

TRIGGERING ARTICLE 50 TEU A LEGAL ANALYSIS

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INTRODUCTION

- Article 50 of the Treaty on European Union (TEU) will govern the UK's withdrawal from the EU.
- The use of Article 50 TEU is unprecedented and withdrawal will be governed by both legal and political processes within the UK, the EU and the World Trade Organization, making it a complex undertaking.
- In this context, several aspects of the interpretation and application of Article 50 TEU pose particular challenges. These include domestic controversy regarding the constitutional requirements for triggering Article 50 TEU, the short time-span of negotiation, and the uncertain role for the UK in trade negotiations with the EU and the rest of the world during the withdrawal process.

This paper outlines these issues, focusing in particular on the EU and international trade (rather than domestic constitutional) dimensions of withdrawal, in order to provide clarity and highlight potential pitfalls affecting both the EU and the UK.

The process of the UK withdrawing from the EU is governed by Article 50 TEU, introduced into EU law by the Treaty of Lisbon 2007. The authors of this Treaty Article have admitted that it was never intended to be used but was carried forward from the earlier failed discussions of the Constitutional Treaty. Article 50 TEU focuses on the procedural aspects of withdrawal from the EU, using the concept of a voluntary application, as opposed to the procedure for expulsion from the EU. Although the Article 50 TEU procedure appears straightforward, the legal uncertainty of the process has been exposed since the referendum result.

HOW WILL THE UK TRIGGER ARTICLE 50 TEU?

Article 50(1) TEU anticipates that the UK will use its own constitutional arrangements to trigger and manage the withdrawal process. Academic and practising lawyers are perplexed as to the definitions and details of these constitutional requirements. The European Union Referendum Act 2015 does not set out the manner in which the result of the 23 June 2016 referendum should be implemented. However, the government made a political promise to implement the result. The UK government has argued that it can invoke the Royal Prerogative to trigger Article 50 TEU, without Parliamentary scrutiny.¹ Thus the referendum result pits the mandate of direct democracy against Parliamentary Sovereignty, the UK constitution's defining principle. A taste of these complexities and lack of consensus amongst lawyers can be found on the UK Constitutional Law Blog.² What has emerged in the first 100 days since the referendum result is that the PM, Theresa May, intends to keep a very tight rein over the Brexit procedures and negotiations, the role of Parliament and, indeed, her own Ministers.

After weeks of speculation PM May announced the first steps of the Article 50 TEU decision on 2 October 2016 addressing the Conservative Party Annual Conference: a "Great Repeal Bill" will replace the European Communities Act 1972 and the Article 50 TEU notice to the EU will be sent by the end of March 2017. This date is seen as realistic, presuming that the legal challenges being made to the way the Article 50 TEU process is being managed have concluded. The most important challenge will not be heard by the Divisional Court

1. The Government's skeleton argument in the litigation pending before the Divisional Court, listed to be heard on 13 October 2016, has been published at: https://www.bindmans.com/uploads/files/documents/Defendant_s_Detailed_Grounds_of_Resistance_for_publication.PDF

2. <https://ukconstitutionalaw.org/blog/>

Article 50 TEU reads:

1. 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.
5. A qualified majority shall be defined in accordance with Article 238(3)(b) of the Treaty on the Functioning of the European Union.
6. 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.

until mid-October 2016, with a contingency in place for a leap-frog appeal to the Supreme Court.

WHEN WILL THE UK TRIGGER ARTICLE 50 TEU?

From the EU perspective, there is an argument to be made that Article 50(1) TEU should be set in motion as quickly as possible, and that the EU, comprised of all the Member States and its Institutions should then negotiate in good faith for the future stability of European integration. This is a *duty* derived from Article 4(3) TEU:

Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.

This entails the UK, the EU and its Member States working positively towards a solution to Brexit, and not hindering the process. The EU is already adapting to the loss of the UK; the UK let go of its turn at chair of the EU Presidency very soon after 23 June 2016 and the EU-27 met in Bratislava to discuss the EU Brexit position on 16 September 2016.³

While the UK's intent to withdraw has already had political reverberations throughout the EU and UK, and the resultant uncertainty had detrimental impacts, the two cannot

commence withdrawal negotiations, even informally, until the UK triggers Article 50 TEU. When it does so, the UK must move quickly. As outlined under Article 50(3) TEU, a two year negotiation period commences - a very short time to unravel 44 years of EU membership and contemplate the future relationship with the EU and other trading partners. Though the period can be extended, it requires the unanimous agreement of EU Member States to do so; the UK will not have control of the negotiating timeline.

Furthermore, after allowing the exiting Member State to choose when it will start the process of withdrawal the EU process is weighted in favour of the EU-27. The European Council will develop the guidelines for the European Commission to lead the withdrawal process and will agree to the withdrawal using a qualified majority vote in the Council. Recently, the PM of Malta, Joseph Muscat, the Head of State overseeing the EU Council Presidency in 2017 told Sky News that once the UK triggers Article 50 TEU the EU Council will debate and draft the European Commission guidelines very quickly – within four to six weeks of the notice. The UK will be up against tough and experienced negotiators: Michel Barnier is leading the European Commission team, with Sabine Weyand as a second chief negotiator. The agreement would need to be approved by the UK and 20 of the 27 remaining Member States, representing 65% of those states' population. The European Parliament also must approve the agreement, voting by a simple majority, but ironically the UK MEPs would still retain the right to vote on this deal.⁴

3. European Council, Bratislava Declaration and Road Map, 16 September 2016: <http://www.consilium.europa.eu/en/press/press-releases/2016/09/16-bratislava-declaration-and-roadmap/>

4. The European Parliament should also be “immediately and fully informed” at all stages of the Article 50 TEU procedure, see Article 218 TFEU.

Article 50 addresses the role of the UK in the exit negotiations with open-ended phrasing. Article 50(4) bars the UK from participation in Council 'decisions concerning it', which narrowly-construed means exit negotiations, or more broadly any matters affecting the EU after the UK leaves which therefore the UK should not be able to influence.

This suggests that the UK will be excluded from the process of drawing up the negotiation mandate and the extension of the negotiating period, which are determined by the Council. However the negotiations themselves will likely be conducted by the European Commission, not the European Council, and include the participation of the UK.

WHAT WILL THE ARTICLE 50 TEU WITHDRAWAL AGREEMENT CONSIST OF?

The Article 50 TEU withdrawal agreement will capture some part of the process of establishing a post-Brexit relationship agreed by the remaining EU-27 and the UK. Yet it seems unlikely that Article 50 TEU will be able to cover the entirety of the regulatory and trade implications of the UK's departure from the EU.

First, the time limit suggests that Article 50 TEU ambitions have to be limited. It is almost guaranteed that trade negotiations will take longer than two years; based on the EU's prior experience of negotiating free trade agreements, it's more likely to take between five and ten years. Any extension to the two year period has to be approved by a unanimous vote in the European Council. This means that, barring unanimous agreement for extension, this relationship must be negotiated either in parallel or after the UK has exited.

Also, there are some indications that the EU will require the UK to leave the EU before negotiating key issues. Under Article 218(3) TFEU, the EU has exclusive competence over common commercial policy that includes negotiating trade agreements. Coupled with this, under Article 4(3) TEU, EU countries must work together in sincere and close co-operation. If interpreted strictly this might suggest that the UK cannot act independently in order to pursue a new trade relationship with the EU, even informally, until the UK is no longer a EU Member State. As outlined below, it would also prohibit the UK from undertaking any trade negotiations with countries outside the EU. This strict interpretation is not necessarily legally accurate: Article 50 TEU has never been triggered before and signals an immediate change to the UK's legal status in the EU. Added to the complexity mix is the fact that in recent years there has been a tendency for the CJEU to become involved in external relations policy. The recent Opinion on 8 September 2016 by the Advocate General Paolo Mengozzi in Opinion 1/15 that the EU-Canada Passenger Name Records Sharing agreement is incompatible with EU law is a salient reminder that political agreements are still subject to the rule of law. A post-Brexit agreement between the UK and the EU would also be susceptible to judicial scrutiny.

Article 50(2) TEU addresses the content of the withdrawal agreement. It is open-ended, stating that 'the Union shall negotiate and conclude an agreement with [the UK], setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union.' This does not preclude trade talks forming part of the Article 50 TEU withdrawal agreement or taking place in parallel. In practice, as Article 50 TEU has never been implemented before, legal debates about whether the UK faces restrictions in pursuing trade talks are highly politicised. However it should be noted that including trade negotiations with the EU under Article 50 TEU would transform the legal identity of the withdrawal Agreement. A parallel 'mixed' agreement (discussed further below) would need to be drawn up that will be voted on by the EU-27 on a unanimity basis and ratified by all of the Member States.

From the UK's perspective, even more concerning than the prospect of delayed trade negotiations is the initial indication that some EU Member States will make concluding any withdrawal agreement difficult for the UK if it maintains its commitment to restricting freedom of movement.

The stumbling block of Single Market membership is the UK government's desire to negotiate a new form of migration package less generous than the current approach which has moved beyond the free movement of labour to embrace wider notions of residency and Citizenship for EU national and their families. After the Bratislava meeting on 16 September 2016, the "Visegrad 4"⁵ indicated that these central European states would want a guarantee that their nationals "are equal" before agreeing to any deal ahead of the UK leaving the EU. In particular they would not countenance any dilution in the free movement of labour provisions if the UK is granted full access to the Single Market.

PM May has so far refused to guarantee the status of EU nationals in the UK, but insisted she wants them to stay after Brexit - if the rights of Britons overseas are respected. Briefing the Reuters news agency, the Slovakian Prime Minister, Mr Fico, stated with respect to existing migrants that: "V4 countries will be uncompromising...Unless we feel a guarantee that these people (living and working in Britain) are equal, we will veto any agreement between the EU and Britain....I think Britain knows this is an issue for us where there's no room for compromise."

The weakness of the UK's bargaining position is seen in Article 50(4) TEU where the UK is unable to influence the negotiations between the remaining 27 Member States in the formal institutional framework of the Council or the European Council. The September 2016 Bratislava Council Meeting inevitably had to exclude the UK in order for the EU-27 to reflect on the impact of Brexit. But after the meeting and the statements from the Visegrad- 4 signaling a veto of any Single Market deal that limited free movement of labour a

⁵ The Visegrad Group comprises: the Czech Republic, Hungary, Poland and Slovakia

hard bargaining position emerged. Thus the two-year period could expire with the UK leaving the EU and no clear promise of a future trade relationship. Shuttle diplomacy and bilateral talks between the UK and the other EU Member States will be inevitable. It may be that a third country, or an acceptable arbitrator is brought in to ease the dialogue.

It has been suggested that if the UK cannot work out a new trade deal in the two-year time frame this is not a dire scenario since there is always the World Trade Organisation (WTO) to fall back on. However, applying existing EU tariffs agreed in the WTO to trade between the EU and UK will be an expensive option at best. The Institute for Fiscal Studies' synthesis of various models suggested that - under a 'WTO rules' scenario - trade between the UK and EU will fall between 17 and 29 per cent and GDP will reduce between 2.6-3.1 per cent.⁶

Also, there will be implications in the WTO as the UK reverts to independent membership separate from the EU. The UK can propose that it and the EU maintain the same tariff levels as when they acted as a Customs Union. Or it might submit a revised tariff schedule on the basis that it is reverting to its status as an independent WTO Member. In both cases it could argue that these changes are of a purely formal character, such that they do not need to be agreed multilaterally.⁷ But other WTO Member States might refuse, and - for economic or political reasons - require consultation and negotiation, a more involved undertaking. Furthermore, there are some areas, such as agricultural Tariff Rate Quotas, where the EU and UK have shared commitments, and a complex disentangling process will be unavoidable. This means that the WTO option, rather than a fall back, is a negotiation unto itself. If these negotiations stall and countries initiate disputes against the UK or the EU, they will be in uncharted legal territory.

There could be more predictability if, rather than relying on WTO rules, the EU and UK pursue the use of transitional arrangements to manage the time period when the UK has formally exited the EU but before the two have agreed and ratified their new trade relationship. The Financial Times recently reported that May's government have not ruled this out and are considering options such as continuing to pay for access to the Single Market to ease the transition.⁸

Another major legal question concerns the trade relationships that the EU and UK envisage with the rest of the world. Trade relationships between the EU and the rest of the world are regulated by two different types of international agreements.

Certain agreements fall within the exclusive competence of the EU and bind the UK under Article 216(2) TFEU. Other kinds of trade agreement are called "mixed agreements" and are concluded by the EU and the Member States, since parts of such agreements also fall within national competence. But the UK does not retain competence to negotiate trade agreements since, with the exception of the Common Foreign and Security Policy, the European Commission has the competence to negotiate international trade agreements under Article 218(3) TFEU. In addition any moves towards conducting negotiations with non-EU trading partners would also be subject to the principle of loyalty found in Article 4(3) TEU, outlined above. The EU has a vested interest in the shape of post-Brexit trade agreements.

The UK government, on the other hand, will argue that it has the ability to undertake trade negotiations on the basis that future trade agreements with third parties will not come into force until after it leaves the EU.⁹ Dr Liam Fox, the international trade secretary, has indicated to the Press that exploratory talks with non-EU states, such as India, have already taken place.¹⁰ The Sunday Times reported that legal advice given to Fox suggests that "... there is a high risk" of the European Commission starting infraction proceedings against the UK if such talks went ahead, with the UK being landed with a "big fine".¹¹ It is also reported that other EU Institutions and Member States could also start proceedings against the UK. This is sensational reporting of the legal position. Any infraction (infringement of EU law) proceedings brought by the European Commission under Article 258 TFEU are not automatically brought before the European Court of Justice (CJEU). There is usually a long period of negotiation and only when talks break down will the European Commission go to court. This part of the process takes several years. If the CJEU finds a Member State in violation of EU law it will hand down a judgment to that effect and a Member State is under a duty to comply with the judgment of the Court. It is only when a Member State does not comply with the Court's judgment that financial sanctions (fines) come into play under Article 260 (2) and (3) TFEU. It is important to realise that fines are not automatically incurred by a breach of EU law. The European Commission must bring a second action against the Member State.

However another factor renders these legal arguments moot: countries may well not wish to engage in trade negotiations until the UK has left the EU so they better understand the market with which they will be concluding a new trade

6. Emmerson, C. et al., 'Brexit and the UK's Public Finances', Institute for Fiscal Studies Report 116, May 2016, available at <https://www.ifs.org.uk/uploads/publications/comms/r1.16.pdf> (accessed 26 September 2016).

7. GATT Contracting Parties, Procedures for Modification and Rectification of Schedules of Tariff Concessions, Decision of 26 March 1980.

8. George Parker et al., 'UK looks for transitional trade deal after Brexit', Financial Times, 4 October 2016.

9. 'Full text: David Davis's Conference Speech', The Spectator, <http://blogs.spectator.co.uk/2016/10/full-speech-david-daviss-conference-speech/>

10. <http://news.ikutseo.com/news/%E2%80%98Liam-Fox-launches-trade-talks-with-India,-China-and-Singapore/>

11. Henry Zeffman and Bruno Waterfield "Trade talks could land Britain with big fine from EU", The Times 19 September 2016.

agreement. The US¹² and Australia¹³, for example, have adopted this position.

IS ARTICLE 50 TEU REVERSIBLE?

A Member State is able to choose the option of leaving the EU and re-joining. Re-joining might not be as protracted as the current negotiations with would-be new accession states, but it is very unrealistic to assume that the EU would allow the UK a new “pick and mix” accession to the EU.

One issue that is not covered in Article 50 TEU is whether a withdrawing Member State can change its mind.

The wording of Article 50 TEU does not appear to allow a Member State to revoke the Article 50 TEU trigger. It specifies that EU treaties will cease to apply after two years, and that the only route to re-joining is through the normal procedure. Yet the weight of academic opinion is that Article 50 TEU does allow for a Member State to revoke the application to withdraw and simply revert to the status quo. Politically speaking, the UK’s partial withdrawal – and exclusion – from some EU institutional activities as well as the widespread uncertainty of impending withdrawal has already rocked the EU and an on-off marriage can hardly be tolerated for any length of time, nor does it currently appear that the UK is courting one.

CONCLUSION

The referendum result pits the mandate of direct democracy against Parliamentary Sovereignty, the UK constitution’s defining principle.

The two-year negotiation period that commences once Article 50 TEU is triggered is a very short time to unravel over 40 years of EU membership. Furthermore, the withdrawal process is heavily weighted in favour of the EU 27, with the European Council responsible for drawing up the withdrawal guidelines, which process will be led by the European Commission. Article 50 (4) bars the UK from participating in Council ‘Decisions concerning it’. This suggests that the UK will be excluded from the process of drawing up the negotiation mandate and the extension period.

It is unlikely that Article 50 TEU will be able to cover the entirety of the regulatory and trade implications of the UK’s departure from the EU as trade negotiations will undoubtedly take more than two years, probably nearer ten in some cases. Added to which, if strictly interpreted, under Article 4 (3) the UK may be prevented from pursuing new trade deals, even informally, until it is no longer a EU Member State. However, there may be room for parallel discussions. Furthermore, some EU Member States may make withdrawal difficult if the UK maintains its commitment to restricting freedom of movement.

If a new trade deal is not negotiated within the timeframe of the withdrawal process, falling back on existing WU tariffs agreed in the WTO between the EU and the UK will be an expensive option and not without the need for a negotiation process.

There is lack of clarity as to whether the UK can undertake trade negotiations with third parties before it leaves the EU. In addition, countries may well not wish to engage in trade negotiations until the UK has left the EU in order to better understand the market.

It should be noted that as Article 50 TEU has never been implemented before, legal debates about whether the UK faces restrictions in pursuing trade talks are highly politicised.

12. Charlotte Ryan and Joe Mayes, ‘Kerry says no U.S. – U.K. trade deal until Brexit talks concluded’, Bloomberg, 19 July 2016, available at <http://www.bloomberg.com/news/articles/2016-07-19/kerry-says-no-u-s-u-k-trade-deal-until-brexit-talks-concluded> (accessed 5 October 2016).

13. Peter Walker, ‘No free trade deal until Brexit settled, says Australian minister’, The Guardian, 7 September 2016, <https://www.theguardian.com/politics/2016/sep/07/no-free-trade-deal-until-brexit-settled-australian-minister-steven-ciobo> (accessed 5 October 2016).

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FURTHER INFORMATION

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The UK Trade Policy observatory (UKTPO), a partnership between the University of Sussex and Chatham House, is an independent expert group that:

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