

THE CURRENT STATE OF UK WITHDRAWAL FROM THE EU (BREXIT)

A Comprehensive Legal Analysis

Philip Allott

1. The unfolding drama is now moving into its fifth Act, when law moves to the front of the stage. If politics is the art of the possible, then it is the job of law to tell politics what is legally possible. There are some knowns, and many known unknowns, in the current situation. The exceptional legal complexity of the situation is due to the fact that it involves the interacting of three distinct legal orders – international law, EU law, and national law. The following is a first attempt to solve the Rubik’s Cube of intersecting legal certainties and uncertainties in the current deeply confused situation. It is meant to be readable by a rather patient general (non-lawyer) reader.

2. There are five different forms of action available under Article 50 of the Treaty on European Union.

- Withdrawal complete within two years.
- Implementation of a withdrawal agreement.
- Withdrawal by default of agreement after two years.
- Extended negotiation period.
- Withdrawal of a notification of intention to withdraw.

3. **Withdrawal complete within two years.**

(1) A withdrawal agreement is *negotiated* by the British Government on behalf of the UK, and by the European Commission on behalf of the EU.

(2) The agreement is *concluded* by the European Council by a qualified majority vote (i.e., not necessarily unanimously), after obtaining the consent of the European Parliament.

(3) The general assumption seems to be that it will not be a ‘mixed’ agreement. A mixed agreement covers matters exclusively within the jurisdiction of the EU and also matters that remain within the jurisdiction of the member states. A mixed agreement requires *ratification* by the member states.

(4) Given the complexity, and often obscurity, of EU law and the degree to which EU law is implemented through national law, it is not easy to see how a withdrawal agreement could manage to avoid all matters in the national jurisdiction category.

(5) There would be a period between the conclusion of the agreement and its entry into force, on or before 29 March 2019. On the agreement’s entry into force, the UK would cease to be a member state of the EU.

4. **Implementation of a withdrawal agreement.**

(1) Article 50 TEU deals with the *conclusion* of a withdrawal agreement, but not its *implementation* in the EU itself and in the other member states. If the withdrawal agreement is not a mixed agreement and the member states are not contracting parties, a difficult question arises about the participation of the member states in the conclusion and implementation of a withdrawal agreement.

(2) *Accession agreements* admitting a new member to the EU are mixed and multilateral, including amendments to the EU treaties and subject to ratification by all member states. The profound transformation of bilateral relations between the existing member states

and the new member state must surely be mirrored in the *reverse transformation* caused by the *withdrawal* of a member state.

(3) Does a withdrawal agreement simply take *direct effect* in all the member states? Direct effect is a foundational principle of EU law. EU legal acts normally take automatic effect in the national legal systems without intervention by the national legislator (except in the case of ‘directives’). Parliaments would surely expect to have a say in the conclusion and implementation of a withdrawal agreement that affects their country so profoundly.

(4) In normal international practice, the period between conclusion of a treaty and its entry into force is devoted to two things: seeking the *approval* of national parliaments to *ratification* of the treaty, and adopting the internal law necessary to allow the treaty to take effect internally. Both things (the national action and the act of accepting the treaty internationally) are usually called ‘ratification’ in two different senses of the word.

(5) The UK is a very rare case of a state that, as a matter of constitutional law, does not require parliamentary ratification of a treaty. Under a constitutional convention, treaties are almost always *laid before* Parliament prior to ratification. Legislation is passed if it is necessary to give legal effect within the UK to a treaty before it can be ratified internationally.

(6) The other member states do require parliamentary approval for the ratification of a treaty. In default of the usual internal ratification process, will they seek parliamentary approval before they take part in the European Council *vote* concluding the withdrawal agreement – or, even, before their Members of the European Parliament (MEPs) vote to *consent* to the agreement?

(7) Even if the withdrawal agreement has some sort of mega-direct-effect, there may still be need for internal legislating, and subordinate legislating, in the EU itself and in the member states (including federated ‘states’ and devolved governments for matters within their jurisdiction) on national internal effects.

(8) Could the withdrawal agreement be prevented from entering into force if one or more member states failed to adopt the legislation required to allow it to be implemented internally in their country? A deal-but-no-deal Brexit?

(9) In the case of UK withdrawal, there would presumably be a *transitional period* after the entry into force of a withdrawal agreement, when the UK’s relationship with the EU and its member states would be finally implemented in great detail, by EU legislation applying to the EU institutions and in the remaining member states and by corresponding legislation in the UK.

(10) The EU (currently including the UK) has trade agreements with most countries and customs unions and free trade areas across the world. Alongside its member states, the EU (currently including the UK) is a member of the World Trade Organisation and a party to the UN Law of the Sea Convention. The UK itself, and countless UK non-state actors, have legal agreements all over the world, of which a fundamental term, express or implied, is UK membership of the EU (including investment protection treaties). A challenging task of legal unscrambling (not a legal term).

(Note. Ireland held constitutional referendums to ratify amendments to the EU treaties in the Single European Act (1987), the Maastricht Treaty (1992), the Amsterdam Treaty (1998), the Nice Treaty (2001 and 2002), the Lisbon Treaty (2008 and 2009), and held a referendum on the Good Friday Agreement (1998). The position on referendums in other member states is not known to the present author.)

(Note. The Canada-EU Trade Agreement is a mixed agreement. It consists of 1634 pages. Negotiations began in 2008 and, after nine rounds of negotiation, ended in 2014. The Agreement was concluded in 2016. It is not in force. Parts of it are being provisionally applied.

A question of the legality of one part of the Agreement has been submitted to the European Court of Justice. Aspects of the Agreement were submitted to the German Federal Constitutional Court in 2016. The Court upheld the legality of German ratification.)

5. Withdrawal by default of agreement after two years.

(1) In accordance with Article 50(3) of the Treaty on European Union, the EU Treaties would cease to apply to the UK, and the UK would cease to be a member state, if an agreement has not *entered into force* two years after the notification of the UK's intention to withdraw from the EU, that is to say, by 29 March 2019.

(2) The legal consequences of that situation are too complicated and extensive to foresee with any degree of clarity or certainty.

(3) The sudden withdrawal of the UK as a member state would presumably take legal effect by some sort of mega-direct-effect (see 4(7) above), followed by a vast amount of internal legislating, and subordinate legislating, in the EU itself and in the member states (including federated 'states' and devolved governments for matters within their jurisdiction).

(4) The UK would not take part in the EU legislating which, however, would have enormous effects on the UK. The UK, and its corporations and citizens, would be subject to all post-withdrawal EU law, if they wish to conduct any activity whatsoever, in trade or otherwise, in the EU.

(Note. On one reckoning, the UK is the world's sixth largest economy. On one reckoning, UK exports to the EU are 44% of its overseas trade and imports are 53%.

It might be argued in proceedings before the ECJ or the ICJ that the default provision in Article 50(3) cannot be interpreted to apply to a member state such as the UK, since such an interpretation would be 'manifestly absurd or unreasonable' according to the general principles of treaty interpretation set out in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (1964), given the immense scale of the consequences, internal and worldwide.)

6. Extended negotiation period.

(1) The European Council, in agreement with the UK, may unanimously decide to extend the period of negotiation beyond the two-year limit.

(2) The extending of the period could presumably be done informally, by an exchange of letters, or even by simply scheduling a further meeting after the date of 29 March 2019. It might be for another fixed period, or open-ended.

(3) It would be a matter to be decided how to involve the member states prior to a unanimous decision by the Council to extend the period of negotiation.

(4) If an agreement were to be negotiated and concluded in an extended period, the matters discussed above would apply.

7. Withdrawal of the notification of intention to withdraw.

(1) It is a member state that 'decides' to withdraw from the EU in accordance with its own constitutional requirements, notifying the European Council of its intention.

(2) Section 1(1) of the European Union (Notification of Withdrawal) Act 2017 conferred on the Prime Minister a power 'to notify the United Kingdom's intention to withdraw from the EU'.

(3) The Prime Minister so notified the President of the European Council in a letter dated 29 March 2017.

(4) It must surely be possible for a member state to notify the President of the European Council that it no longer has the intention to withdraw from the EU. This is not explicitly provided for in Article 50. However, it must be an implied term of that provision.

(5) Countless treaties contain a unilateral power of withdrawal by a contracting party. The state in question notifies its withdrawal to the depositary of the treaty, and the withdrawal takes automatic effect after a given period of time, in accordance with the terms of the treaty provision.

(6) Withdrawal from the EU is not unilateral. It is multilateral, requiring the agreement of the EU itself and all the other member states. Withdrawal by default under Article 50(3) TEU is the consequence of a failure to reach agreement.

(7) If the member state in question cannot reach a satisfactory agreement with the other parties, or if there is no prospect of such an agreement being reached, it must be possible for that member state to decide not to pursue its withdrawal.

(8) To interpret Article 50 TEU otherwise would lead to a ‘manifestly absurd or unreasonable’ result. (See Note to Section 5 above). It would mean that a member state having *the intention to continue as a member state* would be *obliged to cease to be a member state* by the mere fact of having sent a letter to the European Council (notifying *an intention to withdraw*, but not actually *notifying withdrawal*, as in the case of other treaties), causing profound and far-reaching consequences unwished-for by the EU and by other member states.

(9) The question of the legality of a unilateral withdrawal of an Article 50 notification of an intention to withdraw from the EU is the subject of a request to the European Court of Justice for a preliminary ruling (the *Wightman* case).

8 October 2018

Philip Allott is Professor Emeritus of International Public Law at Cambridge University and a Fellow of Trinity College Cambridge.

<http://trin-hosts.trin.cam.ac.uk/fellows/philipallott/>