

COUNTDOWN TO THE REFERENDUM:

A series of articles by Matrix that will explore a number of legal topics surrounding the UK referendum on 23 June 2016.

4: The Post-23 June Process



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Synopsis

- *This article looks at the immediate aftermath of a decision in the referendum on 23 June that the UK should leave the EU. Considers some of the immediate steps necessary in the period after a vote to leave.*
- *Examines article 50 of the Treaty on European Union (on withdrawal from the EU), its procedural mechanisms and its limitations; considers also possible alternatives to art 50.*
- *Highlights areas where uncertainty will have a particular, practical impact.*

Article 50 of the Treaty on European Union (TEU)

Art 50 TEU provides an exit mechanism for a State wishing to leave the EU. Notice under art 50 marks the start of a period for negotiation between the departing State and those that will remain about their future relationship.

The negotiations are to be conducted in accordance with art 218(3) of the [Treaty on the Functioning of the European Union](#) (TFEU), which deals with negotiations between the EU and third countries (art 50(2)).

Absent agreement on an exit package or an extension of time, the departing State's membership of the EU ends automatically two years after notice was first given (art 50(3)).

Any agreement to extend the negotiating period beyond two years requires the unanimous agreement of the Council of Ministers (excluding the UK) (art 50(3)).

Any exit agreement must be approved by a qualified majority vote in the Council of Ministers and by a simple majority of those voting in the European Parliament (art 50(2)). The rules for determining a qualified majority are those in art 238 (3)(b) TFEU (art 50(4)).

Although not provided for in art 50, any agreement which requires treaty changes for those Member States that remain may be subject to any national ratification procedures including, in some instances, possible referendums.

The art 50 process is limited to the future relationship between the departing State and the EU. Any agreements between the departing State and non-EU third countries or organisations will be subject to separate negotiations.

Some immediate steps

Art 50 is only engaged – and the two years start to run - once the departing State gives formal notice. The first issue for the UK Government following a vote to leave on 23 June will be when to give such notice.

The importance of beginning to give effect to the decision of the electorate might suggest that such notice should be given as soon as possible after 23 June. But over the summer Brussels, in effect, closes down and the Conservative Party may be choosing a new leader so three months might be wasted.

Whenever the two years starts to run, the UK Government will need rapidly to formulate and, presumably, make public its negotiating position;¹ so too the EU. These will need to deal with both long term and transitional arrangements.²

¹ Unlike a UK General Election, there are no manifestos setting out detailed prospectuses.

² An early decision will also need to be taken on whether the UK should hold the Presidency of the Council of Ministers in the second half of 2017. Whilst still theoretically possible, realpolitik makes

The UK will also need to articulate its negotiating positions with third countries and organisations outside the EU.

Given the potential cliff edge of the art 50 deadline, the UK will need to deal with the EU and the rest of the world on the parallel assumptions that an agreement with the EU is concluded under art 50 and also that it is not or risk a forced exit and nothing in its place.

The various negotiating positions will need to be fluid enough to deal with the fact that neither the EU's internal business nor its external relations will stand still during the negotiations. Nimbleness will also be needed to deal with political change in Member States.³

At home, the Government will need to formulate – again in parallel – domestic legislation to give effect to any emerging, negotiated long term and transitional agreement and also to an exit precipitated by reaching end of time limit under art 50.

Although the UK Government will be the negotiating party, it will need to have regard to the views of the devolved administrations in the UK during the negotiations. Areas of competency repatriated to the UK from the EU will need to be subject to fresh devolution consideration to determine their place in the various devolution settlements.

Alternatives to art 50 TEU

Disregarding international legal obligations, the constitutionally supreme UK Parliament could decide unilaterally to abrogate our EU treaty obligations. Any such legislation would need to make provision to fill the many legal lacunae which would otherwise immediately exist. To a large extent these provisions would be similar to those needed for an exit precipitated by reaching the end of the art 50 time limit.

It has been suggested during the campaign that, rather than a complete abrogation, there might be a partial abrogation, for example immediately to restrict immigration from elsewhere in the EU.⁴ Again a constitutionally supreme UK Parliament might be able to do this. But, absent complete abrogation, the legislation would need to dovetail into those EU obligations from which we were not immediately resiling.

One or more partial abrogations would, inevitably, complicate any continuing art 50 negotiations.

this unlikely; so too the capacity of the UK civil service to run a Presidency and the exit negotiations at the same time.

³ Both France and Germany have elections in 2017. The Spanish general election three days after the UK referendum may complicate still further the position of Gibraltar in any Brexit negotiations.

⁴ It is possible to envisage other crises during the negotiating period which might trigger more partial abrogation – for example an industrial collapse attributed to EU State Aid policy or an animal health crisis.

The impact of uncertainty

Whilst the UK and the EU work through the post-23 June processes, there will be unusual levels of uncertainty and unpredictability about the future legal landscape.

The impact of EU laws, however, varies considerably from sector to sector. The impact of uncertainty and unpredictability will reflect this. For example in defence and education, uncertainty will be limited. But for those advising in the fields of immigration, asylum, discrimination, employment, agriculture, public procurement, competition and regulatory law, the impact of the uncertainty and unpredictability may be profound and long term. The restoration of domestic competency may also, of course, result in equally profound and long term changes to the law itself.

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Further information

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