

REFERENDUM IN THE UNITED KINGDOM
TO LEAVE THE EUROPEAN UNION

What happens next? Legal Consequences of Brexit

EURO-CEFG Brief



FABIAN AMTENBRINK
ANASTASIA KARATZIA
RENÉ REPASI

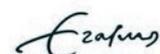


**Universiteit
Leiden**
The Netherlands



TU Delft Delft
University of
Technology

**Erasmus
University
Rotterdam**



REFERENDUM IN THE UNITED KINGDOM

What happens next? Legal Consequences of Brexit

EURO-CEFG BREXIT

The much anticipated 'Brexit' referendum took place yesterday after months of dominating newspaper headlines, political debates, and the public's (and Brussels') attention. As is well-known by now, the referendum on the UK's membership of the EU was the result of David Cameron's pledge in the run-up to the 2015 general elections. Cameron's pledge was that he would renegotiate the position of the UK prior to holding a referendum, with a view to achieving a number of reforms. After the re-election of the Conservative party, Parliament passed legislation allowing for the referendum before the end of 2017 (European Union Referendum Act 2015). Subsequently, the UK government engaged in negotiations with their EU counterparts. The basis of the negotiations was Cameron's proposed reforms, which were sent to the European Council president, Donald Tusk, in November 2015. The end product of the negotiations is set out in the ['New Settlement for the United Kingdom within the European Union'](#), a series of documents outlining agreements reached in the areas of economic governance, competitiveness, sovereignty, and free movement. According to the Prime Minister, the settlement secured all of the UK's objectives, ensuring 'the best of both worlds' for Britain. According to the Leave camp, 'the Prime Minister's hollow deal comes nowhere near the fundamental reform he promised before the election.'

The 'New Settlement' concluded between the UK and the European Council on 19 February 2015 ceased to exist by virtue of the referendum vote to leave the EU.

In this brief contribution, we seek to discuss 'the day after' the 'Brexit' referendum with a focus on the legal consequences of the 'Brexit'. Before engaging with this discussion, we should take a moment to briefly consider the legal and political meaning of the referendum.

WHAT IS THE LEGAL AND POLITICAL MEANING OF THE REFERENDUM?

From a legal point of view, the status of the referendum is clear: the referendum outcome is advisory and legally non-binding. Simply put, Parliament is sovereign, and cannot be bound; therefore technically it can defy the referendum result with a majority vote. Given that there was no minimum turnout required for the referendum to be valid, the final outcome was determined solely by the majority of votes. With a UK-wide turnout of 72%, 51, 9% of the voters voted for the exit of the UK from the EU as opposed to 48.1% that voted for Remain. The non-binding character of the referendum resembles the 2014 Scottish independence referendum and the 1975 referendum on the UK's membership of the Common Market, but contrasts with the 2011 referendum on electoral reform which would have obliged the government to legislate on the basis of its outcome.

Although the referendum is legally toothless, the importance of the vote lies in its political follow-up. Research on national experiences with referendums indicates that the attitude of representative bodies to such referendums directly impacts national parties' electoral performance. Amidst the heightened attention placed in the past year on the re-negotiation of the UK's relationships with the EU, as well as on the referendum itself, arguably there is minimal chance that the UK government will act in defiance of 'the will of the people'. In the past, Cameron had declared that 'a vote to leave is a vote to leave', indicating that he would follow the outcome of the referendum. Downing Street had also dismissed the idea of a second referendum proposed by the Leave camp as leverage for further renegotiations with the EU.

Yet, as the political and legal background to the Brexit reveals, the situation is more complex than the Prime Minister's statement suggests. By virtue of the non-binding nature of the referendum, it will be up to Parliament to vote legislation determining both the way in which Britain will exit the EU, and the terms on which it does so. A number of questions arise in this respect. As David Cameron has already announced that he intends to resign as prime minister, how will his successor envisage legislation to exit the EU? How will the 'Leave' camp contribute to the proposed legislation, given that they do not yet have a specific plan for Britain's post-Brexit relationship with the EU? One of the most pertinent questions is what future arrangements the House of Commons will favour for the relationship between the UK and the EU.

The Prime Minister's resignation could lead to a so-called 'snap general election', a general election called earlier than expected. In this respect, it should be kept in mind that the Fixed-term Parliaments Act 2011 has restricted the conditions under which a snap election can be called. Before 2011, a general election could be declared by the Prime Minister or in case the government was defeated on a confidence motion. Since 2011, such an election can take place either when the government loses a confidence motion by a vote of simple majority or when a 2/3 majority of MPs (currently 434 out of 650) vote in favour. However, the new Prime Minister could also be elected from within the Conservative party without resorting to general elections.

By virtue of the non-binding nature of the referendum, it will be up to Parliament to vote legislation determining both the way in which Britain will exit the EU, and the terms on which it does so. Unanswered questions arise in this respect. How will the next Prime Minister envisage legislation to exit the EU? How will the 'Leave' camp contribute to the proposed legislation, given that they do not yet have a specific plan for Britain's post-Brexit relationship with the EU? One of the most pertinent questions is whether a potential proposal to exit the Single Market would find support in the House of Commons which, at the moment of writing, does not contain a clear majority in favour of such a withdrawal.¹

At this point it should be noted that the way in which UK's exit from the EU will take place is a different matter from the details of the exit arrangements. The former matter seems more straightforward than the latter, since Article 50 TEU provides the legal framework for a Member State's withdrawal from the EU. Yet Article 50 TEU is unclear as to whether arrangements for the UK's future relationship with the EU would be addressed in the withdrawal agreement itself or in a subsequent agreement. In this respect, Article 50(2) only refers to 'taking into account of the framework for [the Member State's] future relationship with the Union.' Moreover, contrary to the argument that invoking Article 50 could lead to further renegotiations with the EU without necessitating a Brexit, it is questionable whether, legally speaking, Article 50 TEU can be used for that purpose or whether its purpose is clearly to trigger a Member State's departure from the EU.² It is also highly doubtful that the two-year timeframe provided in Article 50 (subject to extension on the basis of unanimity in the Council) is sufficient to settle all the details of a post-exit agreement. In this context, the timing of the British government's formal notification to the European Council of its intention to withdraw becomes crucial. In a first reaction, Boris Johnson, one of the most prominent Tory proponents of a Brexit has already stated that in his opinion there is 'no need for haste'.

In addition, although a range of alternatives has been suggested for Britain's post-exit arrangements, there is currently no consensus on what would be the best available option. Given its unprecedented nature, the issue of Treaty withdrawal remains largely uncharted territory.

WITHDRAWAL FROM THE EU – HOW DOES IT WORK?

As mentioned above, the procedure for the withdrawal of a Member State from the EU is set out in Article 50 TEU. Even though theoretically the UK can also withdraw from the EU without reference to Article 50 (e.g. by

¹ <https://next.ft.com/content/f015a0f5-e5fc-3f42-a6c6-990d0a3527de>

² <http://eulawanalysis.blogspot.nl/2014/12/article-50-teu-uses-and-abuses-of.html>; <http://blogs.ft.com/david-allen-green/2016/06/14/can-the-united-kingdom-government-legally-disregard-a-vote-for-brexit/?siteedition=uk>

repealing the European Communities Act 1972), by doing so it would risk breaching its obligations under international law; the Vienna Convention on the Law of Treaties needs to be read in light of the EU Treaties. Such a unilateral withdrawal might also damage Britain's image and credibility as an international negotiator.

The first step in the process under Article 50 TEU is a notification of the UK's intention to withdraw, sent by the Prime Minister to the European Council. This notification will signal two things: first, the beginning of the withdrawal negotiations between the UK and the EU (Article 50(2) and (4)) and, second, the countdown to the two year deadline in which the Treaties will automatically cease to apply to the UK (Article 50(3)), unless the remaining Member States (voting unanimously) agree to extend that time limit.³ In other words, upon the expiry of the two years, and provided that an agreement has not been found by then, the UK will automatically cease to be an EU Member State unless the remaining Member States agree to an extension.

Indeed, it remains open to the UK government to decide when to give formal notice, yet it cannot be said with certainty how long after the referendum this might take place. In his speech after the announcement of the referendum outcome, Cameron announced his plan to postpone the triggering of Article 50 TFEU until his successor takes over as Prime Minister before the Conservative conference in October. It is rather apparent that the delay in Article 50 is intended to put the negotiations on hold and pre-empt further risks to stability.⁴ Maintaining stability in the aftermath of the vote is also the primary objective of the Bank of England (BoE). BoE governor stated that the BoE is prepared to handle the Brexit and to deal with market volatility.⁵ On the other hand, the concern from the side of the EU seems to be that a prolonged delay of Article 50 could lead to paralysis at the EU level. Speaking earlier today, European Parliament party leaders and the President of the European Commission An informal meeting of the EU-27 is expected to take place next week to discuss the outcome of the referendum and the next steps forward.

In the period between the notification and the withdrawal agreement, the UK remains a Member State and EU law continues to apply in the UK. Even though it is likely that the country's influence and position in decision-making would be severely affected, Primary Law does not formally provide for any curtailment on the powers of a withdrawing Member State. In a joint statement issued today, the presidents of the European Council, the Commission, and the European Parliament called for an immediate Article 50 notification from the UK Prime Minister that would respect the will of the British people and would limit prolonged uncertainty at the EU. They excluded any possibility for renegotiations with the UK that could replace the – now void – 'New Settlement'.

With regard to the withdrawal negotiations, the agreement will be negotiated as an international agreement under Article 218(3) TFEU and in accordance with guidelines provided by the European Council voting in unanimity. In light of the European Council's guidelines, the Council, deciding based on qualified majority voting, has to authorise the opening of the negotiations and give the negotiating mandate to the Commission. The parties to the negotiation would be the EU and the UK. As such, the UK would be treated as a non-EU State and thus will not participate in the relevant discussions of the European Council or the Council (Article 50(4) TEU). The final stage of the negotiations requires the consent of the European Parliament (by simple majority voting), and the signing of the agreement by the Council (by enhanced qualified majority voting, meaning 20 out of the 27 Member States, representing 65% of the EU population).

Even though the form of the withdrawal agreement remains unclear for now, one of its objectives could be to pave the way for the new EU-UK relationship. In this sense, the withdrawal agreement and the post-exit arrangements would be intertwined. A notable difference between the agreement under Article 50 and a second agreement, on the post-exit arrangements, concerns the voting requirements for each. In particular, if the agreement on a future UK-EU relationship takes the form of a mixed agreement or an association agreement, its conclusion would require consensus among the 28 Member States and a national ratification of the final agreement.

³ www.publications.parliament.uk/pa/ld201516/ldselect/ldeucom/138/138.pdf

⁴ Already on Friday morning the pound tumbled to its weakest since the mid-1980: <https://next.ft.com/content/50436fde-39bb-11e6-9a05-82a9b15a8ee7>

⁵ <https://next.ft.com/content/5448716c-3301-11e6-bda0-04585c31b153>

As mentioned above, if a withdrawal does not take place within two years, or if the European Council does not agree an extension before the expiry of the two year timeframe, the withdrawing State will cease to be a Member State. In this case, the UK would most likely fall back on WTO rules for market access and its trade relations. Apart from the range of tariffs that would be applied to UK's exporting and importing goods, it is also likely that the country's commitments with other WTO members would need to be re-considered and re-adjusted to the new status of the country.⁶

Beyond the negotiation of the post-exit arrangements at the EU level, UK Government would also need to enact new legislation or repeal old legislation depending on which EU-derived UK laws it will choose to keep. The European Communities Act 1972 would, of course, need to be repealed. A relevant point here is that the devolved legislatures (Scotland, Wales, Northern Ireland) would also have to deal with the EU legislation that was transposed into their laws. It goes without saying that the process of disentwining domestic legislation from EU-transposed legislation would be a prolonged and challenging process.

An even more pertinent issue concerns the position of Scotland and Northern Ireland, both of which voted overwhelmingly for Remain, within the Great Britain after the referendum. Northern Ireland's Deputy First Minister already referred to the possibility of a united Ireland, whilst Scotland's first minister talked of a second independence referendum. The next few days will shed more light on the possibilities and the legal framework for a future Scottish referendum given the upcoming meetings of the Scottish cabinet.

This brief will be continuously updated under www.euro-cefg.eu/news/brexit.

AUTHORS

Fabian Amtenbrink, Professor of European Union Law, Erasmus School of Law, Erasmus University Rotterdam, Visiting Professor College of Europe (since 2009), Scientific Director EURO-CEFG.

Anastasia Karatzia, Assistant Professor of European Union Law, Erasmus School of Law.

René Repasi, Erasmus School of Law, Erasmus University Rotterdam, Scientific Coordinator and Research Fellow of EURO-CEFG.

FOR FURTHER INFORMATION AND QUESTIONS

Fabian Amtenbrink
amtenbrink@law.eur.nl

Anastasia Karatzia
karatzia@law.eur.nl

René Repasi
repasi@law.eur.nl

⁶ www.publications.parliament.uk/pa/ld201516/ldselect/ldeucom/138/138.pdf