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How to Withdraw From the EU

The European Union ("**EU**") is an unusual structure from a comparative international law perspective. It is an entity with a legal personality, created by a treaty. As such, joining it or leaving it has some elements in common with joining or leaving any international intergovernmental structure, such as for example NATO. At the same time, membership of the EU has direct legal consequences not only on governmental and state structures, but also directly on individuals. Membership of the EU by a country grants EU citizenship to that country's citizens. A large part of EU law has direct effect in the relationships between companies and even between individuals, as much as any national law, and without the need of any national authority adapting or implementing it. In other words, in the UK as in any other Member State, EU law is not foreign law. It is a part of national law, as much as an Act of Parliament, only with a different origin. For the same reason, the Court of Justice of the EU is no foreign court: it is a part, a special part, of the national judicial system.

For the legal system of a country to integrate so deeply with EU laws and structures, a very important decision needs to be adopted by a Member State at the time of joining the EU. A decision to become a member of the EU club effectively gives away some elements of national sovereignty, while creating a series of rights, benefits and obligations for individuals and public authorities. It also authorises the European Union to democratically approve new laws in the future (adopted with participation - under certain voting rules - of national representatives sitting in the Council of the EU and in the European Parliament).

There is no EU rule governing who in each new Member State has the authority for making such a commitment, either at the time of joining the EU, or when reforms to the EU treaties create new rights and obligations or further restrict national powers. That decision is left to each Member State and has received different answers in different countries. Moreover, as the EU creates such a strong level of legal integration among its members, each new candidate to the club must be accepted by all the others, that is, by a vote of each of their national parliaments, in the form of a ratification of each new accession treaty.

In the case of the United Kingdom, this initial commitment with the EU was effected essentially by Parliament through the European Communities Act 1972 (the "**EC Act**"), after a period of negotiation about the legal and economic details resulting from joining the club. After that, successive modifications to the Treaties (the last one being the Treaty of Lisbon) have been subject to Parliamentary ratification. Since 1972, Parliament has also approved a long series of legislation implementing EU law, in compliance with the obligation to do so imposed by European Directives.

If this is what is needed to join and to accept any new EU structural reform, it is natural to ask the question: how can the decision to join the EU be reversed? Who in the UK has the authority to reverse it and create the opposite result, the withdrawal from the European Union and a legal termination of certain binding decisions and relationships created over more than four decades?

The EU Process

From an EU perspective, for many years there was no clear answer to the question, "how can a Member State leave the EU?" That changed after the approval of the Lisbon treaty. This reform introduced Article 50, which provides:

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. A qualified majority shall be defined in accordance with Article 238(3)(b) of the Treaty on the Functioning of the European Union.*

5. *If a State which has withdrawn from the Union asks to rejoin, its request shall be subject to the procedure referred to in Article 49.*

The procedure under Article 50 has never before been used and is thus untested. Naturally there is some uncertainty as to how it would operate in practice. The procedure has the following elements, described as they would possibly apply to the UK:

* A decision to withdraw by the UK will only be considered valid if taken in accordance with the UK's "own constitutional requirements".

* The UK would be required to notify the European Council of its intention to withdraw from the EU. An agreement would then be negotiated between the UK and the EU, to address all manner of legal, technical and financial consequences of the withdrawal. Such a deal would need to be agreed by both the EU and the UK. On the EU side, this would require an "enhanced qualified majority" among the remaining Member States, who in most if not all cases will need to have their decision ratified by their national parliaments. Enhanced qualified majority voting means that no single Member State could veto the deal, but a minimum level of support would need to be reached. That is, 20 out of 27 Member States would need to agree, representing 65 per cent of the population. The European Parliament would also need to vote on the agreement, requiring a simple majority.

* The approval of the withdrawal agreement is not necessary for the UK leave the EU. Article 50 is clear: the EU Treaties will cease to apply in the United Kingdom two years after the UK's formal notification to leave the EU; or earlier if the withdrawal agreement enters into force before two years have elapsed; or after an extended period if the UK and all EU Member States unanimously agree.

The UK Process

A question remains open, and the EU Treaty has no answer to it: in the United Kingdom, when for the purposes of Article 50 is a decision to withdraw from the EU taken "in accordance with its own constitutional requirements"?

The British Prime Minister stated to the House of Commons that, *"if the British people vote to leave, there is only one way to bring that about, namely to trigger Article 50 of the Treaties and begin the process of exit, and the British people would rightly expect that to start straight away"*[1]. That raises a separate question: does the UK Government have the authority to give notice to the EU pursuant to Article 50 or is, for example, some further debate and/or approval of Parliament required? These are uncharted waters, but it could be argued that the UK's right to give notice pursuant to Article 50 should be regarded as a power for the UK Government to exercise.

Nevertheless, there is also the question of what process, beyond the Article 50 notification, is required to detach the UK from the EU? This would partly depend on the form that any withdrawal agreement takes and/or if the UK exits by default after two years. If for example, there is a withdrawal agreement and that agreement is effected by way of a treaty, it would be normal to expect it to be dealt with under Crown prerogative powers to conduct foreign affairs, which could be exercised by the Government. However, it would be surprising if the terms of such an important agreement would not be debated and/or approved by Parliament (this same point could equally be made in respect of the Article 50 notification).

Regardless of prerogative powers, Part 2 of the Constitutional Reform and Governance Act 2010 gave statutory effect to the 21-sitting day 'Ponsonby Rule' of laying before Parliament treaties before actual ratification. If the Commons resolves against ratification, the treaty can still be ratified if the Government lays a statement explaining why the treaty should nonetheless be ratified and the House of Commons does not resolve against ratification a second time within 21 days (this process can be repeated ad infinitum).

Furthermore, the withdrawal agreement would potentially have to be implemented by an Act, or Acts, of Parliament. The EC Act might need to be repealed (or possibly amended), and other primary legislation implementing EU law would be similarly affected. Any amendment or repeal of the EC Act would have knock-on effects, for example, on secondary legislation whose enabling power is section 2(2) of that Act, which would require new enabling powers if the Government wanted the relevant secondary legislation to remain in force. It is not difficult to envisage a drawn-out process of creating and/or repealing relevant legislation, each piece of which would be subject presumably to normal Parliamentary approval/voting processes.

Moreover, at both the EU and UK levels we are in an unprecedented situation and, should the British people vote to leave the EU, new legal precedent will need to be created to provide for the UK's withdrawal.

[1] Prime Minister's Statement on the European Council, Hansard, 22 February 2016, Column 24. http://www.publications.parliament.uk/pa/cm201516/cmhansrd/cm160222/debtext/160222-0001. htm#16022210000001

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