

Procedural Steps towards Brexit

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Introduction

With the dust barely settled on the Brexit referendum, a messy legal picture has emerged. Among the many challenges are what, when and how exactly the UK's withdrawal from the EU should be negotiated. In truth, the way the divorce procedure has been regulated under Article 50 TEU leaves much to be desired. Gaps left by the EU legislator will have to be filled rather swiftly by political elites and lawyers. To the EU and its member states, only the rudimentary aspects of withdrawal are clear. In the UK, however, even the staunchest proponents of Vote Leave seem to have been caught off-guard, with no actionable plan for how to handle Brexit – only visions of alternatives to EU membership that are unlikely to be acceptable to the EU27. The fact that alternatives to membership had not been considered seriously prior to the referendum is perplexing, and underlines the impression that the entire exercise was a stroke of irresponsible political chutzpah.

How to trigger Article 50 TEU

Almost immediately after the referendum results were announced, the heads of key EU institutions stifled any speculation about whether Article 50 TEU could be bypassed. This was confirmed during the informal summit on June 29th. It was made abundantly clear that the only way to leave the European Union is through the formal 'divorce' procedure, with the full involvement of relevant EU institutions. Consideration of any other options is an interesting intellectual exercise, but should remain so. This includes some of the fantastical proposals presented by Vote Leave shortly before the electorate went to the polls on June 23rd, including a plan to conclude an agreement with the EU without the actual involvement of EU institutions.

Article 50(2) TEU states that the initiative to commence withdrawal proceedings belongs to the departing country. It neither provides for a deadline for filing the notice, nor sets out any requirements with regard to its format. Arguably, a departing country has to decide when and how to inform the others as to its intentions. In other words, the UK cannot be formally forced to pull the trigger, but can indeed wait until it sees fit. There are a number of reasons behind Whitehall's hesitation.

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First, with the resignation of David Cameron and a government reshuffle in the offing it was indeed more appropriate for the next prime minister to start the procedure. This was stated by Cameron himself, who thereby refused to follow up on his own determination to trigger the withdrawal procedure in the case of a Brexit vote.

Second, a number of UK lawyers claim that domestic constitutional law does not allow a prime minister to issue such a notification without the prior blessing of Parliament.

Third, as mentioned above, it is unclear what, in formal terms, such a notification should look like. Whether a prime minister's announcement to the European Council would qualify as such a notification is questionable. Even less likely is that the member states, including the UK, would agree that the referendum result itself constitutes a notification of intention to withdraw. It is the first step, but not a notification in its own right. The same goes for the repeal of the European Communities Act of 1972, which facilitates the direct application of EU law in the UK. If the UK Parliament opted for that it would be an act of defiance but not a trigger for Brexit. One has to look elsewhere for solutions. For instance, the EU pre-accession experience could be of interest here. The procedure commences with an application for membership, which traditionally amounts to a diplomatic letter expressing the desire to join the European Union. There is no reason why the same could not apply to a notice to withdraw. A diplomatic letter sent by Whitehall to the European Council would thus constitute such a notification.

Fourth, by delaying its submission, the UK government may be trying to kill two birds with one stone. By the time it formally informs the other member states of its intentions it should have a clear plan regarding the shape of future relations with the EU, which will determine the scope of actual negotiations. By pushing the actual decision well into the autumn of this year or – as the new Prime Minister Theresa May had announced before she moved to 10 Downing Street – even into 2017, Whitehall is allowing itself time to regroup. By the same token, this course of action does not allow for the two-year deadline laid down in Article 50 TEU to start running.

To be sure, the two-year deadline seems unrealistic, given the plethora of dossiers to negotiate. Then again, the prescribed period for negotiations can be extended. But this would require unanimity in the European Council, which in the current political climate of ever-increasing fatigue with the UK, should not be taken for granted. Thus, for Whitehall, it makes perfect sense to delay triggering Article 50 TEU to avoid an accidental Brexit that would lack a proper legal framework. If the UK would crash out of the EU without the legal straps attached, bilateral relations between the UK and EU27 would fall only under the WTO rules, which are not fit for purpose when it comes to regulating an EU divorce.

The EU's tough stance

In the days following the referendum the EU and its member states tried hard to push the UK to proceed with the application for withdrawal as soon as possible. Alas, in its initial reactions to the results of the referendum the European Union, once again, failed to speak with one voice on an existential issue. The presidents of key EU institutions argued for an immediate notification but, at the same time, Chancellor Merkel advocated a gentler attitude towards the United Kingdom.

One should not be surprised, however, that the European Union is pressurising the UK to formally initiate the Brexit procedure. First, the EU and its member states should not be made

hostage to the UK's internal party politics. The delay causes uncertainty and is a nuisance at a time when the UK needs to act fast and the EU, its institutions and member states have a number of other crises to handle. Hence the call made at the Informal Summit on June 29th to trigger Article 50 TEU and to get going with negotiations.

Second, the EU is also considering the economic implications of the referendum. The UK economy is in a tailspin and pound sterling has plummeted, just as predicted by many (previously labelled scaremongers by Vote Leave). Although economists are divided on this, one should not exclude the possibility that the eurozone also takes a hit at a time when it is slowly emerging from its biggest crisis ever. Objectively, there is a great need to calm the markets and to demonstrate that the entire process is under control.

Third, the push for a quick divorce is also a reflection of the EU's exasperation with UK exceptionalism and a sign that David Cameron has used up what was left of the UK's political capital in negotiating the February deal, which is now unequivocally off the table.

One set of negotiations or two?

A question that needs to be answered as soon as possible is what exactly should be negotiated and how. Article 50(2) TEU lacks precision so the details will have to be agreed to by both sides, bearing in mind that the EU will have a much stronger bargaining position. The simple truth is that it is the UK departing from the EU, not the other way round, which means one member against 27, although it is in the interest of all involved to make the split as amicable as possible.

Article 50(2) TEU provides that the withdrawal agreement covers the terms of withdrawal, "taking account of the framework" for future relations between separating partners. It is the latter phrase that makes the current discussion complicated, and it will be even more so if the UK does not choose the European Economic Area as a post-divorce solution.

Before various options for interpretation of Article 50(2) TEU are explored, it is worth paying attention to a legal anomaly. Accession to the European Union is regulated by tailor-made treaties, which are primary law (at the same level of hierarchy as the EU's founding treaties) and thus concluded between existing and future member states. One would therefore expect the same in relation to the withdrawal from the European Union. But this is not the case. Article 50 TEU makes it clear that exit from the EU will be regulated in an agreement between the European Union and a departing country. This factor should be the point of departure for interpretation of the vague term "taking account of the framework" for future relations. If it were to regulate purely the terms and conditions of departure from the EU, then the drafters of Article 50 TEU could have opted to have the withdrawal regulated in an act of primary law. However, since Article 50 aims to govern the terms of withdrawal and take account of future relations it has to be, from the point of view of EU law, an international treaty between the EU (and perhaps also its member states) and a departing country.

There are many reasons why a withdrawal agreement should cover both the terms and conditions of exit and future relations. First and foremost, it would guarantee a smooth transition, thereby reducing legal and economic uncertainties. Furthermore, it would streamline the ratification by the EU and its member states, as the entire package would require a single ratification per member state.

Sadly, this is not where the current debate is heading. Unless the UK joins the EEA as an EFTA country, the EU withdrawal and future relations between the UK and EU are, at least for now,

more likely to be regulated by two separate treaties. Here, the options are twofold: either these agreements are negotiated and enter into force simultaneously, or in sequence. The first is controversial from the legal point of view, the second could bring years of uncertainty. Both are explored here in turn.

Two agreements negotiated in parallel or in sequence?

Article 50 TEU provides for a tailor-made procedure requiring qualified majority in the Council and consent of the European Parliament to have a withdrawal agreement approved. If such an agreement were to regulate only the terms of exit, it would be easier and quicker to handle. Nevertheless, the EU would have to decide if it should be a mixed agreement requiring ratification by all remaining member states. It would definitely lead to legal and economic upheaval and extend the period of uncertainty for years, unless it were negotiated in parallel with a deal on future relations and both entered into force together. Such a duo of agreements should be seriously considered, although it goes without saying that it would take more than two years to negotiate and would likely require ratification by all EU member states. Furthermore, on the EU27 side one would face fundamental procedural problems. While a withdrawal agreement would be negotiated and concluded under Article 50 TEU (and 218(3) TFEU) the question arises whether future relations could be negotiated between the EU and one of its member states that is on its way to becoming a 'third country'. On the one hand, one could argue that it could only be done when the UK formally leaves the European Union as Article 218 TFEU only governs conclusion of international treaties between the EU and third countries. On the other hand, Article 50 TEU requires application of Article 218(3) TFEU to withdrawal negotiations, hence a bridge between the two provisions exists. Although that provision only deals with the preparation of the negotiation mandate and the appointment of the EU negotiating team, it already sets a precedent whereby the rules tailor-made for negotiations with third countries are applied to the exit procedure. In this particular case a degree of flexibility and pragmatism will be required from the EU27. As already argued, it is in the interests of both the UK and the EU27 to have an orderly exit. With the simultaneous entry into force of two agreements regulating the terms of withdrawal and future relations, a smooth transition would be secured.

The third and the worst option is the one proposed by Donald Tusk in his interview with *Bild*,¹ on June 12th and now seemingly confirmed by the Informal Summit on June 29th. The proposed arrangement is negotiation of the terms of exit and future relations in sequence. Arguably, this would be disadvantageous for both sides as it would lead to a potentially extended period of time when bilateral relations between the UK and the EU would remain without a tailor-made arrangement, merely regulated by the WTO framework. Although some kind of transitional period could be envisaged in the withdrawal agreement it would make the system profoundly complicated and prone to litigation. For instance, negotiators would have to decide if the UK would still be bound by parts of EU legislation and thus what the role of the UK in the post-Brexit decision-making (or at least decision-shaping) would be; how new EU legislation would affect old legal acts still binding the UK; and how the jurisdiction of the Court of Justice would extend to the UK. It would also stretch the UK civil service immensely, which in coming years will face a number of mammoth tasks, having just experienced austerity cuts. Not only will the UK be negotiating the Brexit deal but it would also have to

¹ See, <http://www.businessinsider.de/donald-tusk-bild-interview-brexit-2016-6?r=US&IR=T>.

prepare for negotiations of free trade agreements with the outside world. It is questionable, though, whether the UK could formally start such negotiations before it ceases to be a member state. As highlighted by the Informal Meeting of Heads of States and Governments on June 29th, until the divorce actually materialises, the UK is bound by EU law, including the rules underpinning the Common Commercial Policy. Furthermore, if it were not to choose the EEA as a future model for relations with the EU, it would also have to negotiate a withdrawal from the European Economic Area, because post EU-exit it would be neither an EU member state, nor an EFTA country and would thus not meet the EEA eligibility criteria. Last but not least, ahead of Brexit, Whitehall, together with the devolved authorities, would have to engage in a colossal preparatory exercise for replacing the directly applicable EU laws with domestic legislation.

What if Scotland opts for independence?

Further complexity will be added if Scotland proceeds with a second independence referendum and becomes an independent state. First Minister of Scotland, Nicola Sturgeon, has already embarked on a fact-finding mission to Brussels. The key legal and political question is whether and how Scotland can stay in the European Union. As long as Scotland remains a constituent part of the United Kingdom it is hard to imagine how staying in the EU could work in practice. But should the drive towards independence prevail the EU27 may be faced with pressure to create a revolving door mechanism for Scotland. A number of options were already discussed before the first Scottish independence referendum. It was made clear that an independent Scotland would have to re-apply for EU membership and join as a new country. This condition is unlikely to change in the future, although one should not exclude a fast-track treatment of such an application for membership. Should Scotland leave the UK, Northern Ireland may follow suit. Sinn Féin has already called for a referendum on reunification of the Irish island.

In sum

One thing is certain, with no precedent to rely on, Article 50 TEU constitutes a challenge for both the EU and the UK. Not only will the gaps in the withdrawal procedure have to be filled by both sides, it will also have to be done under the pressure of time and big politics. The sooner the basic parameters are agreed to, the better. This is no time for delusional visions or political vandalism. The ball is now in the UK's court, however. It needs to file the withdrawal papers first because the EU27 have made it clear that there will not be any informal talks before the desire to leave is formally announced.