



UCL INSIGHTS: RESEARCH BRIEFING

Brexit: Constitutional and legal requirements

Summary

The role of Parliament

Opinion is divided on whether Parliamentary approval is needed to trigger Article 50 (see box). However, Parliament does have a **statutory role in ratifying the withdrawal agreement and in reviewing, amending and repealing legislation** which is derived from EU membership.

Article 50

There is **ambiguity as to whether a member state could change its mind after triggering Article 50 to withdraw from the EU**. Triggering Article 50 invokes a strict two-year time limit to negotiate withdrawal (after which exit will happen automatically unless there is unanimous agreement to extend the negotiation period). Allowing a subsequent withdrawal of Article 50 notification could be seen as a dangerous precedent by other EU member states.

Options for the UK's future relationship with the EU

- **Member of single market:** greater market access; requires free movement of people
- **Free trade agreement:** lower levels of market access; no free movement of people
- **WTO terms:** would result in costly tariffs on exports

Negotiations

The rest of the EU will need to balance the economic desirability of keeping the UK in the single market with the political desirability of discouraging other Eurosceptic movements.

Trade

It is unclear whether any trade agreement with the EU would be negotiated alongside the Article 50 withdrawal negotiations or separately. **The withdrawal and negotiation process will be complex and lengthy:** the average trade deal takes 28 months to negotiate, with EU deals taking much longer.

The devolved assemblies

The legislation which established the Devolved Assemblies will need to be amended to remove the requirement for compliance with EU law. Whilst convention indicates that their consent should be sought before doing this, it is not legally necessary. However, Brexit could increase political divisions and have a negative impact on the economy in Northern Ireland, raising the prospect of a **'hard border' with the Republic of Ireland**; and could increase calls for a **second independence referendum in Scotland**, although currently this may not be politically feasible.

Is Parliamentary approval needed for triggering Article 50?

The UK's vote to leave the EU has raised a number of issues of constitutional and legal importance, sparking not only fierce debate among academic experts but even legal proceedings against the government. Most legal commentators agree that leaving the EU will require the invocation of Article 50 of the Treaty on European Union. Article 50 states, "Any Member State may decide to withdraw from the Union in accordance with its own *constitutional requirements*." Exactly what these requirements are has been the subject of extensive debate.

IS PARLIAMENTARY APPROVAL NEEDED TO TRIGGER ARTICLE 50?

There are varying opinions on the need for Parliamentary approval to invoke Article 50:

- the invoking of Article 50 lies within royal prerogative powers exercised by Government and does not require Parliamentary approval
- royal prerogative powers in this case would undermine a previous Act of Parliament and entail the removal of citizens' rights, so Parliamentary approval is required.
- direct democracy under a referendum overrides representative democracy, so Parliamentary approval is not required
- whether parliamentary approval is required or not, a Parliamentary vote would enhance the democratic legitimacy of the decision

Specifically, **constitutional experts disagree as to whether the Prime Minister can rely on royal prerogative powers to invoke Article 50, or whether, as a matter of domestic constitutional law, Parliamentary approval is necessary.** Drs Nick Barber, Tom Hickman and Jeff King have argued that in our parliamentary democracy, royal prerogative powers cannot be used to make changes where: (a) an

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Act of Parliament would be undermined and (b) the rights of citizens granted by Parliament would be removed. They argue that triggering Article 50 would result in the European Communities Act 1972 (ECA) and its purpose being rendered 'nugatory', as well as the removal of British citizens' rights under the European Parliamentary Elections Act 2002 to vote and stand in elections to the European Parliament. In light of this, they argue, the government cannot rely on royal prerogative powers and **Parliament must provide its approval before Article 50 is invoked.**

However, Professor Kenneth Armstrong has argued that holding a referendum departs from parliamentary sovereignty – that **direct democracy 'trumps' representative democracy** in this context. The Brexit referendum thus represents a direct democratic decision that Parliament has no choice but to implement. Professor Mark Elliot highlights the fact that the ECA only provides that EU treaty law, which '*from time to time*' is applicable to the UK, shall be applied by UK courts. He argues that this means the ECA is only concerned with applying the EU treaty law to which the UK is signed up (rather than automatically applying all EU treaty law). This means that once the UK was no longer signed up to EU treaties, the ECA would cease to apply them to domestic law and so could not be undermined by triggering Article 50.

King has contended that the purpose of the ECA, as indicated by its long title, is to "make provision in connection with the enlargement of the European Communities to include the UK". King argued that this suggests that ongoing membership of the EU is the only plausible construction of the scheme of the Act – which the triggering of Article 50, and leaving the EU, would inevitably frustrate. Furthermore, triggering Article 50 would presumably result in either some kind of amendment or scrapping of the ECA, which would also undermine its purpose.

Other legal commentators have commented that whether or not a vote in Parliament is a legal necessity, there may still be good constitutional reasons for Parliament to give its approval. Professor Colm O'Connell has argued that, given the importance of the process of leaving the EU and the controversial policy decisions as the UK Government works out a negotiation strategy before triggering Article 50, **a Parliamentary vote may be welcome to enhance the democratic legitimacy of the decision.**

What is Parliament's role in the withdrawal process?

Although the Government will lead and carry out the withdrawal negotiations, **Parliament will play a significant role in overseeing the process.** Lord Lisvane argues that Brexit will dominate Parliament for years. He suggests that there will be an appetite for Parliamentary approval at various stages of the process, and that perhaps even a bicameral super committee will be necessary to ensure effective scrutiny. Importantly, **Parliament has a statutory role in ratifying the withdrawal agreement** (and any other post-Brexit treaties). Crucially, **it is possible for MPs to indefinitely block the treaty ratification.**

Parliament will also have an important role to play in reviewing, amending and repealing the huge body of law which is derived from EU membership. Various experts

agree that this process will be challenging and complex in the extreme, not least due to the prevalence of EU law in so many areas. There are two main types of EU law:

1. **EU Regulations** apply automatically in the UK by virtue of the ECA and the EU treaties. They 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.

It will be particularly important for the Government to implement new legislation in areas which are currently covered by EU regulations, to prevent legislative gaps and legal uncertainty. One short-term consequence of Brexit is likely to be an increased concentration of power into the hands of cabinet ministers and civil servants, who will be leading both the negotiations and the process of reviewing all EU law. The UCL Constitution Unit has produced a briefing paper with a detailed analysis of the impact of Brexit on Whitehall and Westminster.

Could the UK change its mind after triggering Article 50?

Assuming the UK does trigger Article 50, would it be able to change its mind and withdraw its notification of withdrawal? Professor Piet Eeckhout notes that Article 50 says nothing on the matter. However, he argues that this may not be possible, because if it were, **this could invite abuse of the process.** Any member state whose EU membership has become problematic could trigger Article 50, and pull back if it does not like the outcome of the exit negotiations. That would not be consistent with the principle of loyal cooperation. The EU would be negotiating a withdrawal agreement, requiring considerable political, diplomatic and bureaucratic energy and resources, in circumstances where the withdrawing State could at any point reverse the process.

Barber, Hickman and King agree, arguing that Article 50 is a 'once and for all decision'. They argue that Article 50 is designed to tip the balance of power in favour of the EU. If the departing state and the EU do not reach an agreement within two years (and the negotiation period is not extended), **the withdrawing state is automatically 'kicked out' of the EU, without an agreement.** This deadline suggests that there is little scope for going back on the decision without the unanimous agreement of the European Council.

However, other legal experts disagree. In evidence to the House of Lords, Professor Derrick Wyatt argues that **nothing in the wording of Article 50 suggests that you cannot change your mind**, noting, "it is in accord with the general aims of the Treaties that people stay in rather than rush out of the exit door".

There is a degree of consensus that the Government is right to not trigger Article 50 until it is fully prepared and has formulated a negotiating stance; the UK is well within its rights to begin the withdrawal process whenever it wants (if at all). There is also general agreement that the Article 50 process can be aborted by consensus agreement.

What are the different options for the UK's future relationship with the EU?

Broadly speaking, Eeckhout has identified three options for how the UK's future relationship with the EU could be modelled:

1. **Membership of the single market** (i.e. the Norway model). This, as the EU has made clear, would require the UK to accept free movement of people. Although this model may be economically attractive, it would not amount to a regaining of sovereignty in a substantive sense.
2. **A free trade agreement**. This would give the UK lower levels of single market access but a greater degree of sovereignty. It is unclear whether any trade agreement with the EU would be negotiated alongside the Article 50 withdrawal negotiations or separately.
3. **Trade with the EU on WTO terms**. This is economically undesirable, as it would result in costly tariffs for exporters. This would only happen if the UK and the EU were unable to strike a deal.

A detailed analysis of the various models can be found [here](#).

How might the EU respond?

Eeckhout highlights that the nature of the **Article 50 withdrawal process tips the balance of power in favour of the EU**. This is because Article 50 sets a two-year time limit on the negotiations, which can only be extended with the *unanimous* consent of the European Council. As such, the UK may have to make concessions to buy more time. As Dr Alan Renwick notes, the deal also has to be approved by the European Parliament.

Economically speaking, it would make sense for the EU to give the UK high levels of market access. However, politically speaking, things are more complicated. Dr Ronan McCrea notes that the EU might not want to give the UK a generous deal, as this could enhance the appeal of Eurosceptic movements and represent an existential threat to the EU. A UCL Constitution Unit briefing paper concurs.

Negotiating trade agreements

It is unclear whether the UK will need to negotiate a separate trade agreement with the EU after the Article 50 withdrawal agreement is concluded. However, what is more clear is that **the withdrawal process will be complex and lengthy**. The average trade deal takes 28 months to negotiate, with EU deals taking much longer, as they often require ratification from each member state. The process will also pose major practical challenges for Whitehall, which is currently scouring the globe for experienced trade negotiators, having long outsourced that function to Brussels.

The status of EU citizens already residing in the UK

The status of many EU citizens already living in the UK has become uncertain. The Prime Minister has not provided any guarantee to EU citizens that they will have the right to remain in the UK, having previously stated that determining such rights would form part of Brexit negotiations. Dr Virginia Mantouvalou has suggested that the UK

Government is presently at risk of violating EU citizens' right to private and family life – a right protected by Article 8 of the European Convention on Human Rights. This is because the Government's present stance may be said to be causing a 'great degree of uncertainty and anxiety' which is likely to leave EU citizens, who came to live here lawfully, currently unable to plan for their lives.

CASE LAW ON THE RIGHT TO PRIVATE AND FAMILY LIFE

Case law from the European Court of Human Rights has established that the right to private and family life may protect a specific way of life if homes have been 'lawfully established' (*Chapman v UK*), as well as the ability of people to 'establish and develop relationships with other human beings' (*Niemietz v Germany*). A clear case may also be made for a violation of Article 8 if the government seeks to deport EU citizens – due to the existence of direct legal authority which states that Article 8 may be violated if a person's being deported has resulted in their separation from close family member (*Al-Nashif v Bulgaria*), or where children may be involved (*ZH (Tanzania) v Secretary of State for the Home Department*).

How will Brexit affect the constitutional dimension of devolution?

Brexit has raised many questions regarding the constitutional aspects of devolution, following the clear voting distinctions between different regions of the UK, including Scotland and Northern Ireland. The devolution legislation which established the Scottish, Northern Irish and Welsh assemblies contains strict requirements for compliance with EU law. This means that any law passed in the devolved nations which are inconsistent with EU law are invalid. **It would be necessary for Parliament to amend this legislation in the event of Brexit**. Under the Sewel Convention, the Westminster Parliament does not amend the devolution statutes without the consent of the devolved assemblies. The UCL Constitution Unit has produced a briefing paper with an in-depth analysis of the impact of Brexit on devolution and the union.

Impact on Scotland

Scotland voted decisively to remain in the EU (62% to 38%). Following the vote, First Minister Nicola Sturgeon has repeatedly said that she thinks it would be democratically unacceptable for Scotland to be taken out of the EU 'against its will'. Professor Sionaidh Douglas-Scott notes that the Scottish Parliament could refuse to give their consent, as a protest to Brexit. Although this could cause a constitutional crisis, **the Scottish Parliament is legally unable to prevent Brexit from happening**. This is because Westminster could amend the devolution legislation without Scottish consent.

Although possibly unconstitutional (and undesirable), such an act would not be unlawful. As McCrea highlighted in a UCL seminar (see 'Background', below), 'unconstitutional', in this context, 'is not synonymous with illegal in the UK. It is more synonymous with rude'.

Is Scottish independence a likely consequence of Brexit?

If refusing consent doesn't work, it is possible that Sturgeon could push for a second independence referendum, although she would need authorisation from Westminster to do so. Professor Robert Hazell argues that **the SNP would not want to hold a referendum unless they were confident they could win** (i.e. if it was clear public opinion has shifted since 2014). He highlights a number of reasons why this may not happen in a post-Brexit world. These include: the prospect of adopting the euro, the possibility of border controls between Scotland and England, and low oil prices undermining the economic viability of independence.

Impact on Northern Ireland

Northern Ireland also voted to remain in the EU (56% to 44%). The constitutional implications of Brexit are significant for Northern Ireland's consociational political system, which is characterised by power-sharing and requires cross-community support for anything controversial. Dr King argues that **Brexit could lead to an accentuation of political divisions**.

In addition, Brexit could lead to the imposition of a 'hard' border with the Republic of Ireland due to additional passport control and/or customs control.

Endnotes

- i. A claim has been brought in the courts to try to ensure that Article 50 cannot be triggered without Parliamentary approval
- ii. Specifically, section 2 of the ECA

Background

The UCL Faculty of Laws hosted a public seminar on 13 July 2016, where legal experts discussed the constitutional and legal implications of Brexit. This briefing paper summarises the key issues that arose from the UCL seminar. Much of the material from this paper is taken from the speakers:

- Professor Piet Eeckhout (Professor of EU Law, UCL)
- Dr Tom Hickman (Reader in Public Law, UCL, and barrister at Blackstone Chambers)
- Professor Jeff King (Professor of Law, UCL)
- Dr Virginia Mantouvalou (Reader in Labour Law & Human Rights, UCL)
- Professor George Letsas (Professor of the Philosophy of Law, UCL)
- Dr Ronan McCrea (Senior Lecturer in EU and Constitutional Law, UCL).

The paper also references a number of other experts:

- Professor Kenneth Armstrong (Professor of European Law, University of Cambridge)
- Professor Colm O'Connell (Professor of Constitutional and Human Rights Law, UCL)
- Professor Mark Elliot (Professor of Public Law, University of Cambridge, and Legal Advisor to the House of Lords Constitution Committee)
- Professor Robert Hazell (Professor of Government and the Constitution, UCL Constitution Unit)
- Lord Lisvane (former Clerk of the House of Commons)
- Dr Alan Renwick (Deputy Director of the UCL Constitution Unit)
- Professor Sionaidh Douglas-Scott (Anniversary Chair in Law, Queen Mary)
- Professor Derrick Wyatt (Professor of Law, Oxford University).

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