

UCL Constitution Unit Briefing Paper

# The Constitutional Consequences of Brexit: Whitehall and Westminster

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This is the first in a series of Constitution Unit briefing papers on the constitutional consequences of Brexit. The series examines the impact that UK withdrawal from the European Union would have upon structures of power and administration in the UK and the EU. The papers are intended to inform debate ahead of the UK referendum on EU membership on 23 June. They do not take sides in that debate.

Much of the material from this briefing paper is adapted from a Constitution Unit seminar on the impact of Brexit on Whitehall and Westminster. Remarks made by our panellists – Lord Lisvane, former Clerk of the House of Commons, Sir Simon Fraser, former Permanent Under-Secretary at the Foreign Office, and Professor Hussein Kassim, co-author of *The European Commission of the Twenty-First Century* – have therefore contributed significantly to the paper.

The paper focuses on the potential impact of Brexit upon Whitehall and Westminster. It asks:


- What would be the **immediate consequences** of a vote to leave the EU?
- How would the **process of withdrawal** affect Whitehall and Westminster?
- How would Whitehall and Westminster change in the long term **after withdrawal**?

The evidence indicates significant impacts:

- A vote to leave would generate immediate political uncertainty and commotion. In the midst of this, the key question would be when and how to begin the withdrawal process.
- That process would dominate the work of parliament and the civil service for months or years. Whitehall would face significant practical challenges: how to successfully coordinate complex withdrawal negotiations whilst also managing the ongoing business of government. Parliament would have to deal with the extensive task of reviewing, amending and repealing a very wide range of EU laws and regulations.
- In the long term post-Brexit, parliament's structures might change relatively little, but arrangements in Whitehall would require substantial adjustments.

## The immediate consequences of a vote to leave

A vote to leave would cause major political uncertainty, not least around whether the Prime Minister would remain in office. Having campaigned to remain in the EU, the government's legitimacy may be challenged. How these pressures are managed would depend on the margin of support for Brexit and whether some parts of the UK have voted to remain.



Alongside this, there would be efforts to calm the financial markets and reassure the business community. The UK's diplomatic service would be required to engage immediately and comprehensively with EU and other key partners.

It is widely accepted that Article 50 of the Lisbon Treaty (see box) is the only legal mechanism for leaving the EU. Although [Vote Leave](#) have argued that 'the UK does not necessarily have to use Article 50', its invocation seems [unavoidable in practice](#). As Article 50 puts the EU in a position of strength relative to the withdrawing state, it is unclear why the remaining 27 member states would agree to negotiate under any other framework.

### *When would Article 50 be triggered?*

A [European Parliament briefing](#) on Article 50 stressed that a withdrawing state can notify the European Council of its intention to leave the EU at its own discretion, and that formal negotiations and the two-year withdrawal process set out in Article 50 begin only after this notification has been received. In theory, this means that the British government could begin the process *whenever it chose* – not necessarily immediately following the referendum.

Some [analysts](#) contend that the process *should not* start immediately after the referendum. They argue that the government should bide its time before notifying the Council as it is in Britain's interests to prepare for the negotiations and pursue informal negotiations before the formal process. But the government has said that it would begin the process immediately: 'if the vote is to leave the EU the British people would expect that process to start straight away' ([David Cameron, 22 Feb 2016](#)).

The government could face a dilemma. Sir Simon Fraser argues: 'it doesn't make sense to begin the two-year period if you don't know what to do with it. However, the public will expect Article 50 to be invoked very quickly'. Lord Lisvane concurs, but also notes that public opinion could shift if prominent Brexit campaigners support delay, as the scale of the task ahead becomes evident. It therefore remains possible that the government would not invoke Article 50 immediately following a vote for Brexit.


## The withdrawal process

The process of withdrawing from the EU would involve both international negotiations and major policy decisions within the UK. International negotiations would have to cover:

- *The terms of withdrawal.* These would be negotiated under Article 50 and require agreement from the UK and a qualified majority of the 27 EU member states.
- *The terms of the UK's future relationship with the EU,* covering issues such as trade and economic relations. Depending on the nature of this supplementary agreement, it might require unanimous agreement of the European Council and ratification by all 27 member states.
- *Free-trade deals with non-EU countries.* After Brexit, the UK would no longer be a party to the EU's existing free-trade arrangements with third countries.

### Article 50

Article 50 of the *Treaty of Lisbon* outlines the legal process by which a state can withdraw from the EU. Once a state has notified its intention to leave, the treaty specifies a *two-year* period for negotiating the terms of withdrawal. This period can be extended by *unanimous* agreement in the European Council. Otherwise, even if no deal has been reached, the withdrawing state automatically ceases to be an EU member. Full details are available [here](#).



Although the Article 50 process formally requires only the first of these, the UK would want to conclude the others prior to withdrawal as well: otherwise, UK trade with EU countries and others would immediately revert to [WTO rules](#), requiring the imposition of tariffs in many areas and the potential re-establishing of customs controls at UK–EU borders.

### *How would the withdrawal process impact Whitehall?*

The scale and complexity of such multi-faceted negotiations would present Whitehall with a major *practical* challenge: how to coordinate the negotiations successfully and achieve the best outcome for the UK whilst simultaneously managing the ongoing business of government.

Some [experts](#) think that Whitehall lacks sufficient resources and expertise to manage such negotiations successfully. Sir Simon Fraser notes that the civil service is smaller today than at any point since the Second World War. The UK has few, if any, trade negotiators, having ‘outsourced’ this function to Brussels. He does not view the challenge as insurmountable, however, provided Whitehall increases capacity and expertise in key areas. Fraser raises the ironic possibility that, ‘due to the demands of the withdrawal process, the UK government could end up spending more taxpayers’ money on European affairs post-Brexit than they currently do!’

Brexit would affect an extremely wide range of policy areas. Every government department is likely to be affected in some way and will therefore need to be involved in the negotiations. Success will require strong leadership, perhaps from a dedicated and senior government minister, complemented by formalised, streamlined coordination across Whitehall (and UKREP – the UK Permanent Representation to the EU). Indeed, [some](#) have even suggested that a new ministry be established to manage the transition.

### *How would the withdrawal process impact Westminster?*

The withdrawal process would keep Westminster busy in:

- overseeing the negotiations outlined above
- reviewing the huge body of law derived from EU membership

*Oversight of the negotiations* would, [Lord Lisvane predicts](#), create a need for regular ministerial statements and urgent questions. He anticipates pressure for a dedicated question time and perhaps parliamentary approval at different stages of the negotiation process. Some kind of oversight super-committee might be required. If not, the Commons and Lords European select committees would face substantial additional burdens in ensuring effective scrutiny.

Much *UK law* now derives from EU law, although [precise estimates of the proportion](#) vary. Brexit would require a major review of this law to ascertain what should be kept, amended, or discarded. This would dominate parliament’s agenda for an extended period.

- Repeal of the 1972 European Communities Act would mean repeal of all EU regulations – covering, e.g., consumer protection, health and safety, and the environment (see box on next page). A [European Law Monitor report](#) said such gaps would cause uncertainty, harming businesses and consumers. The [UK government agrees](#), stressing the need ‘to maintain a robust legal and regulatory framework where that had previously depended on EU laws’. Case-by-case assessment of *all* EU regulations may therefore be required.
- EU directives transposed into UK legislation would not automatically cease to apply after withdrawal. A review would presumably be desired, but would be less urgent.



### Types of EU law

- 1) *EU Regulations* apply automatically in the UK by virtue of the European Communities Act 1972 and the EU treaties. They are not applied via domestic implementing legislation and would automatically cease to apply at the moment of withdrawal.
- 2) *EU Directives* are applied via domestic implementing legislation (UK Acts and Statutes). They would remain in force after withdrawal.
- 3) *European Court of Justice rulings* impact legislation through the Court's power to interpret Regulations and Directives and safeguard the treaties.

Former Parliamentary Counsel [Daniel Greenberg](#) argues that this review process would be 'awe-inspiringly large [...] the largest scale legislation and policy exercise that has ever been carried out'. Others, such as [Martin Howe](#), [Sionadh Douglas Scott](#) and [Vaughne Miller](#), agree.

#### *The withdrawal process and parliamentary control*

The extent of the legislative review required by leaving the EU could create a quandary. A key argument for Brexit centres on the repatriation of sovereignty. Repeal of the 1972 Act would demonstrate that parliamentary sovereignty in fact still exists. But the size of the task involved in making subsequent legal changes could overwhelm parliament's capacity to exercise effective legislative control.

[Martin Howe](#) argues that the process could be simplified using '[Henry VIII](#)' clauses – that is, provisions in a law that allow the government to amend or repeal primary legislation through secondary (subordinate) legislation, often without further parliamentary scrutiny. But this mechanism is highly [controversial](#). In the Brexit context [Sionadh Douglas Scott](#) argues that it could be used to abolish fundamental rights with minimal parliamentary scrutiny, perverting the concept of parliamentary sovereignty.

A [House of Commons briefing](#) argued that the 1972 Act could alternatively be repealed with savings provisions to keep regulations in place. But it warns that even this would be a 'substantial exercise'.

[Gee and Young](#) think that Brexit will lead to a further concentration of power in the hands of ministers and civil servants, who will ultimately decide which laws to amend and discard. This could be at the expense of parliament. However, the government's ability to pursue any wider legislative agenda would be markedly constrained.

### Long-term effects of Brexit

How Westminster and Whitehall might change after Brexit has been negotiated and the dust has settled would depend to a degree on the nature of the [UK's future relationship with the EU](#) – whether closer to the Norway model at one extreme or the WTO model at the other. It is likely, however, that change would be greater in government than in parliament.



### *How would Brexit affect Westminster?*

Lord Lisvane argues that it is unlikely that Brexit would have a major procedural or practical impact on Westminster in the long-term and that the structures of the parliamentary institutions will not change very much. He draws an analogy with Scottish devolution. It was expected to affect the Westminster parliament, and yet there is still a Scottish Affairs Committee, Scottish questions, etc. – the same would likely be true in the event of Brexit.

Much of this will depend on the nature of our future relationship with the EU. For example, if the UK remained in the European Economic Area, it would still have to abide by many EU laws and regulations, which would require the EU committees to continue scrutinising EU law. However, it is also possible to imagine a scenario where the EU committees are no longer deemed necessary. Brexit would presumably lead to more domestic legislation, and more domestic policy-making in general. This could have implications for the parliamentary workload in terms of scrutiny, and may require the establishment of new select committees.

### *How would Brexit affect Whitehall?*

A new foreign policy strategy and outlook could be needed following Brexit. The UK government would seek to present a coherent diplomatic message as it engages with key partners and the wider international community.

In addition, certain departments would have to re-acquire policy-formulation expertise. [Daniel Greenberg argues](#) that where Whitehall currently only implements policies developed in Brussels – e.g. financial services and agriculture – there would be a need to ‘relearn how to formulate policies’. Permanent Secretaries and heads of civil service legal divisions would be particularly concerned because ‘the mechanisms and processes for proper policy and legislative development have fallen into partial disuse’. The extent to which this would be a major problem is unclear.

## Summary

Immediately after a vote for Brexit, the government will have to manage a period of turbulence and political uncertainty. Key decisions will need to be made: namely, when and how to begin the withdrawal process. This process will have a significant impact on Whitehall and Westminster. Managing and coordinating the negotiations will place intensive demands on Whitehall, while the process of reviewing all EU law will dominate Westminster. In the long term, Whitehall is likely to be more affected by Brexit than Westminster, as a number of government units will engage in policy formulation for the first time in years.

This UCL Constitution Unit briefing paper is part of a project on the Constitutional Consequences of Brexit for the UK and EU, which is funded by the Economic and Social Research Council’s ‘UK in a Changing Europe’ initiative and organised in collaboration with the UCL European Institute. The project consists of a series of four seminars, each accompanied by a briefing paper and video. Much of the material in this paper is adapted from the first seminar, on 21 April. Sir Simon Fraser, Lord Lisvane and Professor Hussein Kassim were our panellists, and, without their contributions, this paper would not have been possible. The series is convened by Dr Christine Reh, Dr Alan Renwick and Professor Meg Russell, who also contributed to the writing of the paper.

Details about the remaining events in the series can be found [here](#).