland has a much smaller market to offer than Britain but has been able to secure advantageous terms in trade deals with economies much larger than its own. This is very evident after a close examination of its 2009 trade deal with Japan, from which Swiss exports have benefited significantly. Swiss exports of chocolate, cereal, cheese and watches to Japan all face lower tariffs now.

UK trade would have much to gain if Britain took a similar approach to Switzerland.

4.4. Anglosphere

Some of those who want the UK to leave the EU are considering that the ‘Anglosphere’ could in some ways provide an alternative to the EU.²⁸

²⁵ *Idem*, p. 30.

²⁶ *Idem*, p. 30.

²⁷ *Idem*, p. 30.

²⁸ *Idem*, p. 33.

The main characteristics of the Anglosphere are the English language, Common Law, individualism, democracy, the rule of law, a strong civil society, limited government and private property

5. Conclusions

The task to take into account the future relationship between United Kingdom and European Union is more a political guideline rather than a legal requirement.

The most likely hypothesis is that the withdrawal agreement will contain provisions falling under the exclusive competence of the Union. That would exclude any signature or ratification by the Member State.

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