

How to leave the EU: the key article 50 issues and UK constitutional questions

Much has been written and spoken in the immediate aftermath of the UK's EU referendum about what the UK must do to leave the EU. We look at the key questions in this area, such as whether the UK has yet decided to withdraw, what it must do to withdraw, whether it can change its mind, and the position of Scotland.

What is the mechanism for leaving the EU?

The mechanism for the UK's leaving the EU is set out in article 50 of the Treaty on European Union (see Box 1, overleaf). For withdrawal, article 50 requires:

- A decision by the UK to withdraw from the EU made in accordance with the UK's constitutional requirements
- Notification by the UK to the European Council of this intention
- Guidelines from the European Council as to the EU's negotiating position with the UK
- Negotiations between the UK and the EU as to the arrangements for withdrawal, taking into account the framework for the UK's future relationship with the EU

The UK will leave the EU on the entry into force of the withdrawal agreement or, failing that, the lapse of two years from notification (unless this period is extended by unanimous agreement between the UK and all EU member states). The withdrawal agreement must be approved by the European Council by qualified majority voting and by the European Parliament.

It is important to appreciate that the withdrawal agreement is different from any agreement as to the future relationship between the UK and the EU. The withdrawal agreement covers transitional matters, such as half spent budgets and people already exercising their right of free movement. The agreement as to future relations covers everything else, including access to the internal market. Depending on the range of its subject matter, the agreement as to future relations could require the unanimous consent of all EU member states or only a qualified majority.

During the referendum campaign, some on the Leave side suggested that there might be other (unspecified) ways to withdraw from the EU, but those suggestions seem to have died down. The EU has made it clear that it sees article 50 as the way for a member state to leave the EU since that is what the treaty says. In any event, any other legal routes (eg treaty amendment under article 48) are likely to be more complicated and to require unanimity within the EU. Pre-referendum, there were some suggestions during the campaign that the UK could unilaterally repudiate the EU treaties by repealing the European Communities Act 1972. That would, however, be a breach of the UK's international treaty

Key issues

- Article 50 is the only realistic route out of the EU
- The UK has not yet formally decided to leave the EU
- Legislation is arguably required for a leave decision
- Notice can't be given informally

obligations (an unlikely step for the UK to choose to take), and so doing would make any negotiations between the UK and the EU even harder than they are otherwise likely to be, not to say impossible. There have been no further alternative suggestions of this since the referendum result was declared. Article 50 is, realistically, the UK's route to the exit door.

Article 50 sets out the formal steps leading to withdrawal. There is nothing to stop there being informal discussions between the UK and the EU in the expectation that an article 50 notice will be given in due course. That does, however, depend upon both sides being prepared to engage in discussions before article 50 is invoked (and there have been comments in various parts of the EU

indicating that the EU would not talk before notice was given) and, in particular, on each side having a vision as to what it would like the future relationship between the UK and EU to look like. There will, no doubt, have been contingency planning on this in both London and Brussels, but when this planning will be sufficiently advanced for discussions to commence is open to question.

Has the UK decided, constitutionally, to leave the EU?

No.

The referendum result has had huge political, social and economic consequences, but it is not a decision by the UK in accordance with the UK's constitutional requirements to leave the EU. The European Referendum Act 2015 provided for the referendum, but it did not make the vote binding on the Government or anyone else – indeed, the Act said nothing about the outcome of the referendum. The Government and Parliament must decide what to do in the light of the referendum. The expectation is obviously that a decision will be made for the UK to leave the EU, but the Government and/or Parliament could constitutionally decide to ignore the referendum result, even if a general election intervened, though they would have firmly in mind the political, electoral and other consequences that could flow from this.

How will the UK decide to withdraw from the EU?

Not an easy question, but it is arguable that legislation is required in order to give the Prime Minister authority to write the article 50 letter to the President of the European Council.

Traditionally in the UK, the entry into and performance of treaties has been a matter for the royal prerogative rather than for Parliament. However, while a treaty concluded in this way might confer rights and obligations on the UK in public international law, it would have no effect in domestic law unless given that effect by Parliament. This has been changed somewhat by the Constitutional Reform and Governance Act 2010, but that only applies to the ratification of treaties rather than the exercise of powers given by treaties, such as withdrawal from the EU under article 50 of the Treaty on European Union. Arguably,

Box 1: Article 50 of the Treaty on European Union

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...

therefore, the Government can, in exercise of the royal prerogative, decide on its own to withdraw under article 50.

Against this, the exercise of the royal prerogative is subject to the terms of any legislation. The EU's treaties have been given effect in UK domestic law by the European Communities Act 1972 (see Box 2). Section 2(1) of this Act provides that all rights and powers as, in accordance with the EU's treaties, are without further enactment to have legal effect shall be recognised and available in UK law. As a result of this, for example, EU regulations take effect in the UK. The question is whether the UK Government can, through notification under article 50 given in the exercise of the royal prerogative, deprive the EU's treaties and other legislation of the legal force in the UK that the Act has given to them (bearing in mind that when the Act was first passed, the treaties contained no provision for withdrawal). It is arguable that since Parliament introduced EU law into UK domestic law, only Parliament can take it away or take steps that will lead to its being taken away.

If the Government were to use the royal prerogative for the article 50 notification, there is the possibility that it could be challenged in the courts. Certainly, the safest way for the Government would be to secure, if it can, the passage of legislation that expressly permitted, even required, the article 50 notice to be given.

Can notice of withdrawal be given informally?

No.

The starting point is that, since the UK has not yet decided in accordance with the UK's constitutional requirements to withdraw from the EU, no question of notice under article 50

yet arises. Once that decision is made, article 50(2) goes on that a member state which decides to withdraw "shall" notify the European Council, though no timetable for doing so is set out.

It has been suggested that, in these circumstances, notice could be given in the course of an informal chat between the President of the European Council and the UK Prime Minister. As the Commission has pointed out, this is implausible. A decision as momentous as one to withdraw from the EU must be notified with a degree of formality and solemnity. It should be in writing or, at least, in the form of an official statement at a European Council meeting.

In any event, if the UK were concerned about the risk of giving notice accidentally, it could open each Council meeting with a statement that nothing said constituted notice under article 50 or write to the Council to that effect.

Can notice of withdrawal itself be withdrawn?

Not an easy question. Article 50 doesn't say that notification once given can be withdrawn, but nor does it say that notification can't be withdrawn. The prevalent view is, perhaps, that notice can be withdrawn prior to actual withdrawal from the EU but the position is not clear. If revocation of an article 50 notice was not accepted by all other EU members, the Court of Justice of the European Union would have to decide the point.

Can Scotland veto the UK's withdrawal from the EU?

Seems unlikely.

The argument to the contrary (though

somewhat obscure) seems to run that any legislation withdrawing the UK from the EU will affect issues that fall within the competence of the Scottish Parliament. Under section 28(8) of the Scotland Act 1998, the Westminster Parliament "will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament" (this is often referred to as the Sewel Convention). The Scottish Parliament might decline to give its consent since a large proportion of the Scottish electorate voted to remain in the EU.

However, even if the position following the referendum could conceivably be regarded as "normal", section 28(7) of the Act provides expressly that the legislative power of the Scottish Parliament does not affect the power of the Westminster Parliament to make laws for Scotland. The Westminster Parliament could, if so minded, pass legislation which would, in accordance with normal constitutional principles, be binding on all parts of the UK. What Westminster has given, Westminster can take away.

The Scottish dimension could, however, encourage the Government to seek legislative authorisation for the article 50 notice, rather than seeking to rely on the royal prerogative (though paragraph 7 of Schedule 5 to the Scotland Act 1998 does provide that international relations, including relations with the EU, are matters reserved to the UK government). Scottish members of the Westminster Parliament could, of course, vote against any legislation authorising an article 50 notice.

What work is required for the UK's withdrawal from the EU?

It is impossible to overestimate the amount of work that the UK

Box 2: section 2(1) of the European Communities Act 1972

2. General implementation of Treaties.

(1) All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly; and the expression "enforceable EU right" and similar expressions shall be read as referring to one to which this subsection applies.

Government and, potentially, the Parliament will have to undertake to prepare the UK for withdrawal. There is no prospect of reviewing and revising all EU-derived law before withdrawal is likely to take place. Much of that law can continue in place even though the UK has left the EU, but those parts that cannot do so because, for example, they require mutuality between member states (eg trade relation, passporting, free movement and so on) themselves represent a major challenge, both from the policy point of view and also reaching agreement with the EU, where that is necessary.

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