



## BRIEFING PAPER

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# Brexit: how does the Article 50 process work?

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### 3 Brexit: how does the Article 50 process work?

# Summary

This paper describes the Article 50 TEU process and developments from the EU referendum in June 2016 until January 2017.

## Article 50 TEU

The Treaty base for EU withdrawal is Article 50 of the Treaty on European Union (TEU). This is considered the only legal way to leave the EU, although some suggested there were other ways.

## Notifying intention to withdraw

The first step is to notify the European Council of the intention to withdraw. There is no set timeframe for when it has to do so, or in what form.

The previous Government assumed the Prime Minister would notify the EU under prerogative powers. But arguments that Parliament should – or even would have to – give its consent gained currency after the referendum and was the subject of a legal challenge at the High Court and the Supreme Court in the [Miller case](#).

There is no provision for withdrawing the notification, but many analysts believe Article 50 is revocable and that the UK could change its mind about leaving the EU after notification and before actually withdrawing. The revocability of Article 50 TEU was not raised in the Miller case, but could be important.

Theresa May said the Government intended to notify the European Council by the end of March 2017. To comply with the Supreme Court's judgment of 24 January 2017 in the Miller case, the Government introduced the [European Union \(Notification of Withdrawal\) Bill](#) to provide the Government with the legal authority to issue notice of withdrawal under Article 50. The Bill received Royal Assent on 16 March 2017 and on 29 March the Government delivered the [Article 50 letter](#) to the European Council President, Donald Tusk.

## EU-UK negotiations

Notification triggers the first stage in the withdrawal negotiations between the UK and the EU. The European Council, without UK participation, then adopts guidelines for the negotiations. A Council Decision will authorise the European Commission to open negotiations with the UK and issue detailed negotiating directives. The European Parliament will adopt a non-binding resolution setting out its position on the Brexit negotiations.

The EU negotiator, Michel Barnier, will negotiate a withdrawal agreement with the UK. The withdrawal agreement will be concluded by the EU Council by a 'super' qualified majority (72% of 27 participating states - excluding the UK) after obtaining the consent of the European Parliament.

During the negotiations the UK will continue to participate in EU activities, the EU institutions and decision-making. But it will not take part or vote in any Council or European Council discussion concerning its withdrawal. UK MEPs will participate in the EP vote on the withdrawal agreement.

The negotiation period is two years from formal notification, but it can be extended if all Member States agree.

## The withdrawal agreement

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The European Commission and the UK would like to settle some issues early on in the negotiations: safeguarding citizens' rights, reaching a financial settlement and resolving Ireland/Northern Ireland border issues.

The agreement might also set out transitional provisions, taking into account the framework for the UK's future relationship with the EU.

### **Agreement on future relationship with EU**

It is not yet clear whether the UK's future relationship with the EU will be covered by the withdrawal agreement or negotiated as a separate agreement alongside the withdrawal agreement. The UK Government wants parallel negotiations from the start, but the EU does not want to discuss a future EU-UK trade deal until later.

The Government says it does not intend to seek membership of the European Free Trade Association (EFTA), the European Economic Area (EEA) or Single Market. It was not looking at existing models for its future relationship with the UK, but at a bespoke agreement with the EU, including a comprehensive free trade agreement.

Voting on any separate post-exit EU-UK agreement could require the unanimous agreement of EU Member States and EP consent.

If the UK wants to re-join the EU in the future, it would have to re-apply under Article 49 TEU.

### **Release of EU obligations on withdrawal**

Withdrawal will take effect either when a withdrawal agreement enters into force, or two years after notifying the European Council of the intention to withdraw (unless there is a unanimous agreement to extend the negotiations). If there is no withdrawal agreement after two years and a veto on an extension period, or if the UK does not like the agreement, it can leave the EU without a withdrawal agreement.

The other EU Member States can reject a withdrawal agreement, but they cannot stop the UK from leaving the EU.

EU law will cease to apply to the UK upon withdrawal, but there might be some acquired rights for EU and UK citizens.

There is a question mark over a future role for the Court of Justice of the EU (CJEU) in any transitional agreement between the UK and the EU.

### **Government and Parliamentary preparations**

The Government established two new departments to manage Brexit: the [Department for Exiting the European Union](#), headed by David Davis, and the [Department for International Trade](#), led by Liam Fox. Two corresponding parliamentary Select Committees were established: the Committee for Exiting the EU, chaired by Hilary Benn, and the International Trade Committee, chaired by Angus Brendan MacNeil.

### **Dealing with EU law the UK has implemented: the 'Great Repeal Bill'**

On 2 October 2016, the Prime Minister [announced](#) plans to introduce a "Great Repeal Bill" in the next Queen's Speech, which will repeal the *European Communities Act 1972* (the ECA) and incorporate (transpose) European Union law into domestic law, "wherever practical". The Government indicated that these legal changes within the Bill would take effect on "Brexit Day": the day the UK officially leaves the EU.

The Government indicated that the Bill would be designed to re-establish control over law-making by repealing the ECA and provide some certainty over the content of the

statute book while the UK negotiates its exit from the EU. Once the UK has left, the next legislative stage would be for Government and Parliament to decide whether to keep any EU-derived law in UK domestic law.

### **The devolved regions**

The devolved legislatures will have to deal with EU legislation they have transposed into Scottish, Welsh or Northern Irish law. It will also be necessary to amend the relevant parts of the devolution legislation, which might require a Legislative Consent Motion under the Sewel Convention. This is discussed in more detail in CBP 7793, [Legislating for Brexit: the Great Repeal Bill](#), 21 November 2016.

# 1. Treaty basis for EU withdrawal

## Summary

The Treaty base for EU withdrawal is Article 50 of the Treaty on European Union (TEU). This is considered the only legal way to leave the EU, although some have suggested there are other ways.

## 1.1 Article 50 Treaty on European Union

The Treaty of Lisbon, which came into force in December 2009, provided for the first time a specific legal Treaty base for leaving the EU. This is set out in [Article 50](#) of the Treaty on European Union (TEU): “Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements”.

2. A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.

3. 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.

4. For the purposes of paragraphs 2 and 3, the member of the European Council or of the Council representing the withdrawing Member State shall not participate in the discussions of the European Council or Council or in decisions concerning it.

A qualified majority shall be defined in accordance with Article 238(3)(b) of the Treaty on the Functioning of the European Union.

5. If a State which has withdrawn from the Union asks to rejoin, its request shall be subject to the procedure referred to in Article 49.

Although on the face of it Article 50 TEU is a provision explicitly providing a way of leaving the EU, it is by no means comprehensive. As Adam Łazowski put it: “on closer inspection it raises more questions than it answers. The wording of the provision is cryptic and the regulation of withdrawal from the European Union incremental”.<sup>1</sup>

Article 50 TEU was adopted from the abandoned [Treaty Establishing a Constitution for Europe](#) (Article I-59).

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<sup>1</sup> *European Law Review*, 2012, pp. 523-540, “Withdrawal from the European Union and alternatives to membership”.

## 2. Notification of intention to withdraw

### Summary

After the EU referendum and the decision to leave the EU, the first step is for the UK to notify the European Council of the UK's intention to withdraw. There is no set timeframe for when it had to do so, or in what form.

The assumption that the Prime Minister could notify the European Council under prerogative powers was challenged at the Supreme Court in the Miller case. The Court ruled that Parliament had to give Government the legal authority to notify.

There is no provision for withdrawing the notification, although some analysts believe the UK could change its mind about leaving the EU after notification and before actually withdrawing.

### 2.1 The timing of notification

Article 50 TEU sets no timeframe for notification of intention to withdraw from the EU or what form it should take.

The former Prime Minister, David Cameron, said in his [22 February 2016 Statement](#) on the new Settlement for the UK in the EU that if there was a 'no' vote in the referendum he would trigger Article 50 'straight away'. But in his [resignation speech](#) David Cameron indicated that he would leave the notification to his successor. Theresa May, who became Prime Minister in July 2016, said the Government would trigger Article 50 TEU by the end of March 2017. The two-year negotiating period would start at this point and end in March 2019, unless extended.

Even though the referendum was advisory and not binding, the Cameron and May Governments made clear that they intended to respect the outcome. The then Foreign Secretary, Philip Hammond, [stated](#) on 25 February 2016 (c 497):

The propositions on the ballot paper are clear, and I want to be equally clear today. Leave means leave, and a vote to leave will trigger a notice under article 50. To do otherwise in the event of a vote to leave would represent a complete disregard of the will of the people. No individual, no matter how charismatic or prominent, has the right or the power to redefine unilaterally the meaning of the question on the ballot paper.

And c 498:

The Government's position is that the referendum is an advisory one, but the Government will regard themselves as being bound by the decision of the referendum and will proceed with serving an article 50 notice. My understanding is that that is a matter for the Government of the United Kingdom, but if there are any consequential considerations, they will be dealt with in accordance with the proper constitutional arrangements that have been laid down.

There was some concern that the notification could be made inadvertently, but Article 67(1) of the Vienna Convention on the Law of Treaties requires a state that wants to invoke the Convention in order to withdraw from a treaty to notify the other parties in writing.

## 2.2 The UK Parliament's role in approving the notification

### UK 'constitutional requirements'

Article 50 TEU states that a Member State may 'decide' to withdraw from the EU 'in accordance with its own constitutional requirements'. But what are the UK's constitutional requirements?

Importantly, the referendum result was not in itself a 'decision' to withdraw from the EU, as it had no binding effect.

But whether it was the Government or Parliament that could make the decision became the subject of increasing debate. Four main options were argued, ranging from using the Government's prerogative power to requiring an Act of Parliament:

### Government's 'prerogative' power?

Notification of intention to withdraw from a treaty or international organisation is usually seen as something for the UK Government to do under its inherent 'prerogative power' to conduct foreign affairs.

The UK Parliament can object to the Government ratifying treaties, under Part 2 of the Constitutional Reform and Governance Act 2010, and the House of Commons can continue objecting indefinitely, effectively giving it a power to block ratification. However, the UK Parliament has no formal role in negotiating treaties, or in withdrawing from them. Interestingly, even in the US – where Congress has a strong role in ratifying treaties – the conventional view is that the President may withdraw from treaties without the approval of Congress.<sup>2</sup>

When Lord Hamilton asked in February 2016 if Parliament's approval was needed under the European Communities Act 1972 (ECA) for notification of intention to withdraw from the EU, the FCO Minister Baroness Anelay [replied](#) that it was not:

The European Communities Act 1972 does not require prior approval of actions by Act of Parliament. The European Union Act 2011 does define some circumstances where this is required, but these do not include a notification under article 50.

This 'conventional' position was defended by commentators including [Mark Elliott](#), [Carl Gardner](#) and [David Allen Green](#). It would have meant that the Government alone decided when and how the formal decision to notify was made.

### Parliamentary involvement desirable?

Even without a requirement in the UK's constitutional arrangements for parliamentary approval of a decision to notify the EU of its intention to

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<sup>2</sup> See Laurence R Helfer, '[Exiting Treaties](#)', *Virginia Law Review*, Vol 91, 2005, p1579 fn 25 (p1590).

withdraw, some argued a political case for involving at least the House of Commons.

Sionaidh Douglas-Scott pointed out that the referendum was “a pre-legislative, or consultative, referendum, enabling the electorate to express its opinion before any legislation is introduced”,<sup>3</sup> but asked whether Parliament must “authorise the executive to start the unravelling of a process that will lead to the ECA’s repeal? Once again, we see a lack of certainty as to what sovereignty means in this context”. She also asked which of ‘popular’ sovereignty and ‘parliamentary’ sovereignty “ought to predominate”, suggesting that there could be a political case for involving Parliament at the notification stage.

[Mark Elliott](#), Professor of Public Law at the University of Cambridge, suggested that there were ‘excellent democratic reasons for arguing that Parliament should play a full part’ in the Article 50 deliberations:

As we are rapidly discovering, the volume and complexity of the issues left unresolved by the binary view expressed by the electorate is immense, and Parliament has a crucial role to play in shaping the way forward. For all that the UK has experimented with direct democracy through the holding of a referendum on EU membership and on other constitutional matters, the UK remains, fundamentally, a parliamentary democracy, and it cannot plausibly be argued that the referendum substitutes for proper parliamentary involvement.

### Order in Council required?

Adam Tucker, Senior Lecturer at Liverpool Law School, argued that the only way for Article 50 to be triggered was by making secondary legislation – an Order in Council – under [section 2\(2\) of the ECA](#) (which could be subject to parliamentary override):

So now the United Kingdom enjoys, by virtue of the Treaty of Lisbon, two parallel novel rights: the right to pursue an orderly withdrawal even against the wishes of some other member states, and the right to withdraw unilaterally. But they can only be exercised once a decision to leave has been made (and notified). It follows that the decision to leave comes within the terms of section 2(2) [of the ECA 1972]: it would be (in the 1972 statute’s unwieldy language) a decision for the purpose of enabling rights enjoyed by the United Kingdom to be exercised. In summary, section 2(2), a domestic statutory provision enacted by Parliament, provides a constitutional grounding for an executive (but not prerogative) power to make the decision to leave the EU under Article 50.<sup>4</sup>

[Mark Elliott](#) puts forward two counter-arguments: firstly, that triggering Article 50 is not exercising a right ‘under or by virtue of’ the EU Treaties, and secondly that there is no obligation to use the section 2(2) power, and no need to do so, because a prerogative mechanism for the exercise of the Article 50 power already exists.

<sup>3</sup> Constitutional Law blog, [Brexit, the referendum and the UK Parliament: Some Questions about Sovereignty](#), 28 June 2016,

<sup>4</sup> Adam Tucker, [Triggering Brexit: A Decision for the Government, but under Parliamentary Scrutiny](#), UK Constitutional Law Association, 29 June 2016.

## Act of Parliament required?

Since the referendum result, many commentators – including [Lord Lester of Herne Hill and Sir Malcolm Jack](#) (former Clerk of the House of Commons) – have argued that an Act of Parliament is required before notifying the EU.

Writing in the [Guardian, 27 June 2016](#), Geoffrey Robertson QC maintained that Parliament would have to repeal the ECA before Brexit can be triggered:

It is being said that the government can trigger Brexit under article 50 of the Lisbon treaty, merely by sending a note to Brussels. This is wrong. Article 50 says: “Any member state may decide to withdraw from the Union in accordance with its own constitutional requirements.” The UK’s most fundamental constitutional requirement is that there must first be the approval of its parliament.

However, repealing the ECA before withdrawing from the EU Treaties would put the UK in breach of its EU and international legal obligations.

In a [legal opinion](#) published on 27 June, Nick Barber (Trinity College, Oxford), Tom Hickman (Blackstone Chambers), and Jeff King (senior law lecturer UCL), said that an Act of Parliament was needed to approve the triggering of Article 50 TEU. They argued that if the Prime Minister were to ‘attempt to do so before such a statute was passed, the declaration would be legally ineffective as a matter of domestic law and it would also fail to comply with the requirements of Article 50 itself’. Their argument is based on common law principles found in *The Case of Proclamations*<sup>5</sup> and *Fire Brigades Union* case<sup>6</sup> that the prerogative may only be used where it does not conflict with an Act of Parliament. In the current situation, they continue, UK membership of the EU has been approved by Parliament under the ECA; an Article 50 notification would start the process by which the ECA becomes meaningless; therefore parliamentary approval is required. ‘Statute beats prerogative’.

Lord Pannick (David Pannick QC) took a similar line in an article in [The Times on 30 June](#):

Article 50 notification commits the UK to withdrawal from the EU, and so is inconsistent with the 1972 act. Withdrawal is the object of the notification, and it is the legal effect. If, at the end of the negotiating period, parliament disagrees with the withdrawal which flows from the notification, there is nothing parliament could then do to prevent our withdrawal from the EU, which would frustrate the 1972 act. Therefore prerogative powers may not now be used.

But [Mark Elliott](#) argues that the Article 50 TEU notification itself does not conflict with any UK statute:

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<sup>5</sup> A court decision in 1610 during the reign of King James VI and I which defined some limitations on the Royal Prerogative at that time.

<sup>6</sup> This [case](#) in 1995 raised important constitutional questions about the extent to which the Government is required to seek Parliamentary approval for its policies or may rely instead on prerogative powers. The court ruled that the Home Secretary acted unlawfully in introducing a revised criminal injuries compensation scheme under the prerogative power, rather than implementing the statutory scheme under the Criminal Justice Act 1988. [Comment by Ian Leigh](#).

... it is not the case that triggering Article 50 amounts to the Government's turning the ECA 1972 into a dead letter, since the outcome of any Article 50 process cannot be known. Such a process might result in an agreement that the UK should remain a member of the EU on altered terms, such that the ECA 1972 would continue to bite upon a substantial set of EU-related matters, or that the UK should become a member of the European Economic Area, in which case a substantial corpus of EU law, upon which an amended ECA 1972 might continue to bite, would remain pertinent to the UK. Equally, an Article 50 process would ultimately amount to nothing if it were to be aborted.

He also suggests that it is 'far from clear' that invoking Article 50 would 'frustrate the will of Parliament vis-à-vis the ECA 1972'.

It could be argued that Parliament, by passing the [European Union \(Amendment\) Act 2008](#), has already agreed to the Treaty of Lisbon which introduced Article 50 TEU, without an amendment requiring parliamentary approval to start the withdrawal process;<sup>7</sup> and also passed an Act – the [European Union Referendum Act 2015](#)<sup>8</sup> – to provide for a referendum on whether to stay in or leave the EU. Further down the line Parliament will need to pass legislation to repeal the ECA.

## The *Miller* case at the High Court and the Supreme Court

Gina Miller, an investment manager and philanthropist, brought judicial review proceedings to challenge the legality of the UK Government's proposed use of prerogative powers to give notice under Article 50. The High Court heard the case on 13, 17 and 18 October 2016. The judges that heard the case were the Lord Chief Justice (Lord Thomas of Cwmgiedd DJ), the Master of the Rolls (Sir Terence Etherton MR) and Lord Justice Sales.

### The High Court's judgment

On 3 November 2016, the High Court gave its judgment: [R \(Gina Miller & Dos Santos\) v Secretary of State for Exiting the European Union](#).<sup>9</sup>

The Court found in favour of the claimants. The Court ruled that the Government cannot, according to the United Kingdom's constitutional law, use prerogative powers to give the notice required by Article 50 TEU to withdraw from the European Union.

### What reasons did the Court give for its decision?

The Court rejected the Government's argument that the European Communities Act 1972 (ECA) enabled the Government to modify domestic legal rights through the use of the prerogative. This meant that the Court disagreed with the Government's claim that they

<sup>7</sup> In 1991 Parliament succeeded in passing an amendment to the Maastricht Treaty Bill which required the Government to submit its assessment of the UK's budgetary position annually to Parliament before submitting it to the European Commission. This became [Section 5](#) of *European Communities (Amendment) Act 1993*.

<sup>8</sup> The Act received Royal Assent in December 2015.

<sup>9</sup> [2016] EWHC 2768 (Admin).

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retained, after the passing of the ECA, the power under the prerogative to provide the notice under Article 50 to enable the UK to leave the EU.

The Court added that the Government's approach was "flawed" as it failed to acknowledge the constitutional principle that, "unless Parliament expressly legislates to the contrary, the Crown should not have power to vary the law of the land by the exercise of its prerogative powers".<sup>10</sup>

The judgment outlined that the historical evolution of the constitution, and in particular the outcome of the war between the Crown and Parliament in the seventeenth century, meant that it would be "surprising" if Parliament had intended to leave domestic legislative rights, as enacted by the ECA, subject to the Crown's prerogative powers.<sup>11</sup>

The judgment placed particular emphasis on the ECA's status as a statute of "special constitutional significance".<sup>12</sup> This meant that it was particularly unlikely that Parliament would have allowed the legal changes effected by the ECA to be subject to the Crown's prerogative powers. By enacting such a momentous change, enabling the direct effect of what was then EC law in the UK, it would "not be plausible", the judgment explained, for the ECA to enable the Government to undo those legal changes via the prerogative.<sup>13</sup>

The Court accepted the claimant's submission that if the ECA is the source of domestic legal rights, then the triggering of Article 50 and the withdrawal from the European Union, would deprive those rights of their effect. The Court did not accept the Government's argument that any loss of these rights could be minimised by yet to be enacted primary legislation. The exercise of the prerogative, so said the Court, would still deprive those rights of effect.

The Court set out that the Government had overstated the extent to which the courts would not interfere with Crown's use of the prerogative in the conduct of international relations. The courts would be able to interfere where the exercise of prerogative in the conduct of international relations would "bring about major changes in domestic law".<sup>14</sup>

The Court's central conclusion was that as result of Parliament enacting the ECA, and in the light of relevant constitutional principles, The Crown "has no prerogative power to effect a withdrawal" from the EU by giving notice under Article 50.<sup>15</sup>

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<sup>10</sup> Ibid para 83-85

<sup>11</sup> Ibid para 66

<sup>12</sup> Ibid para 82-88

<sup>13</sup> Ibid para 87

<sup>14</sup> Ibid para 89

<sup>15</sup> Ibid para 111

## The Supreme Court

The Government appealed the High Court's decision and was granted permission to "leapfrog" the Court of Appeal and go directly to the Supreme Court.

The nature of the proceedings in the Supreme Court were different from High Court by virtue of a number of interventions and joined cases. Most notably, the Scottish and Welsh Governments intervened in order to raise matters relating to the impact of triggering Article 50 upon the devolved settlement. The Supreme Court also enabled a separate proceedings on similar issues, brought by Raymond McCord in Northern Ireland, to be heard at the same time. The High Court in Belfast rejected his application, but the Court of Appeal in Belfast referred the appeal to the Supreme Court. The Attorney General for Northern Ireland also made a reference, under his powers in the *Northern Ireland Act 1998* to refer a number of constitutional questions raised in a separate case brought in Northern Ireland by Steven Agnew and others.<sup>16</sup>

The case was heard over four days: 5, 6, 7 and 8 December 2016. For the first time ever, the Supreme Court sat *en banc*, meaning that all sitting justices heard the case.<sup>17</sup> The Court's judgment is expected in January 2017.

## 2.3 Will the EU need to approve the notification?

Notice of withdrawal is unilateral and does not require the consent of the other EU Member States or the European Parliament (EP), or consultation with the Commission.

However, the process of withdrawal is carried out according to EU rules, and, as Dr Adam Łazowski<sup>18</sup> points out, using the metaphor of marriage and divorce, it is not unilateral:

One myth to dispel at the outset of this discussion is the possibility of unilateral exit. The EU is not a golf club but rather a marriage with various strings attached. It is, first and foremost, a legal order agreed between the [28] member states. Although some lawyers and policy-makers may perceive a possibility for unilateral departure in Art. 50 TEU, this is largely an academic exercise. A member state may decide to leave the EU as per domestic constitutional requirements, but this is merely a decision on exit. Withdrawal itself requires a proper treaty framework, regulating the time frame and details of the divorce.<sup>19</sup>

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<sup>16</sup> For full details of the proceeding see: <https://www.supremecourt.uk/news/article-50-brexite-appeal.html>

<sup>17</sup> For background on the size of panels in the Supreme Court see: Joe Tomlinson, Jake Rylatt and Duncan Fairgrieve: [And Then There Were Eleven: Some Context on the Supreme Court Sitting En Banc in the Article 50 Case](#), UKCLA blog 9 November 2016

<sup>18</sup> Professor of EU Law at School of Law, University of Westminster.

<sup>19</sup> CEPS Commentary, [How to withdraw from the European Union? Confronting hard reality](#), Adam Łazowski, 16 January 2013.

The Maltese Presidency has already warned the UK that it cannot have a better deal outside the EU than it does as a Member State.<sup>20</sup> The Maltese Prime Minister, Joseph Muscat, has also said that if the UK secures a transitional deal with the EU, as senior UK figures have suggested, it will have to submit to control by EU courts.<sup>21</sup>

## 2.4 Could a notification be withdrawn?

Article 50 TEU does not state whether a withdrawal notification could be withdrawn.

But because Article 50 has specific provisions on when the Treaties cease to apply, and how a former Member State could re-join, it could be read as implying that notification could not be withdrawn. It specifies (a) that the EU Treaties cease to apply two years after notification in the absence of a withdrawal agreement or an extension of the negotiating period, and (b) that from that point the state that has withdrawn can re-join only through the normal application procedure.

However, in evidence to the Lords EU Committee, Professor Derrick Wyatt argued that there is nothing in the wording of Article 50 TEU to say that a country couldn't change its mind:

It is in accord with the general aims of the treaties that people stay in rather than rush out of the exit door. There is also the specific provision in Article 50 to the effect that, if a state withdraws, it has to apply to rejoin de novo. That only applies once you have left. If you could not change your mind after a year of thinking about it, but before you had withdrawn, you would then have to wait another year, withdraw and then apply to join again. That just does not make sense. Analysis of the text suggests that you are entitled to change your mind, but the politics of it would be completely different.<sup>22</sup>

He also said that 'in law, the UK could change its mind before withdrawal from the EU and decide to stay in after all, but the politics of the referendum result would be likely to rule out that option'.<sup>23</sup>

Sir David Edward, former Judge of the EU Court of Justice, said it was 'absolutely clear that you cannot be forced to go through with it if you do not want to: for example, if there is a change of Government'. But he too speculated about the politics of the situation, and thought the other Member States might only allow the UK not to withdraw after notification if it went 'back to zero'; there would be 'no new opt-outs'.<sup>24</sup> He also reminded the Committee that the new Settlement for the UK in the EU would only come into force if the UK voted to stay in the EU; otherwise it falls.<sup>25</sup>

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<sup>20</sup> Euranet-plus, 11 January 2017, [UK can't have better deal outside EU – Maltese PM](#).

<sup>21</sup> Reuters, 12 January 2017, [EU must control any UK transition deal after Brexit – Malta](#).

<sup>22</sup> [Revised transcript of evidence. Lords EU Committee, 8 March 2016.](#)

<sup>23</sup> Ibid

<sup>24</sup> [Revised transcript of evidence. Lords EU Committee, 8 March 2016.](#)

<sup>25</sup> For information on the new Settlement for the UK in the EU, see Commons Briefing Paper 7524, [EU Referendum: analysis of the UK's new EU Settlement](#), 8 March 2016

Alan Renwick, Deputy Director of The Constitution Unit, thought the EU Court of Justice might rule, if asked, on whether Article 50 TEU implied an ability to withdraw a notification. He also made the point that political reality might take over and the other 27 Member States would allow the UK to change its mind if they want the UK to stay in the EU. But, he cautioned:

... that would again require unanimity – either to amend Article 50 (and we know how much effort is required to change an EU treaty) or, in effect, to extend permanently the two-year negotiation window. Hence, any member state could drive a hard bargain, potentially one detrimental to the UK.<sup>26</sup>

Under the Vienna Convention on the Law of Treaties, a notification of intention to withdraw from a treaty 'may be revoked at any time before it takes effect' (Article 68). However, this provision does not override any specific arrangements in a treaty. There is considerable variation in treaties' exit clauses over whether notification may be withdrawn.<sup>27</sup>

In the High Court case in Miller, it was taken as a given that the notification made under Article 50 TEU is irrevocable, but the point was not argued, in spite of its potential significance.

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<sup>26</sup> [An EU Referendum horror: why you need to know about Article 50. The clause the public don't know about](#), 10 December 2015.

<sup>27</sup> See Laurence R Helfer, '[Exiting Treaties](#)', *Virginia Law Review*, Vol 91, 2005, p1579 at p1597

## 3. The negotiations

### Summary

Notification of the UK's intention to withdraw triggers the start of the withdrawal process. The European Council will adopt guidelines, without the UK's participation. The Commission will formally approve Michel Barnier as its Brexit negotiator and adopt detailed negotiating directives. Mr Barnier has already started to talk to other EU leaders about Brexit, with a view to having an initial EU position once Article 50 is triggered. The European Parliament will adopt a non-binding resolution setting out its position on the negotiations.

The Government has established two new Departments – one on leaving the EU and another on international trade – and Parliament set up two new corresponding Select Committees. Theresa May announced that a 'Great Repeal Bill' would be introduced in the next Queen's Speech. This bill will repeal the European Communities Act 1972 and at the same time "convert" EU law into UK law. Decisions will be taken later on to keep, repeal or amend these laws, depending on the progress and outcome of the withdrawal negotiations.

Until the point of withdrawal the UK is an EU Member State. During the negotiations, the UK will continue to participate in EU activities, the EU institutions and decision-making, and is expected to abide by the principle of 'sincere cooperation' in negotiations on EU legislation in other policy areas until it leaves. It will not take part or vote in any Council or European Council discussion concerning its withdrawal.

Until the UK leaves the EU it cannot negotiate trade agreements with non-EU states, but Government ministers have already talked informally with other states' leaders about future relations.

The negotiation period is two years from formal notification, but it could be extended if all Member States agreed.

The UK will not hold the EU Presidency in 2017.

### 3.1 Will the UK participate in the withdrawal negotiations?

There was some initial confusion over the meaning of Article 50(4) TEU with regard to the UK's participation in the negotiations. The confusion arose as a result of the language used to explain Article 50(4) TEU, and led Dr Alan Renwick to take issue with an article in Prospect Magazine in December 2015<sup>28</sup> which stated: "Clause 4 says that after a country has decided to leave, the other EU members will decide the terms—and the country leaving cannot be in the room in those discussions. Repeat: we'd have no say at all on the terms on which we'd deal with the EU from then on, and no opportunity to reconsider".

Although the actual withdrawal negotiations will be between the EU and the withdrawing State rather than multilaterally between that State and the other Member States, Article 50(4) TEU envisages that

<sup>28</sup> [An EU Referendum horror: why you need to know about Article 50. The clause the public don't know about](#), Bronwen Maddox, 10 December 2015.

withdrawal could be discussed by Member States in the Council and European Council. The UK will be excluded from such meetings.

In an exchange in March 2016 between Members of the Lords EU Committee and expert witnesses, Professor Derrick Wyatt clarified for Peers that “We would be barred from [...] anything to do with the withdrawal agreement”<sup>29</sup>

Christophe Hillion thought the exclusion of the withdrawing State from the Council was more to do with limiting its influence over on-going or future EU law-making than its own withdrawal:

... it is questionable whether [a withdrawing state] should ... be entitled to influence EU decisions that might never apply to it, or indeed use its position to obtain concessions in the context of the withdrawal negotiations, even if arguably, its actual influence might have diminished as a result of its precarious position in the system. While Article 50 TEU does not readily provide a legal basis for an outright suspension of the withdrawing state’s decision-making rights as soon as the exit process is formally initiated, the notion of ‘decisions concerning it’ could nevertheless be construed broadly enough so as to limit its weight in the Council and European Council. The ensuing *partial*/suspensive effects of the notification, foreseen in paragraph 4, would thus circumscribe the withdrawing state’s influence on the production of EU norms that would not affect it as Member State.<sup>30</sup>

## 3.2 Informal Brexit talks?

The EU institutions have insisted that there will be no informal talks with the UK about Brexit before formal notification under Article 50 TEU.

However, Michel Barnier has travelled to most other EU Member States to prepare the EU position on Brexit, and said he would have visited all 27 by the end of January.<sup>31</sup> In December 2016 Barnier set out progress on Brexit:

This Task Force, together with all the services of the European Commission, has screened all the *acquis* of the European Union to identify the issues that will be discussed during the negotiations.

Together with colleagues from the European Council, I have participated in bilateral meetings with the Sherpas of the 27 Heads of State or Government.<sup>32</sup>

Also, in spite of affirmations that the UK is a full EU Member State until it leaves, there is some evidence that the UK is already being excluded from informal talks among the other 27 Member States about Brexit. Theresa May did not attend an informal dinner meeting of the European Council in December 2016.

Although the UK cannot conclude trade agreements with non-EU states until it leaves the EU, UK ministers have already talked informally to the governments of countries outside the EU (including the US, India, China, South Korea, Mexico and New Zealand) about future trade relations.

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<sup>29</sup> [Revised transcript of evidence, 8 March 2016.](#)

<sup>30</sup> Hillion, *op cit.*

<sup>31</sup> European Commission [press briefing](#), 6 December 2016.

<sup>32</sup> *Ibid.*

### 3.3 What about UK MEPs, Commissioner, Judges and staff?

Commentators tend to agree that the UK's MEPs will be able to participate in EP business concerning the withdrawal, including the EP vote on any withdrawal agreement, although Gostynska *et al*/suggest this might in the event prove too controversial.<sup>33</sup>

In the absence of any indication to the contrary, it is assumed that the UK's EU Court Judges will continue with their work and that staff working for the EU institutions will continue in post until withdrawal takes effect. The UK Commissioner, Lord (Jonathan) Hill, resigned in June 2016 and was replaced by [Julian King](#) in August 2016, who took on the Security Union portfolio.

Jean-Claude Juncker has assured UK staff in the Commission that he will try to support and help them in a "spirit of reciprocal loyalty".<sup>34</sup> According to the Staff Regulations, they are "Union officials" who work for the EU as European, not national, civil servants.

### 3.4 How long will the negotiations take?

Under Article 50 TEU withdrawal takes place after two years, but there is a possibility of extension if all Member States agree to this. In theory, many extensions could be made in this way, although politically this is unlikely.

Michel Barnier has emphasised the short time-frame for concluding a withdrawal agreement, given that the two years includes the time spent drawing up a negotiating mandate. He suggested on 6 December 2016 that the negotiations, if triggered by UK notification by the end of March 2017, should be concluded by October 2018. This would allow time for approval by the EU Council, EP and the UK Parliament within the Article 50 two-year time frame.

In reality it is impossible to say how long the negotiations will take, but many analysts think two years will not be long enough. Sir David Edward thought a long negotiation period under Article 50 TEU would be necessary because 'withdrawal from the Union would involve the unravelling of a highly complex skein of budgetary, legal, political, financial, commercial and personal relationships, liabilities and obligations'.<sup>35</sup>

Open Europe published comparative information on the time it takes to negotiate EU free trade agreements: they took on average between four and seven years.<sup>36</sup>

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<sup>33</sup> The Polish Institute of International Affairs, [The Renegotiation Delusion? Nine Questions about Britain's EU Future](#), Agata Gostyńska, Roderick Parkes, Marta Stormowska, Pawel Tokarski, Patryk Toporowski, May 2013, p 22.

<sup>34</sup> Jean-Claude Juncker, [Message to staff](#), 24 June 2016.

<sup>35</sup> [Scottish Constitutional Futures Forum contribution, 17 December 2012.](#)

<sup>36</sup> Pawel Swidlicki, [Would Brexit lead to "up to a decade or more of uncertainty"?](#) Open Europe, 29 February 2016.

When Greenland withdrew from the EC/EU, the transitional rules took two years to negotiate, and the issues were much less complex. The Government Report, [The process for withdrawing from the European Union](#), referred to 'a decade or more of uncertainty', referring not just to the negotiating period but to the post-exit period in which the UK would be establishing or consolidating its new relationship with the EU and the rest of the world.

The previous Government thought it would not be possible to conclude an agreement within two years and that an extension of the negotiating period would be needed.<sup>37</sup> There may be political reasons for either prolonging the negotiations or not allowing them to be extended. Open Europe's Pawel Swidlicki suggested: "there may be a desire to drag out the negotiations in order to ward off those who may want to follow the UK's lead".<sup>38</sup> On the other hand, the other Member States may not want to grant the UK more time to negotiate everything it wants to get from the withdrawal agreement. Sir David Edward outlined some possible reasons:

Remember that other member states have much higher priorities, such as refugees and so on. Their willingness to sit down, make concessions and go on and on beyond two years is not necessarily guaranteed. They may say, "Right, you want to go, so please go and let us get on".<sup>39</sup>

So more time is not guaranteed, even if it were considered necessary by the UK and a majority of Member States.

The Chancellor, Philip Hammond, told the Treasury Select Committee in December 2016 that a transitional deal, in which the UK would pay for access to the single market for about 24 months after leaving the EU, would help to ensure a "smooth" Brexit.<sup>40</sup> Mark Carney, the Governor of the Bank of England, has also suggested a two-year transitional deal to mitigate the impact of Brexit on the UK economy.<sup>41</sup>

### 3.5 What about the status of the UK during the negotiations?

The UK will still be a Member State during the withdrawal negotiations and will continue with business as usual until the withdrawal agreement enters into force or two years (or possibly more) after notification. Existing EU law will continue to apply in the UK, and the UK will be bound by the principle of 'sincere cooperation'. Politically, this could be difficult.

The previous Government said that a vote to leave and the on-going withdrawal negotiations would "have an impact on our ability to affect the EU's decision-making".<sup>42</sup> In the 2013 Polish Institute of International Affairs [report](#), Gostyńska et al thought Article 50 TEU is "ambiguous

<sup>37</sup> Cm 9216, [The process for withdrawing from the European Union](#), February 2016.

<sup>38</sup> [Would Brexit lead to "up to a decade or more of uncertainty"?](#) 29 February 2016.

<sup>39</sup> Revised transcript of evidence, Lords EU Committee, 8 March 2016.

<sup>40</sup> [Reported](#) in Business Insider, 12 December 2016.

<sup>41</sup> [Open Europe, 12 January 2017](#).

<sup>42</sup> Cm 9216, [The process for withdrawing from the European Union](#), February 2016.

about the legal status of a withdrawing Member State in the transitional period between the notification of withdrawal and the moment when the treaties cease to apply to it”, continuing:

It is disputable whether such a state is entitled to remain actively involved in the EU in the transition period. The full participation of the British delegation in EU decision-making, particularly in adopting EU law could encounter opposition from those Member States with opposing agendas. It is, however, proper to expect that a withdrawing Member State should abide by a principle of sincere cooperation even though it already has one foot outside the EU.

It remains to be seen whether the UK can maintain its influence in the EU institutions or in policy and law-making once the withdrawal negotiations start.

### 3.6 How will the Government manage the negotiations?

Given that EU law applies in a broad range of policy areas, a UK withdrawal will probably involve all Government Departments, as well as the UK Representation in Brussels (UKREP). Sir Ivan Rogers, the UK Permanent Representative to the EU since November 2013, resigned on 3 January 2017 and was replaced by Sir Tim Barrow.

David Cameron had set up a cross-departmental EU unit which would “report to the whole of the Cabinet on delivering the outcome of the referendum, advising on transitional issues and exploring objectively options for [the UK’s] future relationship with Europe and the rest of the world from outside the EU.”<sup>43</sup> In July 2016 this unit was replaced by a new [Department for Exiting the European Union](#), and the new Secretary of State for Exiting the EU is David Davis MP. The department is “responsible for overseeing negotiations to leave the EU and establishing the future relationship between the UK and EU”.

There is a new corresponding parliamentary Select [Committee for Exiting the EU](#), chaired by Hilary Benn. The Committee’s first Inquiry is on the [UK’s negotiating objectives for withdrawal from EU](#).

The Government established another new department, the International Trade Department, with Dr Liam Fox as the new Secretary of State for International Trade. The corresponding new parliamentary Select Committee, the International Trade Committee, has launched an Inquiry on [UK trade options beyond 2019](#).

The UK negotiators are likely to include David Davis, the Secretary of State for Exiting the EU, officials in his Department (Oliver Robbins and colleagues), and Tim Barrow.

Theresa May said the Government will not give a blow-by-blow account of negotiations, which it believes would compromise its negotiating strategy. It has also said it will keep Parliament at least as well-informed as the EP, although it is not yet clear exactly what this will mean.

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<sup>43</sup> [Statement](#) to the Commons on 27 June 2016.

## 4. The withdrawal agreement

### Summary

It is unclear from the terms of Article 50 TEU how far arrangements for the UK's future relationship with the EU will be included in the withdrawal agreement.

There are different opinions as to what else a withdrawal agreement might include; the content would be up to the negotiators. Transition arrangements in policy areas covered by the EU Treaties will have to be settled. They might negotiate, alongside the withdrawal agreement, agreement(s) with the rest of the EU on the post-exit relationship (e.g. membership of EFTA or the EEA). This/these would be signed and ratified after withdrawal.

The Government does not appear to be heading for an EFTA/EEA route.

Chancellor Philip Hammond suggested the UK will need a transitional agreement with the EU.

There are particular concerns about the continuation of the UK's trading relations with third states and there is a question about possible vested rights for individuals and companies.

Under Article 50 TEU Qualified Majority Voting (QMV) is required to agree a withdrawal agreement. But voting on any separate post-exit agreement would be different and could require the unanimous agreement of EU Member States and EP consent.

The other EU Member States can reject a withdrawal agreement, but they cannot stop the UK from leaving the EU.

### 4.1 What will the withdrawal agreement cover?

The scope of the withdrawal negotiations can be as narrow or as wide as the negotiators choose, because Article 50 TEU does not specify how far-reaching a withdrawal agreement should be.<sup>44</sup>

It is not clear from Article 50 TEU whether all the arrangements for the withdrawing State's future relationship with the EU will be included in the withdrawal agreement, or require the negotiation of a separate agreement with the EU. Article 50(2) TEU refers only to negotiating and concluding arrangements for withdrawal, 'taking account of the framework for [the exiting State's] future relationship with the Union'.

Some commentators believe the withdrawal negotiations and agreement will focus on the mechanics of withdrawal and the transition period, before a separate agreement on the withdrawing State's future relationship with the EU comes into force. Christophe Hillion, for example, thinks the Article 50 procedure might not envisage "far reaching EU commitments in terms of future cooperation with the withdrawing state", but be limited to "setting out the arrangements for [the] withdrawal of a technical nature, possibly to areas where the EU has exclusive powers, such as trade".<sup>45</sup>

<sup>44</sup> Eszter Zalan, [EUObserver, 24 February 2016](#).

<sup>45</sup> Hillion, p. 140.

He argued that although the framework for a future relationship would be left to a later more comprehensive agreement, the withdrawal agreement would aim to tackle policy issues such as “the movement and treatment of citizens from the withdrawing state, and of citizens from other Member States resident in that state”.<sup>46</sup>

According to a European Parliament Research Service (EPRS) briefing on the withdrawal process, the withdrawal agreement will be “merely declaratory” because “the withdrawal takes place even if an agreement is not concluded”. The authors argue that the agreement between the EU and the withdrawing State will be about the “arrangements for its withdrawal” and the framework for future relations, but not the withdrawal itself.<sup>47</sup>

Whatever the withdrawal agreement looks like, it will have to be compatible with the EU Treaties, and the Court of Justice of the EU could be asked to rule on this or on the decision to conclude it.

### 4.2 What will need to be settled?

The policy areas that will need to be discussed in the course of withdrawal negotiations are considered in a 2016 Commons Briefing Paper 7213, [EU referendum: impact of an EU exit in key UK policy areas](#). The Government Report, [The process for withdrawing from the European Union](#), looked at key matters that would need to be tackled in the negotiation of withdrawal and transition provisions. The list included the following:

- unspent EU funds due to UK regions and farmers;
- cross-border security arrangements including access to EU databases;
- co-operation on foreign policy, including sanctions;
- transfer of regulatory responsibilities;
- arrangements for contracts drawn up in accordance with EU law;
- access to EU agencies that play a role in UK domestic law, such as the European Medicines Agency;
- arrangements for the closure of EU agencies headquartered in the UK – the process for relocating the two UK-based EU agencies has already begun;
- departure from the Single European Sky arrangement;
- access for UK citizens to the European Health Insurance Card;
- the rights of UK fishermen to fish in traditional non-UK waters, including those in the North Sea;
- continued access to the EU’s single energy and aviation markets;

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<sup>46</sup> Hillion, p.141.

<sup>47</sup> EP Research Service, [Article 50 TEU: Withdrawal of a Member State from the EU](#), Eva-Maria Poptcheva, February 2016.

- the status of the UK's environmental commitments made as party to various UN environmental conventions and currently implemented through EU legislation.<sup>48</sup>

In its first report the new Brexit Committee set out what it considered the “bare minimum” that will need to be clarified before the UK leaves the EU:

The institutional and financial consequences of leaving the EU including resolving all budget, pension and other liabilities and the status of EU agencies currently based in the UK;

Border arrangements between Northern Ireland and the Republic of Ireland and a recognition of Northern Ireland's unique status with regard to the EU and confirmation of the institutional arrangements for north-south cooperation and east-west cooperation underpinning the Good Friday Agreement;

- the status of UK citizens living in the EU;
- the status of EU citizens living in the UK;
- the UK's ongoing relationship with EU regulatory bodies and agencies;
- the status of ongoing police and judicial cooperation; and
- the status of UK participation in ongoing Common Foreign and Security Policy missions;
- a clear framework for UK–EU trade; and
- clarity on location of former EU powers between UK and devolved governments.<sup>49</sup>

In December 2016 Michel Barnier set out four main ideas had informed the Brexit taskforce preparation to date:

First, unity. Unity is the strength of the European Union and President Juncker and I are determined to preserve the unity and the interest of the EU27 in the Brexit negotiations. This determination is shared by all governments.

Second, 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.

Third, negotiations will not start before notification. Fourth, the Single Market and its four freedoms are indivisible. Cherry picking is not an option.<sup>50</sup>

MPs want to know more about the UK's negotiating strategy. The Prime Minister is expected to set out the Government's Brexit plan in February 2017, with a speech at Lancaster House on 17 January 2017 in which reports speculate she will signal an intention to opt for a ‘hard Brexit’, taking the UK out of the single market and the customs union.<sup>51</sup>

<sup>48</sup> Cm 9216, [The process for withdrawing from the European Union](#), February 2016.

<sup>49</sup> Exiting the EU Committee, First Report 2016-17, The process for exiting the European Union and the Government's negotiating objectives, [The Article 50 negotiation: what will it cover?](#) 14 January 2017.

<sup>50</sup> [Commission press release](#), 6 December 2016.

<sup>51</sup> See Telegraph, 14 January 2017, [Theresa May to side with Eurosceptics in major Brexit speech revealing what she wants from negotiations](#).

### Are there any priorities?

Priorities for Commission are safeguarding citizens' rights, reaching a financial settlement, and resolving border issues. The EU has stipulated that sufficient progress must be made on these matters before there can be any discussion of the UK's future trading relationship with the EU.

Both sides have said that they want to prioritise citizens' rights and resolve the complex impacts of Brexit on the Ireland-Northern Ireland border. But beyond that there has already been some significant disagreement. The UK is likely to continue to contribute to the EU Budget until it leaves, and probably beyond; the so-called 'divorce bill' is likely to be one of the most difficult issues, with cost estimates in the range of €60 to €100 billion.

It is possible that there may be some reconciliation in the final Brexit agreement to balance what the UK is owed, for instance from programmes it has contributed to before the Brexit date, and what it owes for any benefit it may be entitled to for a while after Brexit.

## 4.3 External agreements

Leaving the EU will take the UK out of the Common Commercial Policy under which the EU has concluded hundreds of free trade and other agreements with third countries worldwide.<sup>52</sup> EU competence only agreements will simply not apply to the UK, but what about mixed agreements, which are concluded by the EU and each of the Member States in their own right? Will they have continuing effect? The Government has said the withdrawal agreement will have to include "transition arrangements for UK exit from EU Free Trade Arrangements with third countries".<sup>53</sup> Many argue that the UK will have to re-negotiate all its relations with third states on a bilateral basis.

Lord Lawson [told](#) BBC Radio 4's World at One on 29 February 2016 that all the UK's trading arrangements would "remain totally unchanged", but this view is not shared by many analysts. Thomas Sebastian<sup>54</sup> thought the UK would remain a treaty party to mixed agreements after withdrawal, but that in "most cases", it would not be able to take the benefit of mixed trade agreements. This is because the trade sections of these agreements are "generally written as applying to the EU and the country it's signing an agreement with. Each provision in each mixed agreement would have to be scrutinised to see how it applied to a post-Brexit Britain".<sup>55</sup>

Dr Markus Gehring<sup>56</sup> made a similar point, but he thought mixed agreements "could be subject to automatic termination as far as the UK

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<sup>52</sup> See Commons Briefing paper

<sup>53</sup> [The process for withdrawing from the European Union](#), Cm 9216, February 2016.

<sup>54</sup> Barrister at Monckton Chambers.

<sup>55</sup> InFacts, [Lawson wrong on keeping EU trade deals post-Brexit](#), Sam Ashworth-Hayes, 4 March 2016.

<sup>56</sup> Lecturer in Law, University of Cambridge.

is concerned”,<sup>57</sup> because of provisions determining the application of the agreement, or a clause defining State Parties as Member States of the EU, or clauses which determine the territorial scope of the agreement.<sup>58</sup>

The House of Lords European Union Committee looked at this issue in its 5<sup>th</sup> Report of 2016–17, [Brexit: the options for trade](#), 13 December 2016. The report concluded (para. 168):

On the balance of evidence, we conclude that the UK is unlikely to be able to retain access to the EU’s FTAs with third countries following Brexit, whether they are mixed agreements or not. We urge the Government to confirm that this is the case.

There is a list of the EU’s external agreements in CBP 7850, [Legislating for Brexit: EU external agreements](#), 5 January 2017.

## 4.4 Acquired rights?

The UK will be released from EU obligations on withdrawal. However, there is a question mark over possible ‘acquired rights’ (also referred to as vested or executed rights).

There is nothing in the EU Treaties stating that rights acquired during the currency of the EU Treaties will automatically continue after leaving the EU. Unlike many international treaties, there is no survival clause in the EU Treaties with rules on protecting the acquired rights of citizens and businesses or on the possible survival of claims based on EU law.

The withdrawal agreement will presumably address this. By way of example, Article 2 of the [Protocol](#) attached to the Greenland Treaty clarified that there would be a transitional period during which Greenlanders, non-national residents and businesses with acquired rights under EU law would retain these rights.

The question of whether international law, the European Convention on Human Rights or anything else might provide some protection for acquired rights not covered in the withdrawal agreement is discussed in chapter 3, ‘Acquired rights’, of Commons Briefing Paper 7214, [Brexit: some legal and constitutional issues and alternatives to EU membership](#), 28 July 2016.

The House of Lords European Union Committee, 10<sup>th</sup> Report of 2016–17, looked at this subject, particularly with regard to EU citizenship rights, in [Brexit: acquired rights](#), 14 December 2016.

## 4.5 The Great Repeal Bill

Implementing the withdrawal agreement will require domestic legislation to be enacted by the UK Parliament. The Government has announced that the first step in legislating for Brexit will be the Great Repeal Bill, which will be included in the Queen’s speech in May 2017.

<sup>57</sup> EU Law Analysis, 6 March 2016, [Brexit and EU-UK trade relations with third states](#).

<sup>58</sup> He gives the example of Article 360 of the Association Agreement between the EU and Central American States, which restricts the application of the agreement to countries in which the EU Treaties apply.

The Bill was first announced by the Prime Minister, Theresa May, at the Conservative Party Conference on 2 October 2016. She described it as a “historic Bill”, which would repeal the *European Communities Act 1972* and “convert the ‘acquis’ – that is, the body of existing EU law – into British law”. The Prime Minister added that this would enable Parliament “to amend, repeal and improve any law it chooses”.<sup>59</sup>

David Davis, the Secretary of State for Exiting the EU, confirmed that the Great Repeal Bill is separate from the Article 50 process:

Let me be absolutely clear: this Bill is a separate issue from when article 50 will be triggered. The great repeal Bill is not what will take us out of the EU, but what will ensure the UK statute book is fit for purpose after we have left. It will put the elected politicians in this country fully in control of determining the laws that affect its people’s lives—something that does not apply today. [...]<sup>60</sup>

A statement on the Department for Exiting the EU’s website indicated that the delegated powers in the Bill may also be used by Ministers to make changes, by secondary legislation, to give effect to the outcome of the negotiations with the EU “as they proceed”.<sup>61</sup> At this stage it is not yet known whether the Government will use any powers included in the Bill to give effect to the legal outcomes of the withdrawal agreement, or whether separate primary legislation will be used, or whether it might be a combination of the two.

Sir Stephen Laws QC, former First Parliamentary Counsel, predicts that the Bill will probably include “very wide powers to make subordinate legislation: to allow for different potential outcomes from the negotiations, and generally for the widespread nature of the required changes”.<sup>62</sup>

An important factor in the Government’s planning for legislating for Brexit will be the timetable of the negotiations. The UK Government will have to coordinate the two so that the relevant domestic legislation can be passed in order to give to any withdrawal agreement in time for day when the UK officially leaves the EU.

The Government will also introduce a number of other bills to prepare for Brexit, on matters such as immigration, tax, agriculture, trade and customs regimes, fisheries, data protection and sanctions.

## 4.6 How could other EU Member States influence the withdrawal agreement?

Other EU Member States, if they were so minded, could ensure that the UK does not secure the withdrawal agreement (QMV) or post-exit relationship it wants (QMV or unanimity, depending on the areas covered).

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<sup>59</sup> Theresa May, *ibid.*

<sup>60</sup> HC Deb 10 October 2016 c41

<sup>61</sup> Gov.uk, ‘[Government announces end of European Communities Act](#)’, 2 October 2016

<sup>62</sup> S Laws, ‘Article 50 and the political constitution’, UK Constitutional Law Association, 18 July 2016

Fabian Zuleeg of the European Policy Centre has emphasised that it will be up to the rest of the EU Member States to determine what kind of a negotiation they want to have with the UK. He thought: “The political realities would not be very accommodating to the UK”, and it would be on EU negotiators’ minds “that a costless divorce which still gives access to the single market, would prompt questions from other member states”.<sup>63</sup> He said it would not be “in the political interest of the rest of the EU countries to concede a lot to the UK”.<sup>64</sup>

There is a big question mark over the likelihood of this happening, but the Government acknowledged the possibility in its [Report](#) on the withdrawal process:

The precise process for negotiating that agreement would depend on its content, but an ambitious agreement could need the unanimous agreement of all 27 Member States in the Council.<sup>65</sup> Any such process would clearly add to the complexity and hence, very probably, to the length of the overall negotiations. If the agreement needed unanimous agreement in the Council, it would be open to any Member State to seek to block it, or to extract a price for agreeing any element of the agreement.

There will also be a risk of other Member States gaining from the need for unanimous agreement on an extension of the two-year negotiating period, and the Government [pointed to](#) the possibility of other Member States failing to ratify an agreement arranging future EU-UK trade relations.

## 4.7 Will a withdrawal agreement have to be ratified?

### By the EU

The Council of the EU (excluding the UK) will adopt the withdrawal agreement, having obtained the consent of the EP by a simple majority.<sup>66</sup> The EP will therefore have a right of veto over the withdrawal agreement, but not over withdrawal itself.<sup>67</sup>

The Council (excluding the UK) will act by an enhanced majority under Article 238(3)(b) TFEU. This requires 72% of Council Members (i.e. 20 of the remaining 27 Member States) representing at least 65% of the total population of these States.<sup>68</sup>

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<sup>63</sup> [EUObserver, 24 Feb 2016](#).

<sup>64</sup> Ibid.

<sup>65</sup> For instance, an agreement focused solely on trade would need to be approved by the European Parliament and a qualified majority of the Council. A full association agreement that provided for trade and wider co-operation would need to be agreed by the European Parliament and unanimously by the Council.

<sup>66</sup> Whereas the application of a new Member State requires the consent of the majority of the EP’s component members.

<sup>67</sup> The EP’s views could be taken into account at other times throughout the process: the [framework agreement](#) on relations between the Commission and the EP provides that the Commission keeps the EP informed, and the Commission undertakes to take due account of what the EP says.

<sup>68</sup> Whereas entry of a new Member State is decided by unanimity in the Council.

## By the Member States

Article 50 TEU does not specify whether or not Member States will have to ratify a withdrawal agreement, but this might be necessary under international or domestic legal norms. Christophe Hillion speculated that “the silence of Article 50 TEU could indeed be read as precluding [Member States’] participation”. He suggested this might be to help its entry into force and avoid “disruptive effects” (which national ratification can cause, particularly if a referendum is held).<sup>69</sup> This could be an argument for putting as much as possible into the Article 50 TEU agreement.

EU Treaty amendment will not be required for withdrawal, although as a matter of house-keeping, the remaining Member States will need to amend Article 52 TEU (application of EU Treaties), Article 355 TFEU (territorial scope) and the protocols and other provisions relating to the UK opt-out and opt-in arrangements. An amendment or protocol might be needed to refer to any new UK status in relation to the EU.<sup>70</sup> This would be made in accordance with Article 48 TEU and would be ratified by all Member States.

## By the UK

A withdrawal agreement will probably require ratification by the UK. It will therefore trigger the treaty provisions of the Constitutional Reform and Governance Act 2010. These require most treaties subject to ratification to be laid before Parliament – with a Government Explanatory Memorandum – for 21 sitting days before the Government can ratify them, and give either House the power to delay ratification (indefinitely, in the case of the House of Commons). The 2010 Act does not require a debate or vote on treaty ratification, however, nor give Parliament the power to amend treaties.<sup>71</sup>

In the view of one expert, although an Act of Parliament would be required to formally leave the EU and to repeal all or part of the ECA, “it may not be required for the purposes of Article 50(1)”.<sup>72</sup>

If any future relations agreements are ‘mixed’ agreements, including elements of a free trade agreement between the EU Member States and the UK as a third state, they would need to be ratified by the UK and all EU Member States according to their constitutional requirements.

## 4.8 Transitional arrangements

Some take the view that Article 50 TEU provides for the negotiation of a withdrawal agreement only, taking into account the withdrawing

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<sup>69</sup> Christophe Hillion, “EU withdrawal law”, The Oxford Handbook of European Union Law, edited by Anthony Arnall, Damian Chalmers, 2015

<sup>70</sup> In the case of Greenland, Protocol (No 34) to the [TEU](#) on Special Arrangements for Greenland refer to the territory’s relationship with the EU. French Algeria became independent in 1962, but was not removed from the EU Treaties until later.

<sup>71</sup> [Constitutional Reform and Governance Act 2010, Part 2](#): see [Parliament’s new statutory role in ratifying treaties](#), Commons Library Standard Note 5855, 8 February 2011

<sup>72</sup> Alisdair Gillespie, The English Legal System, 5<sup>th</sup> edition, 2015, p.608.

State's future relationship with the EU to the extent that it would regulate a transition period before an agreement on the future relationship entered into force. This would be necessary to avoid a hiatus between the State's withdrawal and an agreement on the future relationship.

Professor Wyatt thought "Co-ordination between the withdrawal treaty on the one hand and the future relations treaty on the other would be important. The UK's aim would be to have a smooth transition between the past in the EU and the future in the new arrangement".<sup>73</sup>

In 2003 the Convention Praesidium made clear that an "associate status" need not form part of a withdrawal agreement,<sup>74</sup> referring to what is now Article 8 TEU on the EU's relationship with its neighbours. Outside the EU, the UK would remain a part of the EU's immediate environment - as the Prime Minister acknowledged in his [Bloomberg speech](#) in January 2013.

As noted above, the UK Chancellor and the Governor of the Bank of England among others have suggested a separate, transitional agreement would help to provide a smoother path to Brexit.

The Brexit Committee's first report noted that several witnesses had advocated "some form of transition or adjustment period to enable businesses to plan for any change in trading arrangements that may occur in the wake of the UK exiting the EU".<sup>75</sup> The Committee concluded:

A period of transition, or adjustment, is a factor in most trade agreements. The Government must make clear from the outset that a period of adjustment to any change in trading arrangements or access to EU markets for UK service industries will be sought as part of the negotiations.

164. If final agreement is not possible by the time that the UK leaves the EU, it would be in the interests of both sides of the negotiations for an outline framework, with appropriate transitional arrangements, for the UK's future relationship with the EU to be agreed in respect of access to the Single Market for goods and services and future trade policy.

165. In addition to the economic aspects of the relationship, it is essential that cooperation in defence, foreign policy, security and the fight against terrorism, which is of benefit to both the UK and the EU-27, is not lost when the UK exits the EU. If it is not possible to conclude an agreement on all areas of cooperation in Justice and Home Affairs and Common Foreign and Security Policy before the UK leaves the EU, transitional arrangements to ensure that mutually beneficial cooperation is not brought to an abrupt end by Brexit will be needed.<sup>76</sup>

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<sup>73</sup> Revised transcript of evidence, Lords EU Committee, 8 March 2016.

<sup>74</sup> Praesidium, [CONV 724/1/03. REV 1, VOLUME 1](#), 28 May 2003; [CONV 648/03. 2 April 2003](#).

<sup>75</sup> Exiting the EU Committee, The process for exiting the European Union and the Government's negotiating objectives, [Negotiating the future relationship](#), 14 January 2017.

<sup>76</sup> Ibid, paras. 163-165.

## 4.9 Can the UK be prevented from leaving?

Some argue that the UK could be prevented from leaving the EU, but this is not the case.

While it is true that the other Member States could veto a withdrawal agreement, the UK cannot be prevented from leaving the EU two years from notification. Under Article 50(2) TEU the withdrawing State does not have an obligation to negotiate a withdrawal agreement, although the EU does.<sup>77</sup>

A minority argue that a negotiated withdrawal is obligatory, implying that without one a State could not withdraw. Bartłomiej Kulpa thought this was implicit in the whole of Article 50 TEU, rather than in individual paragraphs:

It could also be suggested that according to the opening paragraph of the withdrawal clause a Member State has the unrestricted right to the withdrawal itself, ie without a waiting period. A serious weakness with this interpretation is that it is hard to translate this approach into reality. What is more, this construction might be challenged on the basis that Article 50 TEU ought to be interpreted in toto. Therefore, one has to concur with the opinion that analysis of all five paragraphs separately may lead to misleading conclusions.<sup>78</sup>

But Article 50(3) clearly provides that a State can withdraw from the EU; having no withdrawal agreement would not stop the UK from leaving the EU. The 2003 European Convention Praesidium commented, with regard to a similar provision in the European Constitution, that 'since many hold that the right of withdrawal exists even in the absence of an explicit provision to that effect, withdrawal of a Member State from the Union cannot be made conditional upon the conclusion of a withdrawal agreement'.<sup>79</sup>

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<sup>77</sup> See Tatham, "'Don't Mention Divorce at the Wedding, Darling!'" in EU Law After Lisbon (2012), p.152.

<sup>78</sup> EU Law Analysis, 19 January 2016, [Member States' Right to a Decision on Withdrawal from the EU: A Legal Analysis \(Article 50\(1\) TEU\)](#).

<sup>79</sup> Praesidium, [CONV 724/1/03, REV 1, VOLUME 1](#), 28 May 2003; [CONV 648/03, 2 April 2003](#).

## 5. Future relations with the EU

### Summary

Many experts believe the future relationship between the UK and the EU will be contained in a separate agreement.

Leaving the EU will mean leaving the European Economic Area (EEA), but the UK could ask to rejoin the European Free Trade Association (EFTA) and the EEA. This could be negotiated separately but alongside the withdrawal agreement. But the Government wants a different, bespoke relationship with the EU which does not require free movement.

If the UK wanted to re-join the EU in the future, it would have to re-apply under Article 49 TEU

### 5.1 A separate agreement?

Many experts believe the detailed future relationship between the withdrawing State and the EU will be negotiated alongside the withdrawal agreement using the processes set out in the EU Treaties and put in a separate agreement, probably similar to an association agreement. Ideally, the two agreements would enter into force at the same time.<sup>80</sup>

The withdrawal agreement, argued Professor Wyatt, could not “accommodate all the details of the future trading relationship”. He referred to the “shadow future relationship”, which could be “negotiated in parallel with the withdrawal agreement by analogy with the appropriate treaty base”. The procedure for negotiating a trade or association agreement is different from the Article 50 procedure, involving unanimity in the Council rather than QMV, and requiring EP consent.

Professor Wyatt envisaged the timing as follows:

The withdrawal agreement would come into force (bringing about withdrawal) but would take effect a few days later. In those few days, the Council and Parliament would endorse the shadow agreement that had already been agreed in draft by reference to the appropriate treaty base: that is, with the appropriate majorities in the Council and the Parliament.<sup>81</sup>

This “shadow agreement” could take some time to ratify, but provisional application could be made for certain parts of it until full ratification was complete.

<sup>80</sup> Sir David Edward thought the [German translation](#) of Article 50 TEU<sup>80</sup> was different from the English translation and envisaged that “the structure of future relations will already have been established at the point when withdrawal takes place”, Revised transcript of evidence, [The Process of Leaving the European Union](#), 8 March 2016.

<sup>81</sup> Revised transcript of evidence, [The Process of Leaving the European Union](#), 8 March 2016.

Łazowski thought a withdrawal agreement could be a complex mixed agreement, accompanied by a Treaty amendment agreement and an EFTA/EEA accession agreement:

Unless it is decided otherwise, a withdrawal treaty may have to be concluded as a mixed agreement, making the ratification procedure much longer and more complex as it will involve the member states. It has to be emphasised that a departing country will be treated as a third country during such negotiations. Moreover, unlike accession treaties, withdrawal agreements do not form part of EU primary law. Thus, unless a special formula is developed, they cannot amend the treaties on which the EU is based. This implies that alongside an international treaty regulating withdrawal, the remaining member states would have to negotiate between themselves a treaty amending the founding treaties in order to repeal all provisions touching upon the departing country. Further complexities may be added if a departing country chooses to make a rapid move from the EU to the European Economic Area (EEA) instead. That would necessitate a third treaty regulating the terms of accession to EFTA and a fourth to deal with the accession to the EEA. The latter would require the approval of the EU and its member states, the EEA-EFTA countries and the departing/joining country.

'Mixity' would depend on the content of the withdrawal agreement. If it is limited to withdrawal only and not future relations, it would not be a mixed agreement.

## 5.2 Will the UK stay in the EEA if it left the EU?

The European Economic Area (EEA) comprises all 28 EU Member States and three of the four European Free Trade Association (EFTA) States: Norway, Iceland and Liechtenstein. Membership is based on the [European Economic Area Agreement](#), which is a treaty between the EU Member States and the EFTA States.

British Influence, a pro-single market think-tank, has argued that the UK will remain a member of the EEA when it leaves the EU.<sup>82</sup> But the Government and most experts believe leaving the EU means the UK will no longer be a member of the EEA. The UK would have to seek to re-join EFTA under Article 128 of the EEA Agreement and then apply to join the EEA. It is possible that this could be tackled in the course of withdrawal negotiations with a view to the UK acceding to EFTA and the EEA as soon as it has left the EU, but the move would not be automatic.

There is no precedent for a non-EU/non-EFTA state joining the EEA. EEA integration, either through EFTA membership or an association agreement directly with the EEA, has been discussed with reference to the microstates of Andorra, Monaco, and San Marino. In 2011 the EU conducted a review of EU relations with these microstates and published its results in November 2012, updated in 2013.<sup>83</sup> The EEA

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<sup>82</sup> British Influence, [Smart Brexit](#), 28 November 2016.

<sup>83</sup> See [COM\(2012\) 680 final/2](#).

was suggested as a possible framework for such integration, but the report concluded in section 5.4:

... given that the European Economic Area Agreement was concluded between two pre-existing trade and economic areas (the EU and EFTA), it would in principle be necessary for the small-sized countries first to become a member of either one in order to join the EEA.

There might not be much appetite to re-admit the UK, as Sir David Edward pointed out in evidence to the Lords EU Committee:

Norway is a relatively small state. Iceland is a very small state. Liechtenstein is a mini-state. I am not sure that they would particularly welcome us in EFTA. It is often expressed that that is one of our choices, but I am not sure that it is.<sup>84</sup>

The Government in any case does not appear to be seeking EEA membership, which would impose free movement rules as a condition for membership of the single market, but aspires to a “bespoke agreement with the EU which ensures open and free trade and control over the UK’s borders and laws”.<sup>85</sup>

### 5.3 Could the UK later re-join the EU?

Yes, but Article 50(5) TEU makes clear that a country which withdraws from the EU would have to re-apply under Article 49 TEU, following the usual application process for EU membership.

It is unlikely that if in the future the UK re-applied to be a member of the EU, it would gain membership with its current concessions, opt-outs and opt-in arrangements intact.

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<sup>84</sup> Revised transcript of evidence, Lords EU Committee, 8 March 2016.

<sup>85</sup> Lords EU Committee, Brexit: the options for trade, [Summary of conclusions and recommendations](#).

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