

Brexit means Brexit: but what might Brexit mean?

The EU Treaties and practical legal options for re-engagement by the UK

Alan Dashwood

I. Article 50 TEU

There are important questions to which Article 50 does not provide a clear legal answer, so the answer has to be a pragmatic political one:

- When must/should the Article 50 process be triggered by formally giving notice to the European Council of the UK's decision to withdraw from the EU?
- Is it legally possible to revoke notice of a decision to withdraw, once given?
- Should there be one agreement or two?

Article 50 refers to the negotiation and conclusion of an agreement with the State that has decided to withdraw, "*setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union*".

- Who should lead the negotiations on the EU side?

Article 50 says that the agreement shall be negotiated in accordance with Article 218 (3) TFEU, which provides: "*The Commission, or the High Representative...where the agreement envisaged relates exclusively or principally to the [CFSP], shall submit recommendations to the Council, which shall adopt a decision authorising the opening of negotiations and, depending on the subject of the agreement envisaged, nominating the union negotiator **or the head of the Union's negotiating team***".

2. A maximalist proposal ("Soft Brexit" or "Brexit lite")

The primary goal should be for the UK to remain within the internal market. That is especially important for services, which are vulnerable to protectionist measures masquerading as prudential regulation. The make-or-break factor will be the degree of flexibility, on both sides, on the issue of the free movement of persons.

In broad terms, the solution should consist of full participation in the internal market, subject to some curbs on freedom of movement, and with add-ons in the form of some level of continuing participation in certain other EU policy areas.

(a) Internal market package

- Application, in principle, of rights of free movement and equal treatment.
In particular, the rights of the following would be preserved:
 - (i) Persons who had already exercised rights of free movement under the Treaties before a specified date.

- (ii) Workers accepting “offers of employment actually made” (Article 45 (3) (a) TFEU).
 - (iii) Persons exercising the right of establishment or freedom to provide services.
 - (iv) Persons who are self-sufficient (including retirees).
 - (v) Students (including rights of access under the *Gravier* principle).
- Emergency brake on job seekers.

Article 112 of the EEA Agreement provides:

“1. If serious economic, societal or environmental difficulties of a sectorial or regional nature liable to persist are arising, a Contracting Party may unilaterally take appropriate measures under the conditions and procedures laid down in Article 113.

2. Such safeguard measures shall be restricted with regard to their scope and duration to what is strictly necessary in order to remedy the situation. Priority shall be given to such measures as shall least disturb the functioning of this Agreement.

3. The safeguard measures shall apply with regard to all Contracting Parties”.

The procedure of Article 113 requires notification to be given to the EEA Joint Committee and a month’s delay before the safeguard measures are implemented (other than in exceptional circumstances requiring immediate action), in order to provide an opportunity for consultations within the Committee.

A possible solution would consist of establishing a similar mechanism, with an acknowledgement in the Withdrawal Agreement that conditions exist for recourse to the mechanism for a period of (say) 7 years.

- Budget contribution

A substantial contribution to the EU Budget would be unavoidable.

This solution would significantly reduce the disruptive consequences of Brexit for businesses.

However, the UK would still have to establish its own external tariff and its own commercial policy towards third countries. It would be outside the CAP and the Common Fisheries Policy.

(b) Add-ons

- Full continuing participation in research programmes.
- Full continuing participation in the Erasmus scheme for students.
- Continuing participation by the UK in the area of freedom security and justice (Title V of Part Three of the TFEU) under arrangements that would broadly reproduce the existing legal position, including the possibility of opting into future measures.
- Some degree of continuing participation in the common foreign and security policy.

These add-ons would provide a “sweetener” for the other Member States, while also serving the interests of the UK. They would entail further budget contributions.

(c) Institutional framework

The choice is between:

- Joining the EEA.
This would bring UK within the EEA’s institutional framework, comprising: the EEA Council; the EEA Joint Committee; the EFTA Surveillance Authority and the EFTA Court.

Would the UK be welcome?

- A bespoke Treaty.
Would the EU be willing to tolerate the complexity of a separate set of institutions through which to interact with the UK?

3. “Hard Brexit”

This would entail coming out of the external market and negotiating access for UK goods and services on the basis of a free trade agreement (FTA).

Even a far-reaching FTA, like the Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada, would be unlikely to provide a level of access for financial services comparable to that enjoyed by the UK as an EU member.

4. The prospects for remaining

There is an outside chance that a twist of the political kaleidoscope may provide an opportunity for a change of mind, formalised by a second referendum or a general election, once the implications of Brexit have properly sunk in. But it would be foolish to count on this.

Professor Sir Alan Dashwood QC

Henderson Chambers

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