

30 March 2017

## UK starts European Union withdrawal process

The UK prime minister gave notice to the European Council yesterday of the UK's intention to withdraw from the European Union (EU). The letter of notice expressed the UK's intention to negotiate the terms of the UK's future partnership at the same time as negotiating the terms of its withdrawal from the EU and to develop a "deep and special partnership" with the EU. It was also acknowledged that leaving the EU without an agreement would require the UK to trade with the EU on World Trade Organisation terms. The letter also set out some high-level principles for the forthcoming negotiation, the "indivisible" nature of the four freedoms of the single market, a desire to reach an early agreement about citizens' rights and the need for transitional arrangements.

### Initial process under Article 50

Article 50 of the Treaty on European Union provides a method for a state to depart from the EU:

*"In light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with [the UK], setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union."*<sup>1</sup>

Article 50 allows the UK to leave the EU unilaterally, without the EU's approval. It also compels the European Commission to negotiate the terms of withdrawal – but provides for automatic departure for the UK following two years from the date of notification, regardless of whether the terms of withdrawal are agreed. This is generally regarded as leaving the UK with less bargaining power in the negotiation, as the impact of having no trade terms in place is arguably greater upon the UK than the remaining EU states.

The European Council is responsible for drafting the guidelines for the negotiation, although it is up to the European Commission to conduct the negotiation. As a minimum, the guidelines will set out the EU's requirements for the treatment of the 3 million EU citizens currently in the UK, the basis for negotiating the UK's liabilities to the EU or "exit bill" (covering areas as diverse as future pension liabilities of EU officials and the current value of the UK's contribution to the EU's assets) and the UK's trade status after exit (reportedly, the draft guidelines underpin the continuing importance of EU membership for free trade).

Whilst the negotiations are specifically about the UK's exit, Article 50 requires them at least to take account of the future relationship between the UK and the EU. Whether the European Commission will agree, as requested by the UK, to the terms of the UK's future partnership alongside the terms of the UK's withdrawal is open and dependent on politics as much as the terms of Article 50. Angela Merkel, the German Chancellor, indicated yesterday that the negotiations must first "disentangle our interlinked relationship" before beginning talks on future ties. In practice, few commentators consider it feasible to agree to new trade terms covering a vast range of products and services in the two-year negotiating period.

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<sup>1</sup> Article 50(2).



Formal guidelines will need to be endorsed by a summit of the remaining 27 EU countries, due to take place on 29 April 2017. Once the guidelines are formalised, the European Commission will develop a more detailed mandate for the negotiations. Face-to-face talks cannot take place until this happens, meaning that talks are likely to start in late May or early June 2017.

### **Conclusion of the withdrawal agreement**

*“[The withdrawal agreement] shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.”<sup>2</sup>*

The Council of the EU will agree on the withdrawal agreement by a qualified majority (72% of participating states, excluding the UK) after obtaining the consent (by majority vote) of the European Parliament.

If the withdrawal agreement involves policy areas within the preserve of Member States (as has been the case with recent EU free trade agreements with countries outside the EU), it will require additional ratification by every national parliament in the EU (and, depending on local constitutional arrangements, regional parliaments). This will be a time-consuming and contentious process.

### **Two-year cliff edge and transitional arrangements**

Further, under Article 50:

*“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 [...], unless the European Council, in agreement with [the UK], unanimously decides to extend this period.”<sup>3</sup>*

Article 50 provides for a two-year negotiation period and for the EU Treaties automatically to cease to apply in March 2019, unless there is unanimous agreement to extend the negotiating period.

In practice, on the assumption that it is unlikely that new trade terms can be agreed in the two-year period, the withdrawal agreement will cover the exit arrangements and put in place transitional provisions until new trade terms are agreed. Transitional measures will be crucial to ensure businesses can continue to trade with the EU and the UK has indicated that it wants to agree transitional measures within one year prior to the end of the negotiating period - by March 2018. Transitional measures could last years.

Looking further ahead, Michel Barnier, for the European Commission, has said that he wants talks to be concluded by October 2018 to allow both sides time to ratify the deal.

During the negotiations the UK will continue to participate in EU activities, the EU institutions and decision-making, other than discussions and decisions concerning its withdrawal.

It is unclear whether the Article 50 notice is revocable. It seems unlikely that the remaining EU states would allow the UK to use revocation of Article 50 as a negotiating tool, meaning that revocation may only be possible with agreement of all the remaining EU states. It is also worth noting that Article 50 states that negotiations cannot be used to renegotiate the conditions of future membership, should the UK seek that path.

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<sup>2</sup> Article 50(2).

<sup>3</sup> Article 50(3).



## **Position of UK financial services industry**

For the UK's financial services industry, continued access to EU customers and markets is crucial and heavily reliant on continuation of EU passporting rights. Michel Barnier has already acknowledged the impact on financial stability and the need for specific terms to ensure reciprocal access. The Article 50 letter states that, in financial services, regulatory frameworks and standards already match and refers, in the context of a new free trade agreement, to the management of the evolution of UK and EU regulatory frameworks to maintain a fair and open trading environment. In practice, a future agreement is likely to be focussed on managing future divergence between UK and EU financial services regulation as a condition to reciprocal access. A bespoke agreement on financial services would go further than reliance on third country "equivalence" decisions (contemplated in some areas of EU financial services and which rely primarily on convergence of rules at the time equivalence is granted) – in an ideal world, it would allow the City to diverge from EU standards to a reasonable degree whilst retaining access to EU customers and markets. At the same time, UK and EU firms should prepare for the not insignificant risk of passporting rights ceasing to be in place with no transitional arrangements in 2018. The UK regulators might publish in due course their expectations for firms' planning in this regard.

## **Changes to UK legislation**

Domestically, the government published today a "white paper" (draft legislation) setting out details of the "Great Repeal Bill". The Bill will seek to repeal the 1972 European Communities Act (although that may not strictly be required) and to give UK ministers sweeping powers to translate EU laws and rules into the UK context. This is intended to work by, firstly, converting all EU directly effective law (encompassing thousands of EU regulations) into UK law and preserving UK law implementing EU law (encompassing thousands of UK laws) as it stands immediately before the UK's departure, allowing Parliament (or bodies empowered by Parliament) to decide later what to keep, amend or repeal and, secondly, enabling changes to be made to the preserved EU law that would otherwise "not function sensibly" after the UK's withdrawal from the EU.

The project raises numerous questions. There will be much work in deciding which EU law should be retained and how to amend EU law to make it workable purely in the UK context. As an example, whilst much of the Treaty of the Functioning of the European Union is irrelevant in a purely UK context, it includes statements as to individual's fundamental rights (such as equal pay for male and female workers), which might or might not be enshrined in a UK context. The white paper indicates that protections provided by EU treaties as a "backstop" will be preserved. As another example, how should references to EU bodies (such as the Commission) or arrangements with other member states (such as reciprocal access to each other's markets) be translated in a UK context? In practice, there will be insufficient time for Parliament to make these decisions by primary legislation and the white paper - recognising the need to find "the right balance between scrutiny and the need for speed" - gives circumstances in which the government (as opposed to Parliament) can pass the necessary secondary legislation, such as where as no policy decision is involved in the change in law. Defining the ability of the government to exercise these powers is likely to involve heated Parliamentary debate. There is also the challenge of properly reflecting the withdrawal agreement in the amended legislation in good time prior to the exit date.

In terms of jurisdiction, the government has indicated that past decisions of the Court of Justice of the European Union (CJEU) will continue to be binding, but has stated that, post withdrawal, the government will bring an end to the jurisdiction of the CJEU in the UK. The white paper also sets out a proposed approach to conflicts between EU-derived and "preserved" law and legislation passed after exit from the



EU, where newer legislation will take precedence over EU-derived law. Differences of interpretation and conflicts between prior EU law and newer UK legislation will raise complex issues in the future.

After Brexit, Parliament will be free to consider the vast corpus of preserved EU law. This will take many years. Whether preserved EU law (and related implementing UK law) will be frozen, particularly in fast-changing areas such as financial services, is unclear. The ability of bodies other than Parliament to update law in line with, for instance, EU regulation and international developments will need to be carefully defined.

Following the Great Repeal Bill, the government will introduce further bills to reflect the UK's changed status and new domestic powers, including a new customs bill and immigration bill.

For more detailed analysis of the issues, please contact your usual Ropes & Gray partner. For additional Brexit resources, please refer to the Ropes & Gray [Brexit](#) webpage.

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WHAT HAPPENS NEXT?



2017

**29 March 2017**

PM notifies European Council of UK's decision to leave EU under Article 50(2) of the Treaty of European Union (TEU)

**23 April and 7 May 2017**

French Presidential election

**29 April 2017**

Special European Council of EU27 leaders, without UK and chaired by Donald Tusk, will meet to agree and adopt guidelines for the Brexit negotiations

**Mid-May 2017**

EU General Affairs Council meeting of EU27 leaders, without UK, will meet to agree legal negotiating directives (the "mandate") for the Commission and authorise the opening of the negotiations

**May/June 2017**

The UK government is expected to introduce legislation to leave the EU and convert all existing EU laws into British law - the Great Repeal Bill

**24 September 2017**

German Federal Election

2018

**October 2018**

Barnier's target to finalise the Withdrawal Treaty

**Between October 2018 and March 2019**

The Houses of Parliament, European Council and European Parliament vote on any deal

2019

**March 2019**

Agreement ratified. If no agreement is reached, the UK's withdrawal from the EU would become effective without agreement. There is an option to agree to extend negotiations under Article 50(3) of TEU

**Autumn 2018 – Spring 2019 or 2021 and beyond**

The Scottish Parliament has backed the First Minister's call for a second independence referendum between Autumn 2018 and Spring 2019. The First Minister will ask for a Section 30 Order to be granted by the UK government which would give the Scottish government the power to call a new vote. So far, the UK government has not granted consent or scheduled a date and the PM says there will not be a vote before at least 2021

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