

Brexit Essentials: Procedural and substantive implications of the vote for Brexit

1. Introduction

- 1.1 This is the eighth in a series of briefings covering the essential aspects of the UK's referendum on EU membership. Now that the UK electorate has voted to leave, this edition discusses:
 - (A) The timetable for exit;
 - (B) The alternative models to the UK's membership of the EU; and
 - (C) The constitutional process for putting an alternative model in place.
- 1.2 We also cross-refer to previous Brexit Essentials briefing papers dealing with the longer term impact of Brexit.

2. The timetable for exit

- 2.1 Article 50 of the Treaty on European Union (“**Article 50**”) allows a member state to decide to withdraw “*in accordance with its own constitutional requirements*”.¹ Although informal discussions with the EU can be held beforehand, the formal process of leaving the EU will be triggered only when the UK delivers its Article 50 notice to the European Council. Delivery of the notice will trigger the start of a two year period to exit, which can only be extended with the unanimous agreement of the European Council. Without such an extension (and assuming that agreement on the terms of withdrawal has not otherwise already been reached), the UK's membership of the EU will end automatically on the expiry of that two year period.
- 2.2 In practice, the timing of delivery will be largely a political rather than a legal question. Alternative timeframes for delivery of the Article 50 notice might include:

Scenario 1	Almost immediate delivery of the notice ²	This was the Prime Minister's stated preference before his resignation announcement: “ <i>the British people would rightly expect [the process for exiting the EU under Article 50] to start straight away</i> ”.
Scenario 2	Delivery in autumn 2016	Following the Prime Minister's resignation and the resulting leadership election, this will allow some time to plan for the steps the UK will need to take leading up to exit, including potentially parliamentary debate.
Scenario 3	Delivery in autumn 2017	Initiation of the exit process after the French presidential elections in April/May 2017 and the German federal elections in autumn 2017 may avoid interruptions or delays in the negotiations.

¹ See <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012M/TXT&from=en> for the full text of Article 50.

² The UK Government could deliver an Article 50 notice immediately, without legislation or approval of Parliament because the operation and negotiation of treaties are a matter for the executive (i.e. the Government) rather than the legislature (Parliament). The Government would also not require any form of EC consent in order to deliver its Article 50 notice.

- 2.3 Estimates as to how long will be required to complete the exit negotiation vary widely.
- 2.4 The Government has stated that it is “*probable that it would take up to a decade or more to negotiate firstly our exit from the EU, secondly our future arrangements with the EU, and thirdly our trade deals with countries outside of the EU, on any terms that would be acceptable to the UK. This would be a long period of uncertainty, which would have consequences for UK businesses, trade and inward investment*”.³
- 2.5 On the other hand, the Vote Leave campaign has suggested that “*given that all the big issues have already been solved over the years between the EU and countries around the world, and [that] there is already a free trade zone stretching from Iceland to the Russian border, the new UK-EU Treaty should be ready within two years,*” and “*all the important elements of a new Treaty should be in place well before the next election [in 2020]*”.⁴

3. Alternative models to EU membership

- 3.1 There are a number of possible scenarios for the UK’s future relationship with the EU. Further information on each of these models can be found in the second Brexit Essentials briefing.⁵
- 3.2 The different models can be grouped under three main headings:
- (A) Exit the EU but join the EEA, retaining access to the single market;
 - (B) Exit the EU and join EFTA, with EU relations governed by a framework of bilateral agreements and some limited access to the single market; or
 - (C) Total exit from the EU and the single market. In this model, the UK could: seek to join the EU Customs Union (as Turkey has done); access the EU market under the World Trade Organisation (WTO) rules; or negotiate a special deal from scratch under a new free trade agreement.

4. The constitutional process for implementing an alternative model

Article 50 of the Treaty of Lisbon (2009) contains the formal procedure to be followed by a Member State wishing to withdraw from the EU. To date, this procedure remains untested. Once a Member State has notified the European Council of its intention to leave, Article 50 specifies a two year period for negotiating the terms of withdrawal (which can be extended by unanimous agreement in the European Council). Following notification by the UK under Article 50, the European Council (excluding the UK) will agree guidelines for the EU’s negotiating mandate. In practice, it is then likely that the European Commission will be the EU body actually negotiating with the UK. The subsequent entry into the negotiated withdrawal agreement requires the approval of both the European Parliament (by a simple majority) and the European Council (excluding the UK and by enhanced qualified majority voting).

³ See para. 3.11 of the Government publication: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/504216/The_process_for_withdrawing_from_the_EU_print_ready.pdf

⁴ See briefing “‘Leave’ looks like...” on Vote Leave’s website here: http://www.voteleavetakecontrol.org/briefing_newdeal

⁵ <https://www.slaughterandmay.com/media/2535258/brexit-essentials-alternatives-to-eu-membership.pdf>

- 4.1 Delivery of an Article 50 notice will trigger a period of formal negotiation between the UK Government and the EU.
- 4.2 Article 50 provides that the intended result of such negotiation would be to agree the arrangements for the UK's withdrawal from the EU, including by "*taking account of the framework for [the UK's] future relationship with the Union*". However, the precise scope of the negotiations (including the extent to which they should take account of the UK's proposed future relationship with the EU) would need to be agreed between the UK Government and the EU.
- 4.3 In principle, therefore, the Article 50 process allows for the UK and the EU to negotiate both the terms of the UK's departure from the EU and the nature of the UK's alternative relationship with the EU.
- 4.4 The UK Government would be leading the negotiations on the UK's behalf. It is unclear how exactly the Government would run the negotiations. The Government may consider it desirable to appoint a cabinet minister to run the negotiation process, and it is highly likely that civil servants from numerous Government departments would also need to be involved.
- 4.5 Parliament does not have a direct constitutional role in the negotiation of treaties and as such will not automatically be directly involved in these negotiations. However, it is possible that Parliament would push for some form of on-going involvement in different stages of the process (e.g. via Parliamentary committee, regular debates or ministerial questions). As an international agreement, any withdrawal agreement would also need to be laid before Parliament before it can be ratified by the Government.⁶ In practice, this means that both Houses of Parliament would have the opportunity to review the agreement and to resolve against its ratification, and in principle it would be possible for the House of Commons (but not the Lords) to block indefinitely the Government's ratification of the withdrawal agreement.⁷ Given the nature and impact of the withdrawal agreement in the UK, it seems highly likely that this review period would include a parliamentary debate on its terms (in both Houses).⁸ Indeed, recent press reports have suggested that MPs would, depending on the precise terms of the withdrawal agreement and the nature of the Government's proposed alternative relationship with the EU, be prepared to disrupt the Government's proposals in Parliament by voting against them.⁹
- 4.6 Once the Government has ratified the withdrawal agreement, the agreement's domestic implementation will require an Act (or Acts) of Parliament. For example, the European Communities Act 1972 would need to be repealed (or amended), and other primary legislation implementing EU law would have to be repealed if the Government did not want it to remain part of UK law. The passing of these Acts will likely give rise to further Parliamentary scrutiny of the arrangements relating to withdrawal (as well as, potentially, the nature of the UK's post-exit relationship with the EU).

⁶ This procedure is governed by the Constitutional Reform and Governance Act 2010.

⁷ In circumstances where the House of Commons resolves against ratification, the Government would be required to give further explanation as to why the agreement should be ratified and give the House a further opportunity to resolve against ratification (or remain silent and therefore implicitly agree to ratification). If the House again resolves against ratification, this process repeats *ad infinitum*. The House of Lords does not have the power to block ratification on its own.

⁸ It has also been suggested that the UK Government could call a second referendum to vote on the terms of the withdrawal agreement. However, the Government has been clear that it does not consider this to be appropriate.

⁹ See e.g. <http://www.bbc.co.uk/news/uk-politics-eu-referendum-36457120>

5. Longer term impact of Brexit

5.1 The longer-term effects of Brexit are uncertain, and will depend on which Brexit option is adopted. While the impact of Brexit on legal practice areas therefore remains unclear, it could include the following:

- (A) **Corporate/M&A:** the legal framework that applies to public mergers would be unlikely to change significantly, though there could be an impact on some cross-border mergers of private companies within the EEA. Rules where EU-wide recognition will still be important post-Brexit, for example in relation to prospectuses, are less likely to change.
- (B) **Financing:** provisions allowing banks to pass on the cost of regulatory change could increase borrowing costs for business, while the future of the capital markets union could be called into question without UK involvement.
- (C) **Competition law and State aid:** EU competition rules will still apply to UK firms doing business in the EU, which, in the event of exit also from the EEA could leave companies facing parallel competition-law investigations by the UK and EU authorities. The UK may be free to support “national champions” outside the EU state aid regime, but companies would lose their right to complain to the European Commission about EU state aid violations by other Member States.
- (D) **Financial services:** the status of the UK as a financial hub may be called into question as firms may no longer enjoy a European ‘passport’ to establish a branch or provide services on a cross border basis, needing local authorisation consistent with EU minimum standards for cross border operations.

For further information on the impact of Brexit on various practice areas, please see [Brexit essentials five: The legal and business implications of the UK leaving the EU \(March 2016\)](#). The practice areas covered are:

- Competition law and State aid (Page 11)
- Corporate law (Page 4)
- Data protection (Page 44)
- Dispute resolution (Page 8)
- Environment and climate change (Page 23)
- Financial services and insurance (Page 33)
- Financing (Page 6)
- Infrastructure, energy and natural resources (Page 30)
- Intellectual property (Page 20)
- M&A (Page 3)
- Pensions and employment (Page 15)
- Real estate (Page 26)
- Restructuring and insolvency (Page 42)
- Tax (Page 27)