

KEY POINTS

- When it comes to the withdrawal treaty the UK government will be exercising the Crown's prerogative power to make and ratify treaties.
- The UK leaving the EU distorts the voting at EU Council meetings in favour of the three largest states.
- If an agreement is needed to deal with the "future relationship" of the UK with the EU, the agreement could be treated as a mixed agreement requiring signing not only by the EU but also by each individual member state.

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Brexit means Article 50 or does it?

In this article, Richard Nowinski considers three issues relating to Article 50: the giving of notice of intention to withdraw; the EU's internal voting procedure; and the period of negotiation.

BACKGROUND

Tucked away in the Final Provisions to the Treaty of European Union (TEU) is Article 50, an article that would have received scant attention but now suddenly is on the lips of politicians, in the pages of the popular press and subject to intense academic debate. The calls from politicians both in Britain and continental Europe to immediately serve notice under Article 50 have not been followed, fortunately common sense prevailed but we are now left in a "phony war" with irreconcilable demands for settlement.¹

Will Britain serve notice to leave? The continental press have speculated that Britain will not leave. Unfortunately this is unlikely to happen. We have the prime minister's oft repeated tautology, "Brexit means Brexit" added to the foreign secretary's cricketing analogy involving an umpire, that examination of Article 50 TEU is obligatory.

ARTICLE 50

The article is short, just 262 words and first came to light in the draft European Constitution.² The original European communities treaties had no provision addressing withdrawal by a member state. However this was not an impediment to leaving. Greenland had become a member of the European Communities in 1973 when part of Denmark (Denmark had joined at the same time as the UK). Following the devolution of Greenland there was a referendum held in 1982 which voted to leave the European Communities.³ Their concern was to have exclusive fishing rights to their waters, this was a major part of Greenland's economy. Negotiations took

two years resulting in a treaty of seven articles with Greenland ceasing to be party to the European Coal and Steel and Atomic Energy Communities and to have a special arrangement with the European Economic Community. The "special arrangement"

enabled Greenland to keep their fishing rights and tariff free access to the EU and importantly it continued to make its financial contribution to the EU.⁴

The European Convention led to the drawing up of a draft constitution which was never executed. This draft was followed by the Treaty of Lisbon and it was by this treaty that the provision (modified slightly from the European Convention draft) on withdrawal appears in the consolidated version of the TEU.

There are three issues that I will focus on: the first is the giving of notice of intention to withdraw; the second on the European Union's internal voting procedure; and third on the period of negotiation.

Paragraph 1 of Article 50 states that:

'Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements'

Paragraph 2 provides that:

'A Member State which decides to withdraw shall notify the European Council of its intention. In the light of 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 into account the framework for its future relationship with the Union.'

In the second paragraph there is provision that the negotiations are to be in accordance with Art 218(3) of the Treaty on the Functioning of the European Union

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(TFEU). This requires the European Commission to make recommendations to the European Council and the European Council will nominate the head of the negotiating team. The paragraph continues that the European Council shall conclude the agreement acting by a qualified majority.

Paragraph 4 of Article 50 excludes the withdrawing member states from participation in discussions within the European Council.

NOTICE TO WITHDRAW

No notice to withdraw has been given by Britain to the European Council and the UK cannot be forced to give such notice, it is a matter solely for the UK government to decide.⁵ The entry into and the denunciation⁶ of treaties is the exercise by the government of the Crown's prerogative powers in relation to foreign affairs. "The making and ratification of treaties and other international agreements is a power of the Crown within that prerogative"⁷ unless exceptionally statute provides that these powers are to be exercised with the approval of Parliament.⁸ There is a practice that important treaties are, after signature but before ratification, laid before Parliament so

Feature

that Parliament can discuss the treaty but Parliament does not ratify. It is also the case, that in general, a treaty that the UK enters into does not become part of the municipal law. For this to happen an Act of Parliament is required. EU treaties are subject to the same rule. The European Communities Act 1972 (1972 Act) implemented the treaties, as they were in 1972, by s 2(1) of the 1972 Act:

'All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties...are without further enactment to be given legal effect or used in the United Kingdom...'

David Pannick acting for Lord Rees-Mogg in the Rees-Mogg Case had sought judicial review of the then Foreign

prerogative power is used to withdraw or denounce a treaty.¹⁰ It also follows, and this is more important, that when it comes to the withdrawal treaty the government will be exercising the Crown's prerogative power.

QUALIFIED MAJORITY

The withdrawal treaty is to be with the European Union and concluded by the European Council on the basis of a qualified majority. The UK will be excluded from Council meetings relating to the withdrawal and in voting. A qualified majority requires at least 55% of member states. This means at least 15 member states representing at least 65% of the total EU population (less the UK). A blocking minority would need to represent more than 35% of the EU population. This voting

the EU and individual member states.¹² Mixed agreements have become common in external relations. The drafting of para 2 of Article 50 is not clear in this regard. It states that the leaving state shall negotiate an agreement 'setting out the arrangements for its withdrawal, taking account of the *framework* for its future relationship with the Union' (emphasis added). This suggests, possibly, another agreement which deals comprehensively with the "future relationship", all fertile ground for arguments on the EU's competence¹³ and whether joint action by the EU and individual member states is required.

The EU-Canada Comprehensive Economic and Trade Agreement (CETA) is an example. The position of the European Commission had been that CETA could be signed by the Union but certain member states objected, principally France and Germany, that CETA was a mixed agreement and would have to be signed by the Union and each member state.¹⁴ Romania has already said that it will not sign while Romanians are discriminated by the Canadians in being required to have visas issued before travelling to Canada.

TWO YEARS

Paragraph 3 of Article 50 provides that the Treaties cease to apply when the withdrawal agreement enters into force or failing that two years after notice of intention to withdraw. The treaties ceasing to apply in the absence of an agreement would be chaotic to say the least and more likely to be disastrous to the UK economy than the EU's economy although I would expect both sides to act to mitigate the effects. Not least there will be extensions to the negotiation period (I do not consider the requirement for unanimity to be an obstacle but it will give opportunities for brinkmanship in the negotiations). The two year negotiating deadline will certainly concentrate the minds of all those involved and work against leaving the difficult decisions to later. My preference would be to have it all agreed within that time frame but as the UK is starting from an irreconcilable position¹⁵ I am not confident. ■

As though there were not enough uncertainties, there are such things as mixed agreements to consider.

Secretary's decision to ratify the Maastricht Treaty and one of the arguments that he advanced was that, the argument concerned a Protocol to the Maastricht Treaty, as the Protocol had effect not only on the international plane but because of s 2(1) of the 1972 Act, on the domestic plane by enacting s 2(1) of the 1972 Act to amend or add to the EEC Treaty (as it then was). The court dismissed this argument. Lloyd LJ giving the single judgment of the Court of Appeal said:

'We find ourselves unable to accept this far-reaching argument. When Parliament wishes to fetter the Crown's treaty-making power in relation to Community law, it does so in express terms...There is in any event insufficient ground to hold [that] Parliament has by implication curtailed or fettered the Crown's prerogative to alter or add to the EEC Treaty'⁹

There is no reason in law or logic for this not to be the case where the Crown's

formula favours the large member states; France, Germany and Italy represent 47% of the EU population; while Poland, Spain, Romania and the Czech Republic would represent 27% if they were against the three largest states such that a blocking vote would be difficult. UK leaving distorts the voting in favour of the three largest states.¹¹

Although notice of the intention to withdraw has not been given, the consequences (not just market and economic) are already being felt. The government has confirmed that it will not be taking over the presidency of the European Council next year. Even though notice of withdrawal has not been given the UK was excluded from a European Council meeting. This is the presage of the UK's declining influence in the shaping of European law.

As though there were not enough uncertainties, there are such things as mixed agreements to consider. Mixed agreements are where parts of the agreement do not come within the EU's competence and therefore the conclusion of the agreement requires joint action by

Biog box

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- 1 Both the Prime Minister and the Foreign Secretary have said that the UK wants to retain access to the Single Market but to control immigration while both Germany and France have said there is no access to the single market unless there is also free movement of people.
- 2 The British diplomat, Lord Kerr, was involved in the introduction of the article '... it is better to have a framework for leaving than none' from Alex Barker's article in the Financial Times (www.ft.com/brexit).
- 3 The total population of Greenland at the time was some 50,000.
- 4 Greenland became "associated" with what was then the EEC; this applied to non-European countries which had a special relation with the member states (generally colonial possessions), the purpose of the association being to promote economic relations with the EEC (*EU Law after Lisbon: Biondi, Eeckhout and Ripley OUP 2012*).
- 5 The outcome of the Brexit referendum is in any event no more than advisory.
- 6 A term used, in this sense, to describe the withdrawal from a treaty.
- 7 Sydney Kentridge acting for the Crown in *Reg v Foreign Secretary, Ex p Rees-Mogg* [1994] Q.B. 552 at 557 (*Rees-Mogg Case*).
- 8 The European Parliamentary Elections Act 1978 imposed an express statutory prohibition against the ratification of any treaty that provided for any increase in the powers of the European Parliament unless approved by Act of Parliament.
- 9 Page 567 *Rees-Mogg Case*.
- 10 There has been substantial debate on this issue – see UK Constitutional Law Association Blogs and Mark Elliott's website Public Law for Everyone.
- 11 If interested in the voting there is a voting calculator that can be downloaded as an App <http://www.consilium.europa.eu/en/council-eu/voting-system/voting-calculator/>
- 12 EU External Relations Law: Eeckhout, OUP 2011 p 212.
- 13 In The European Convention's Secretariat comments on Art 46 (the precursor of Article 50) CONV 648/03 2 April 2003, it was observed that as regards an agreement between the Union and the withdrawing state on the arrangements for withdrawal and on the future relationship, such an agreement should not be a condition of the withdrawal; also the legal consequences of a withdrawal without agreement should be examined.
- 14 The UK government does not appear to have a position on this issue and as to whether it will sign and ratify CETA while still a member state.
- 15 It will turn on what "restriction on immigration" turns out to mean.

Further Reading:

- Brexit: divining the impact on financial services agreements [2016] 6 JIBFL 362B.
- The City of London and Brexit: threat or opportunity? [2016] 6 JIBFL 323.
- LexisNexis Loan Ranger blog: What does the referendum result mean for borrowers and lenders?