



BRIEFING PAPER

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Brexit: how does the Article 50 process work?

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Summary

Article 50 TEU

The Treaty base for EU withdrawal is Article 50 of the Treaty on European Union (TEU). This is usually considered the only legal way to leave the EU, although some have suggested there are other ways.

Notifying intention to withdraw

After a decision to leave the EU, the first step is for the UK to notify the European Council of the UK's intention to withdraw.

There is no set timeframe for when it has to do so, or in what form.

It is likely that the notification would be done by the Prime Minister under prerogative powers. But arguments that Parliament should – or even would have to – give its consent have gained currency since the referendum.

There is no provision for withdrawing the notification, but some analysts believe the UK could change its mind about leaving the EU after notification and before actually withdrawing.

EU-UK negotiations

Notification would trigger the opening of withdrawal negotiations between the UK and the EU. The European Council would draw up a negotiating mandate ('guidelines') without the UK's participation.

The EU negotiator would then negotiate a withdrawal agreement with the UK. The withdrawal agreement would be concluded by the EU Council by qualified majority (excluding the withdrawing state) after obtaining the consent of the European Parliament.

During the negotiations the UK would continue to participate in EU activities, the EU institutions and decision-making. But it would not take part or vote in any Council or European Council discussion concerning its withdrawal.

The negotiation period is two years from formal notification, but it could be extended if all Member States agreed.

The UK could still hold the EU Presidency in 2017 in spite of the vote to leave, although politically this could be very awkward.

The withdrawal agreement

The withdrawal agreement would contain whatever the negotiators wanted it to, but would probably set out the detailed withdrawal arrangements and transition provisions, taking into account the framework for the withdrawing State's future relationship with the EU.

There are particular concerns about the continuation of the UK's trading relations with third states and there is a question about possible vested rights for individuals and companies.

Agreement on future relationship with EU

It is not clear whether the UK's future relationship with the EU would be covered by the withdrawal agreement or negotiated as a separate agreement alongside the withdrawal agreement. If it was a separate agreement, it could for example be an Association

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Agreement entered into by the leaving State, the EU and the remaining Member States, agreed by unanimity in the Council and with EP consent.

The UK could ask to join the European Free Trade Association (EFTA) and the European Economic Area (EEA). Membership of these organisations would not be automatic but subject to the unanimous approval of existing Members.

Voting on any separate post-exit agreement could require the unanimous agreement of EU Member States and EP consent.

If the UK wanted to re-join the EU in the future, it would have to re-apply under Article 49 TEU.

Release of EU obligations on withdrawal

Withdrawal would take effect either when a withdrawal agreement entered into force, or two years after notifying the European Council of the intention to withdraw (unless there is a unanimous agreement to extend the negotiations). If there is no withdrawal agreement after two years and a veto on an extension period, or if the leaving State does not like the agreement, it can leave the EU without a withdrawal agreement.

The other EU Member States could reject a withdrawal agreement, but they could not stop the UK from leaving the EU.

EU law ceases to apply to the withdrawing state upon withdrawal, but there might be some acquired rights for EU and UK citizens.

Dealing with EU law the UK has implemented

Having triggered the Article 50 process, the UK Government and Parliament would decide which EU-based laws, rules and regulations they wanted to keep, amend or repeal. The starting point is likely to be repealing the European Communities Act 1972, perhaps with savings provisions.

UK primary or secondary law implementing EU law and directly effective EU law could continue if the Government wanted and/or to the extent practicable.

The devolved legislatures would have to deal with EU legislation they have transposed into Scottish, Welsh or Northern Irish law. It would also be necessary to amend the relevant parts of the devolution legislation, which might require a Legislative Consent Motion under the Sewel Convention.

[Note: This briefing paper was previously entitled 'EU referendum: the process of leaving the EU'].

1. Treaty basis for EU withdrawal

Summary

The Treaty base for EU withdrawal is Article 50 of the Treaty on European Union (TEU). This is usually considered the only legal way to leave the EU, although some have suggested there are other ways.

1.1 Article 50 Treaty on European Union

The Treaty of Lisbon, which came into force in December 2009, provided for the first time a specific legal Treaty base for leaving the EU. This is set out in [Article 50](#) of the Treaty on European Union (TEU):

1. Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.
2. A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the 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 account of the framework for its future relationship with the Union.

That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.
3. 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 referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.
4. For the purposes of paragraphs 2 and 3, the member of the European Council or of the Council representing the withdrawing Member State shall not participate in the discussions of the European Council or Council or in decisions concerning it. A qualified majority shall be defined in accordance with Article 238(3)(b) of the Treaty on the Functioning of the European Union.
5. If a State which has withdrawn from the Union asks to rejoin, its request shall be subject to the procedure referred to in Article 49.

Although on the face of it Article 50 TEU is a provision explicitly providing a way of leaving the EU, it is by no means comprehensive. As Adam Łazowski put it: “on closer inspection it raises more questions than it answers. The wording of the provision is cryptic and the regulation of withdrawal from the European Union incremental”.¹

¹ *European Law Review*, 2012, pp. 523-540, “Withdrawal from the European Union and alternatives to membership”.

Article 50 TEU was adopted from the abandoned [Treaty Establishing a Constitution for Europe](#) (Article I-59).

1.2 Is Article 50 TEU the only way to leave?

An untested process

Article 50 TEU has never been used before, so there is no clear framework for how it works. But both pro- and anti-EU camps have concluded that Article 50 TEU is the best and the 'legal' way to withdraw from the EU.²

When the UK held a referendum on continued EEC membership in 1975, it was assumed that the UK would be able to withdraw if it voted to leave, even though there was no specific EU legal basis for withdrawal at that time.

Could the UK leave by amending the EU Treaties, by agreement under provisions in international law, or by simply amending or repealing domestic legislation?

Amending the EU Treaties under Article 48?

Article 48 TEU sets out the procedure for amending the EU Treaties. In theory it could be used to remove all references to the UK and make the necessary adjustments. Article 48's predecessor (former Article 236 EEC) was used for Greenland's exit from the EEC.

However, as Professor Kenneth Armstrong has [pointed out](#), not only would this circumvent the specific mechanisms contained in Article 50 for departure from the EU, it would also require unanimous agreement of the Member States.

It would mean that the UK was still formally a state party to the EU Treaties as a matter of international law.

Withdrawing 'by consent of all the parties'?

The 1969 [Vienna Convention on the Law of Treaties](#) (to which the UK is a party) provides that states can withdraw from a treaty 'only as a result of the application of the provisions of the treaty or of the present Convention' (Article 42(2)). The Convention sets out a series of grounds for terminating a treaty, including:

- 'in conformity with the provisions of the treaty', i.e. if the treaty explicitly provides for it (Article 54(a));
- 'by consent of all the parties after consultation with the other contracting States' (Article 54(b));
- following a 'material breach' by one of the parties (Article 60);
- 'supervening impossibility of performance' (Article 61); or
- 'fundamental change in circumstances' which 'constituted an essential basis of the consent of the parties to be bound by the treaty' (Article 62).

The Vienna Convention applies to treaties adopted within an international organisation 'without prejudice' to the organisation's own

² A report in the [Huffington Post, 22 February 2016](#), summarised views about the Article 50 TEU withdrawal route.

rules (Article 5).³ In other words, Article 50 takes precedence over the Vienna Convention's general provisions.

In [evidence](#) to the House of Lords Select Committee on the European Union on 8 March 2016, Professor Derrick Wyatt looked at alternative routes for withdrawing from international treaties and concluded that Article 50 TEU was the only route in this case:

It is not open to all the member states simply to sit down and agree the matter between themselves. The institutions are involved and the national parliaments are involved. I am certainly not disagreeing with the proposition that because there is a specific provision it excludes others, but quite apart from that, any alternative under public international law simply does not fly. In my view, Article 50 is the only route.

Only repealing domestic legislation?

It has been suggested that the UK could leave the EU simply by repealing the *European Communities Act 1972* (ECA), thereby unilaterally removing its obligation to implement EU law.⁴

The ECA would almost certainly be repealed or substantially amended in any case (see below). But doing so would not by itself remove the UK's obligations under EU or international law, and would pose problems of a practical, as well as constitutional and legal, nature.

Obligations under EU law

The EU Treaties include specific mechanisms for dealing with breaches of EU law:

- Article 258 TFEU: enforcement action by the Commission;
- Article 259 TFEU: another Member State can bring a case to the Court of Justice of the EU; and
- Article 7 TEU: suspending membership of a state breaching the EU's fundamental values.

The degree to which those mechanisms might be invoked in the circumstances is uncertain.

Obligations under international law

The UK Government is also bound under international law by the obligations of the EU Treaties.

One of the main principles of customary international law is that agreements are binding and must be performed in good faith (*pacta sunt servanda*). This principle was reaffirmed in article 26 of the 1969 [Vienna Convention on the Law of Treaties](#):

Every treaty in force is binding upon the parties to it and must be performed by them in good faith.

³ The Convention Praesidium's [comments](#) on the 2003 draft EU Constitution provision made clear that the exit clause was based on the Vienna Convention.

⁴ See, e.g. Douglas Carswell's Private Members' Bill, the [European Communities Act 1972 \(Repeal\) Bill 2012-13](#), and Philip Hollobone's similar [European Communities Act 1972 \(Repeal\) Bill 2013-14](#), and Nigel Lawson, [Telegraph, 17 February 2016](#).

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In general international law (Vienna Convention Article 60(2)), a 'material breach' of a multilateral treaty by one of the parties to it entitles:

- (a) the other parties to agree unanimously to suspend the operation of the treaty in whole or in part or to terminate it either:
 - (i) between themselves and the defaulting State, or
 - (ii) between all the parties;
- (b) a party specially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part between itself and the defaulting State;
- (c) any party other than the defaulting State to suspend the operation of the treaty in whole or in part with respect to itself, if a material breach by one party 'radically changes the position of every party with respect to the further performance of its obligations under the treaty'.

A 'material breach' of a treaty means either a repudiation of the treaty not permitted by the Vienna Convention, or a violation of a provision essential to the object or purpose of the treaty (Article 60(3)).

However, these reactive suspensions are not allowed for treaty provisions on 'protection of the human person' in treaties of a humanitarian character (Article 60(4)).

If a breach causes harm to another party to the treaty, that party may have the right to take reasonable countermeasures, or to present an international claim for compensation or other relief.

The devolution angle

Sionaidh Douglas-Scott, professor of law at Queen Mary University of London, has suggested that although the UK Parliament may repeal the European Communities Act 1972, this would not bring an end to the domestic incorporation of EU law in the devolved nations:

It would still be necessary to amend the relevant parts of devolution legislation. But this would be no simple matter and could lead to a constitutional crisis. Although the UK Parliament may amend the devolution Acts, the UK government has stated that it will not normally legislate on a devolved matter without the consent of the devolved legislature. This requires a Legislative Consent Motion under the Sewel Convention. However, the devolved legislatures might be reluctant to grant assent, especially as one feature of the 'Vow' made to the Scottish electorate was a commitment to entrench the Scottish Parliament's powers, thus giving legal force to the Sewel Convention. So the need to amend devolution legislation renders a UK EU exit constitutionally highly problematic.⁵

⁵ <http://www.centreonconstitutionalchange.ac.uk/blog/british-withdrawal-eu-existential-threat-united-kingdom>. See further 'Exiting the EU: impact in key UK policy areas', Commons Library briefing paper 7213, 12 February 2016, p138

2. Notification of intention to withdraw

Summary

After a decision to leave the EU, the first step is for the UK to notify the European Council of the UK's intention to withdraw.

There is no set timeframe for when it has to do so, or in what form.

It is likely that the notification would be done by the Prime Minister under prerogative powers. But some commentators have suggested that Parliament should give its consent.

There is no provision for withdrawing the notification, although some analysts believe the UK could change its mind about leaving the EU after notification and before actually withdrawing.

2.1 When would the notification be made?

Article 50 TEU sets no timeframe for notification of intention to withdraw from the EU.

The Prime Minister said in his [22 February 2016 Statement](#) on the new Settlement for the UK in the EU that if there was a 'no' vote in the referendum he would trigger Article 50 'straight away':

... if the British people vote to leave, there is only one way to bring that about, namely to trigger Article 50 of the Treaties and begin the process of exit, and the British people would rightly expect that to start straight away.

However, in his [resignation speech](#) David Cameron indicated that he would leave the notification to his successor, who is due to be in place by September 2016:

A negotiation with the European Union will need to begin under a new Prime Minister, and I think it is right that this new Prime Minister takes the decision about when to trigger Article 50 and start the formal and legal process of leaving the EU.

Even though the referendum was advisory and not binding, the Government has made clear that it intended to respect the outcome. The Foreign Secretary Philip Hammond [stated](#) on 25 February 2016 (c 497):

The propositions on the ballot paper are clear, and I want to be equally clear today. Leave means leave, and a vote to leave will trigger a notice under article 50. To do otherwise in the event of a vote to leave would represent a complete disregard of the will of the people. No individual, no matter how charismatic or prominent, has the right or the power to redefine unilaterally the meaning of the question on the ballot paper.

And c 498:

The Government's position is that the referendum is an advisory one, but the Government will regard themselves as being bound

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by the decision of the referendum and will proceed with serving an article 50 notice. My understanding is that that is a matter for the Government of the United Kingdom, but if there are any consequential considerations, they will be dealt with in accordance with the proper constitutional arrangements that have been laid down.

Presumably notification of the decision could be delayed if Parliament wanted to debate a UK exit before the formal notification, or if a parliamentary committee – the European Scrutiny Committee, for example – wanted to take evidence from the Government on its decision to notify.

But there has been pressure from some other EU Member States and institutions to make the notification soon.

2.2 What form should the notification take?

Again, Article 50 does not specify what form the notification of intention to withdraw should take.

There has been some concern that the notification could be made inadvertently.

However, it is likely to be made in writing. Article 67(1) of the Vienna Convention on the Law of Treaties requires a state that wants to invoke the Convention in order to withdraw from a treaty to notify the other parties in writing.

2.3 Would the UK Parliament need to approve the notification?

UK 'constitutional requirements'

Article 50 TEU states that a Member State may 'decide' to withdraw from the EU 'in accordance with its own constitutional requirements'. But what are the UK's constitutional requirements?

Importantly, the referendum result was not in itself a 'decision' to withdraw from the EU, as it had no binding effect.

But whether it is the Government or Parliament that can make the decision is the subject of increasing debate. Four main options have been argued so far, ranging from using the Government's prerogative power to requiring an Act of Parliament:

Government's 'prerogative' power?

Notification of intention to withdraw from a treaty or international organisation is usually seen as something for the UK Government to do under its inherent 'prerogative power' to conduct foreign affairs.

The UK Parliament can object to the Government ratifying treaties, under Part 2 of the Constitutional Reform and Governance Act 2010, and the House of Commons can continue objecting indefinitely, effectively giving it a power to block ratification. However, the UK Parliament has no formal role in negotiating treaties, or in withdrawing from them. Interestingly, in the US – where Congress has a strong role

in ratifying treaties – the conventional view is that the President may withdraw from treaties without the approval of Congress.⁶

When Lord Hamilton asked in February 2016 if Parliament’s approval was needed under the European Communities Act 1972 (ECA) for notification of intention to withdraw from the EU, the FCO Minister Baroness Anelay [replied](#) that it was not:

The European Communities Act 1972 does not require prior approval of actions by Act of Parliament. The European Union Act 2011 does define some circumstances where this is required, but these do not include a notification under article 50.

This ‘conventional’ position has been defended by commentators including [Mark Elliott](#), [Carl Gardner](#) and [David Allen Green](#). It would mean that it is for the Government alone to decide when and how the formal decision to notify is made.

Parliamentary involvement desirable?

Even if there is no requirement in the UK’s constitutional arrangements for parliamentary approval of a decision to notify the EU of its intention to withdraw, there may be a political case for involving at least the House of Commons.

Sionaidh Douglas-Scott points out that the referendum was “a pre-legislative, or consultative, referendum, enabling the electorate to express its opinion before any legislation is introduced”,⁷ but asks whether Parliament must “authorise the executive to start the unravelling of a process that will lead to the ECA’s repeal? Once again, we see a lack of certainty as to what sovereignty means in this context”. She also asks which of ‘popular’ sovereignty and ‘parliamentary’ sovereignty “ought to predominate”, suggesting that there may be a political case for involving Parliament at the notification stage.

[Mark Elliott](#), Professor of Public Law at the University of Cambridge, suggests that there are ‘excellent democratic reasons for arguing that Parliament should play a full part’ in the Article 50 deliberations:

As we are rapidly discovering, the volume and complexity of the issues left unresolved by the binary view expressed by the electorate is immense, and Parliament has a crucial role to play in shaping the way forward. For all that the UK has experimented with direct democracy through the holding of a referendum on EU membership and on other constitutional matters, the UK remains, fundamentally, a parliamentary democracy, and it cannot plausibly be argued that the referendum substitutes for proper parliamentary involvement.

Order in Council required?

Adam Tucker, Senior Lecturer at Liverpool Law School, has argued that the only way for Article 50 to be triggered is by making secondary legislation – an Order in Council – under [section 2\(2\) of the ECA](#) (which could be subject to parliamentary override):

⁶ See Laurence R Helfer, ‘[Exiting Treaties](#)’, *Virginia Law Review*, Vol 91, 2005, p1579 fn 25 (p1590)

⁷ Constitutional Law blog, [Brexit, the referendum and the UK Parliament: Some Questions about Sovereignty](#), 28 June 2016,

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So now the United Kingdom enjoys, by virtue of the Treaty of Lisbon, two parallel novel rights: the right to pursue an orderly withdrawal even against the wishes of some other member states, and the right to withdraw unilaterally. But they can only be exercised once a decision to leave has been made (and notified). It follows that the decision to leave comes within the terms of section 2(2) [of the ECA 1972]: it would be (in the 1972 statute's unwieldy language) a decision for the purpose of enabling rights enjoyed by the United Kingdom to be exercised. In summary, section 2(2), a domestic statutory provision enacted by Parliament, provides a constitutional grounding for an executive (but not prerogative) power to make the decision to leave the EU under Article 50.

[Mark Elliott](#) puts forward two counter-arguments: firstly, that triggering Article 50 is not exercising a right 'under or by virtue of' the EU Treaties, and secondly that there is no obligation to use the section 2(2) power, and no need to do so, because a prerogative mechanism for the exercise of the Article 50 power already exists.

Act of Parliament required?

Since the referendum result, many commentators – including [Lord Lester of Herne Hill](#) and [Sir Malcolm Jack](#) (former Clerk of the House of Commons) – have argued that an Act of Parliament is required before notifying the EU.

Writing in the [Guardian, 27 June 2016](#), Geoffrey Robertson QC maintained that Parliament would have to repeal the ECA before Brexit can be triggered:

It is being said that the government can trigger Brexit under article 50 of the Lisbon treaty, merely by sending a note to Brussels. This is wrong. Article 50 says: "Any member state may decide to withdraw from the Union in accordance with its own constitutional requirements." The UK's most fundamental constitutional requirement is that there must first be the approval of its parliament.

However, as discussed above, repealing the ECA before withdrawing from the EU Treaties would put the UK in breach of its EU and international legal obligations.

In a [legal opinion](#) published on 27 June, Nick Barber (Trinity College, Oxford), Tom Hickman (Blackstone Chambers), and Jeff King (senior law lecturer UCL), said that an Act of Parliament was needed to approve the triggering of Article 50 TEU. They argued that if the Prime Minister were to 'attempt to do so before such a statute was passed, the declaration would be legally ineffective as a matter of domestic law and it would also fail to comply with the requirements of Article 50 itself'. Their argument is based on common law principles found in *The Case of Proclamations*⁸ and [Fire Brigades Union](#) case⁹ that the prerogative may

⁸ A court decision in 1610 during the reign of King James VI and I which defined some limitations on the Royal Prerogative at that time.

⁹ This [case](#) in 1995 raised important constitutional questions about the extent to which the Government is required to seek Parliamentary approval for its policies or may rely instead on prerogative powers. The court ruled that the Home Secretary acted unlawfully in introducing a revised criminal injuries compensation scheme

only be used where it does not conflict with an Act of Parliament. In the current situation, they continue, UK membership of the EU has been approved by Parliament under the ECA; an Article 50 notification would start the process by which the ECA becomes meaningless; therefore parliamentary approval is required. 'Statute beats prerogative'.

Lord Pannick (David Pannick QC) took a similar line in an article in [The Times on 30 June](#):

Article 50 notification commits the UK to withdrawal from the EU, and so is inconsistent with the 1972 act. Withdrawal is the object of the notification, and it is the legal effect. If, at the end of the negotiating period, parliament disagrees with the withdrawal which flows from the notification, there is nothing parliament could then do to prevent our withdrawal from the EU, which would frustrate the 1972 act. Therefore prerogative powers may not now be used.

But [Mark Elliott](#) argues that the Article 50 TEU notification itself does not conflict with any UK statute:

it is not the case that triggering Article 50 amounts to the Government's turning the ECA 1972 into a dead letter, since the outcome of any Article 50 process cannot be known. Such a process might result in an agreement that the UK should remain a member of the EU on altered terms, such that the ECA 1972 would continue to bite upon a substantial set of EU-related matters, or that the UK should become a member of the European Economic Area, in which case a substantial corpus of EU law, upon which an amended ECA 1972 might continue to bite, would remain pertinent to the UK. Equally, an Article 50 process would ultimately amount to nothing if it were to be aborted.

He also suggests that it is 'far from clear' that invoking Article 50 would 'frustrate the will of Parliament vis-à-vis the ECA 1972'.

It could be argued that Parliament, by passing the [European Union \(Amendment\) Act 2008](#), has already agreed to the Treaty of Lisbon which introduced Article 50 TEU, without an amendment requiring parliamentary approval to start the withdrawal process;¹⁰ and also passed an Act – the [European Union Referendum Act 2015](#)¹¹ – to provide for a referendum on whether to stay in or leave the EU. Further down the line Parliament will need to pass legislation to repeal the ECA.

2.4 Would the EU need to approve the notification?

Notice of withdrawal is unilateral and does not require the consent of the other EU Member States or the European Parliament (EP), or consultation with the Commission.

under the prerogative power, rather than implementing the statutory scheme under the Criminal Justice Act 1988. [Comment by Ian Leigh](#).

¹⁰ In 1991 Parliament succeeded in passing an amendment to the Maastricht Treaty Bill which required the Government to submit its assessment of the UK's budgetary position annually to Parliament before submitting it to the European Commission. This became [Section 5](#) of *European Communities (Amendment) Act 1993*.

¹¹ The Act received Royal Assent in December 2015.

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However, the process of withdrawal is carried out according to EU rules, and, as Dr Adam Łazowski¹² points out, using the metaphor of marriage and divorce, it is not unilateral:

One myth to dispel at the outset of this discussion is the possibility of unilateral exit. The EU is not a golf club but rather a marriage with various strings attached. It is, first and foremost, a legal order agreed between the [28] member states. Although some lawyers and policy-makers may perceive a possibility for unilateral departure in Art. 50 TEU, this is largely an academic exercise. A member state may decide to leave the EU as per domestic constitutional requirements, but this is merely a decision on exit. Withdrawal itself requires a proper treaty framework, regulating the time frame and details of the divorce.¹³

2.5 Could a notification be withdrawn?

Article 50 TEU does not state whether a withdrawal notification could be withdrawn.

But because Article 50 has specific provisions on when the Treaties cease to apply, and how a former Member State could re-join, it could be read as implying that notification could not be withdrawn. It specifies (a) that the EU Treaties cease to apply two years after notification in the absence of a withdrawal agreement or an extension of the negotiating period, and (b) that from that point the state that has withdrawn can re-join only through the normal application procedure.

However, in evidence to the Lords EU Committee, Professor Derrick Wyatt argued that there is nothing in the wording of Article 50 TEU to say that a country couldn't change its mind:

It is in accord with the general aims of the treaties that people stay in rather than rush out of the exit door. There is also the specific provision in Article 50 to the effect that, if a state withdraws, it has to apply to rejoin de novo. That only applies once you have left. If you could not change your mind after a year of thinking about it, but before you had withdrawn, you would then have to wait another year, withdraw and then apply to join again. That just does not make sense. Analysis of the text suggests that you are entitled to change your mind, but the politics of it would be completely different.¹⁴

He also said that 'in law, the UK could change its mind before withdrawal from the EU and decide to stay in after all, but the politics of the referendum result would be likely to rule out that option'.¹⁵

Sir David Edward, former Judge of the EU Court of Justice, said it was 'absolutely clear that you cannot be forced to go through with it if you do not want to: for example, if there is a change of Government'. But he too speculated about the politics of the situation, and thought the other Member States might only allow the UK not to withdraw after notification if it went 'back to zero'; there would be 'no new opt-

¹² Professor of EU Law at School of Law, University of Westminster.

¹³ CEPS Commentary, [How to withdraw from the European Union? Confronting hard reality](#), Adam Łazowski, 16 January 2013.

¹⁴ [Revised transcript of evidence, Lords EU Committee, 8 March 2016](#).

¹⁵ Ibid

outs'.¹⁶ He also reminded the Committee that the new Settlement for the UK in the EU would only come into force if the UK voted to stay in the EU; otherwise it falls.¹⁷

Alan Renwick, Deputy Director of The Constitution Unit, thought the EU Court of Justice might rule, if asked, on whether Article 50 TEU implied an ability to withdraw a notification. He also made the point that political reality might take over and the other 27 Member States would allow the UK to change its mind if they want the UK to stay in the EU. But, he cautioned:

... that would again require unanimity – either to amend Article 50 (and we know how much effort is required to change an EU treaty) or, in effect, to extend permanently the two-year negotiation window. Hence, any member state could drive a hard bargain, potentially one detrimental to the UK.¹⁸

Under the Vienna Convention on the Law of Treaties, a notification of intention to withdraw from a treaty 'may be revoked at any time before it takes effect' (Article 68). However, this provision does not override any specific arrangements in a treaty. There is considerable variation in treaties' exit clauses over whether notification may be withdrawn.¹⁹

¹⁶ Ibid

¹⁷ For information on the new Settlement for the UK in the EU, see Commons Briefing Paper 7524, [EU Referendum: analysis of the UK's new EU Settlement](#), 8 March 2016

¹⁸ [An EU Referendum horror: why you need to know about Article 50. The clause the public don't know about](#), 10 December 2015.

¹⁹ See Laurence R Helfer, '[Exiting Treaties](#)', *Virginia Law Review*, Vol 91, 2005, p1579 at p1597

3. The negotiations

Summary

Notification of the UK's intention to withdraw would trigger the opening of withdrawal negotiations between the UK and (probably) the European Commission. The European Council would draw up a negotiating mandate ('guidelines') without the UK's participation.

Until the point of withdrawal the withdrawing State is an EU Member State. During the negotiations, the UK would continue to participate in EU activities, the EU institutions and decision-making. But it would not take part or vote in any Council or European Council discussion concerning its withdrawal.

The negotiation period is two years from formal notification, but it could be extended if all Member States agreed.

The UK could still hold the EU Presidency in 2017 in spite of a vote to leave, although politically this could be very awkward.

3.1 What would European Council negotiating 'guidelines' do?

The European Council would adopt by consensus, but without the UK, 'guidelines' for the EU's negotiating mandate.

We do not know what this would look like, but under Article 50 TEU the Union would conduct negotiations based on these guidelines and in accordance with Article 218(3) [Treaty on the Functioning of the European Union](#) (TFEU). Under this Article, the European Commission²⁰ submits a recommendation to the Council, which adopts a Decision authorising the opening of the negotiations and, 'depending on the subject of the agreement envisaged, nominating the Union negotiator or the head of the Union's negotiating team'.

These are the usual rules by which the Council sets a negotiating mandate for the Commission to negotiate an agreement between the EU and third countries. The Commission is likely to be the negotiator, but Article 218(3) TFEU does not prescribe that it is.

Under Article 218(4) the Council can nominate a special committee to work with the Commission, to which the Government refers in its [report](#) on the process for withdrawing from the EU. This is not a provision of Article 50 TEU or Article 218(3), but it could be done.

Allan Tatham thought that in the absence of any detail in Article 50 TEU, and considering the Greenland precedent, the Council might

...request Opinions of the Commission and the European Parliament before proceeding to commence the withdrawal process at Union level. The Council would therefore garner the

²⁰ Under Article 218(3) the High Representative for foreign and security policy could be the negotiator, but this would be unlikely here, as the agreement would not relate "exclusively or principally" to the CFSP.

views (and possible support) of the main Union institutions before starting negotiations.²¹

The European Parliament is likely to seek some involvement in the negotiations.

Sir David Edward thought the Council's internal services and the other Member States would also be 'closely involved right the way through'.²²

3.2 Would the UK participate in the withdrawal negotiations?

Yes it would, but there has been some confusion over the meaning of Article 50(4) TEU in this regard:

For the purposes of paragraphs 2 and 3, the member of the European Council representing the withdrawing Member State shall not participate in the discussions of the European Council or Council or in decisions concerning it.

The confusion arises as a result of the language used to explain Article 50(4) TEU. The then Foreign Secretary, William Hague, told the Foreign Affairs Committee on 24 February 2013:

Article 50(4) deprives the withdrawing State not only of a vote on the terms of the withdrawal agreement but also of the right to take part in discussions about that agreement in either the European Council or the Council.²³

What is not always made clear is that the negotiations would probably be conducted by the Commission, not the Council (made up of government ministers from the EU Member States), and that Article 50 TEU refers to exclusion from the Council in drawing up the negotiating mandate and in any extension of the negotiating period.

For this reason Dr Alan Renwick took issue with an article in Prospect Magazine in December 2015²⁴ which stated 'Clause 4 says that after a country has decided to leave, the other EU members will decide the terms—and the country leaving cannot be in the room in those discussions. Repeat: we'd have no say at all on the terms on which we'd deal with the EU from then on, and no opportunity to reconsider'.

Renwick explains:

Clause 4 says only that we wouldn't be in the room when the EU decides its position in the negotiations; but of course we would be in the room when the EU is negotiating with us. Furthermore,

²¹ "Don't Mention Divorce at the Wedding, Darling!": EU Accession and Withdrawal after Lisbon", from *EU Law after Lisbon*, Eds Andrea Biondi, Piet Eeckhout, and Stefanie Ripley, 2012.

²² [Revised transcript of evidence](#) Lords European Union Committee, 8 March 2016.

²³ Foreign Affairs Committee, First Report, The future of the European Union: UK Government policy Supplementary [written evidence](#) from the Foreign and Commonwealth Office, Letter from Rt Hon William Hague. Other commentators have made this point, e.g. [The Renegotiation Delusion? about Britain's EU future nine Questions](#), May 2013, Agata Gostyńska, Roderick Parkes, Marta Stormowska, Pawel Tokarski, Patryk Toporowski.

²⁴ [An EU Referendum horror: why you need to know about Article 50. The clause the public don't know about](#), Bronwen Maddox, 10 December 2015.

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the UK is a country with clout, and it could use that to extract some advantage.²⁵

Although the actual withdrawal negotiations would be between the EU and the withdrawing State rather than multilaterally between that State and the other Member States, Article 50(4) TEU envisages that withdrawal could be discussed by Member States in the Council and European Council.

Hillion thought the exclusion of the withdrawing State from the Council was more to do with limiting its influence over on-going or future EU law-making than its own withdrawal:

... it is questionable whether [a withdrawing state] should ... be entitled to influence EU decisions that might never apply to it, or indeed use its position to obtain concessions in the context of the withdrawal negotiations, even if arguably, its actual influence might have diminished as a result of its precarious position in the system. While Article 50 TEU does not readily provide a legal basis for an outright suspension of the withdrawing state's decision-making rights as soon as the exit process is formally initiated, the notion of 'decisions concerning it' could nevertheless be construed broadly enough so as to limit its weight in the Council and European Council. The ensuing *partial* suspensive effects of the notification, foreseen in paragraph 4, would thus circumscribe the withdrawing state's influence on the production of EU norms that would not affect it as Member State.²⁶

An exchange in March 2016 between Members of the Lords EU Committee and expert witnesses also showed that there remains a lack of clarity about this part of Article 50 TEU:

Baroness Scott of Needham Market: [...] I am still not clear from that whether we would be barred from discussions relating to the withdrawal itself and its terms or from all business going forward.

Sir David Edward: I am not clear either.

Professor Derrick Wyatt: I do not think we would be barred from all business going forward.

Sir David Edward: No, certainly not.

Professor Derrick Wyatt: We would be barred from what Sir David has just drawn attention to, which is anything to do with the withdrawal agreement.²⁷

3.3 What about UK MEPs, Commissioner, Judges and staff?

Commentators seem to agree that the withdrawing State's MEPs would be able to participate in EP business concerning the withdrawal, including the EP vote on any withdrawal agreement, although

²⁵ Constitution Unit, [What happens if we vote for Brexit?](#) 19 January 2016.

²⁶ Hillion, op cit.

²⁷ [Revised transcript of evidence, 8 March 2016.](#)

Gostynska *et al*/suggest this might in the event prove too controversial.²⁸

In the absence of any indication to the contrary, it is assumed that the withdrawing State's Commissioner would continue with his/her portfolio, that EU Court Judges would continue with their work and that staff working for the EU institutions would continue in post until withdrawal took effect. However, the UK Commissioner, Lord Hill, [announced](#) on 25 June that he would stand down. He hoped for an "orderly handover" in the coming weeks and Jean-Claude Juncker has suggested appointing a temporary UK Commissioner for the remaining period until the UK leaves the EU.

Jean-Claude Juncker has assured UK staff in the Commission that he will try to support and help them in a "spirit of reciprocal loyalty".²⁹ According to the Staff Regulations, they are "Union officials" who work for the EU as European, not national, civil servants.

3.4 How long would the negotiations take?

Under Article 50 TEU withdrawal takes place after two years, but there is a possibility of extension if all Member States agree to this. In theory, many extensions could be made in this way, although politically this is unlikely.

It is impossible to say how long the negotiations would take, but many analysts think two years would not be long enough. Sir David Edward thought a long negotiation period under Article 50 TEU would be necessary because 'withdrawal from the Union would involve the unravelling of a highly complex skein of budgetary, legal, political, financial, commercial and personal relationships, liabilities and obligations'.³⁰

Open Europe published comparative information on the time it takes to negotiate EU free trade agreements: they took on average between four and seven years.³¹

When Greenland withdrew from the EC/EU, the transitional rules took two years to negotiate, and the issues were much less complex. The Government Report, [The process for withdrawing from the European Union](#), referred to 'a decade or more of uncertainty', referring not just to the negotiating period but to the post-exit period in which the UK would be establishing or consolidating its new relationship with the EU and the rest of the world.

The Government thinks that an extension of the negotiating period would be needed:

²⁸ The Polish Institute of International Affairs, [The Renegotiation Delusion? Nine Questions about Britain's EU Future](#), Agata Gostyńska, Roderick Parkes, Marta Stormowska, Pawel Tokarski, Patryk Toporowski, May 2013, p 22.

²⁹ Jean-Claude Juncker, [Message to staff](#), 24 June 2016.

³⁰ [Scottish Constitutional Futures Forum contribution, 17 December 2012.](#)

³¹ Pawel Swidlicki, [Would Brexit lead to "up to a decade or more of uncertainty"?](#) Open Europe, 29 February 2016.

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2.5 The complexity of the negotiations, and the need for the UK to negotiate adequate access to the Single Market after it leaves the EU, would make it difficult to complete a successful negotiation before the two year deadline expired. Any extension to the two year period set out in the Treaty would require the agreement of all 27 remaining EU Member States.³²

But more time is not guaranteed, even if it were considered necessary by the UK and a majority of Member States.

There may be political reasons for either prolonging the negotiations or not allowing them to be extended. Open Europe's Pawel Swidlicki suggested: 'there may be a desire to drag out the negotiations in order to ward off those who may want to follow the UK's lead'.³³ On the other hand, the other Member States may not want to grant the UK more time to negotiate everything it wants to get from the withdrawal agreement. Sir David Edward outlined some possible reasons:

Remember that other member states have much higher priorities, such as refugees and so on. Their willingness to sit down, make concessions and go on and on beyond two years is not necessarily guaranteed. They may say, "Right, you want to go, so please go and let us get on".³⁴

3.5 What about the status of the UK during the negotiations?

The UK would still be a Member State during the withdrawal negotiations and would continue with business as usual until the withdrawal agreement entered into force or two years (or more) after notification. Existing EU law would continue to apply in the UK, and it would be bound by the principle of 'sincere cooperation'. Politically, this could be difficult.

The Government says that a vote to leave and the on-going withdrawal negotiations would 'have an impact on our ability to affect the EU's decision-making', and:

2.8 While these negotiations continued, we would be constrained in our ability to negotiate and conclude new trade agreements with countries outside the EU. The countries with which we currently have preferential trade agreements through the EU are likely to want to see the terms of our future relationship with the EU before negotiating any new trade agreements with the UK. In addition, many of our trading partners, including the United States, are already negotiating with the EU. Before they start negotiations with the UK they are likely to want those deals to conclude.³⁵

In the 2013 Polish Institute of International Affairs [report](#), Gostyńska et al thought Article 50 TEU is 'ambiguous about the legal status of a withdrawing Member State in the transitional period between the

³² Cm 9216, [The process for withdrawing from the European Union](#), February 2016.

³³ [Would Brexit lead to "up to a decade or more of uncertainty"?](#) 29 February 2016.

³⁴ Revised transcript of evidence, Lords EU Committee, 8 March 2016.

³⁵ Cm 9216, [The process for withdrawing from the European Union](#), February 2016.

notification of withdrawal and the moment when the treaties cease to apply to it', continuing:

It is disputable whether such a state is entitled to remain actively involved in the EU in the transition period. The full participation of the British delegation in EU decision-making, particularly in adopting EU law could encounter opposition from those Member States with opposing agendas. It is, however, proper to expect that a withdrawing Member State should abide by a principle of sincere cooperation even though it already has one foot outside the EU.

3.6 How will the Government manage the negotiations?

Given that EU law applies in a broad range of policy areas, a UK withdrawal will probably involve all Government Departments, as well as the UK Representation in Brussels (UKREP). Exactly how they will contribute to the negotiations is not clear.

The Prime Minister has set up a cross-departmental EU unit. He said in his [statement](#) to the Commons on 27 June 2016:

It will report to the whole of the Cabinet on delivering the outcome of the referendum, advising on transitional issues and exploring objectively options for our future relationship with Europe and the rest of the world from outside the EU. And it will be responsible for ensuring that the new Prime Minister has the best possible advice from the moment of their arrival.

It is to be headed by Oliver Letwin, who will "listen to all views and representations and make sure they are fully put into this exercise". The Home Office second permanent secretary Olly Robbins is the top civil servant. He will "examine all the options and possibilities in a neutral way and set out costs and benefits to enable the right decisions to be made".³⁶

Ian Milne, Chairman of Global Britain, suggested in 2011 that a ministry would need to be established to manage the transition and post-exit situation. He proposed a 'Ministry of EU Transitional Arrangements', META, which would be headed by a member of the Cabinet, with the task of administering and regulating the two-year withdrawal process and the two years after withdrawal. META would have a senior opposition shadow minister as deputy and include senior executives from the private sector, business, transport, energy, farming, fishing, military and legal circles. Milne also thought ministries such as the Treasury, the Foreign and Commonwealth Office (FCO), Agriculture and Fisheries, Business and Defence amongst others, should report to META on matters concerning the withdrawal.³⁷

Nicholas Wright of the University College London European Institute considered the possible role of government departments:

³⁶ [Global Government Forum, 29 June 2016](#).

³⁷ Ian Milne, "[The Road to Self-Government](#)", from Time to say no, Alternatives to EU Membership, Civitas, October 2011.

All aspects of UK membership would have to be addressed, with no part of Whitehall unaffected and all needing to feed into the negotiating process. This will pose a significant administrative and bureaucratic challenge domestically and in Brussels (one that will include the devolved administrations, each with their own concerns).

Sophisticated machinery exists to manage and co-ordinate British European policy inputs. This would logically underpin the negotiating process, although unsurprisingly the Government [refuses to comment](#) on the specific arrangements in the event of a Leave vote. The so-called 'Triangle' of FCO, Cabinet Office and UK Permanent Representation in Brussels (UKREP) traditionally oversees European policy coordination, although domestic line ministries manage the details of their specific policy responsibilities, while the Treasury also has a significant say. The traditional split sees the Cabinet Office act as the 'gearbox' for European policy co-ordination, while the FCO focuses on foreign and security policy and treaty-making.

The Cabinet Office would be the logical domestic hub for the negotiations with the FCO contributing expertise and leadership in terms of treaty-making and utilising the UK's broader diplomatic network in pursuit of an agreement. UKREP, meanwhile, could be expected to lead negotiations in Brussels whilst also providing a conduit for 'on the ground' intelligence and as a source of advice on negotiating strategy. The economic and financial significance of leaving the EU means significant Treasury involvement should also be expected. The process will therefore be highly complex and multi-dimensional, requiring careful management and political leadership to contain tensions over priorities and direction.³⁸

3.7 Would the UK Presidency take place?

The UK is due to hold the EU Presidency from July to December 2017. Politically, it would be difficult for the UK to hold the EU Presidency if it is negotiating to withdraw from the EU,³⁹ but legally there would appear to be no impediment. The UK would still be a Member State at this time, albeit heading for the exit door, and until the 23 June the UK Government was intending to press ahead with its presidency plans for 2017. But how could the UK advance and defend the EU's interests during that time in the way the presidency is meant to?

British diplomats are now reported to have informed their EU colleagues about their intention to abandon the UK presidency.⁴⁰

Although there is no EU law providing for a Member State to relinquish its presidency role, the Commission could propose amending the [Council Decision](#) of 1 January 2007 setting out the EU presidency rotation, so that the UK would not hold the presidency at that time. In 2006 and 2007 Germany and Finland swapped presidency dates to avoid national elections in each country.

³⁸ [Post-Brexit, would Whitehall be able to rise to the challenge of negotiating the best possible deal?](#) 26 February 2016, UCL European Institute.

³⁹ EurActiv [reported](#) on 24 June 2016 that "it would be surreal if the UK presides over a Union that it is going to leave".

⁴⁰ [Politico, 25 June 2016](#).

Professor Wyatt thought the most difficulties would arise with UK participation in the 'trio system', by which an EU presidency acts together with the following two presidencies in the interests of continuity and planning:

We would be in that trio, we would be in the next trio and then we would have the presidency. Forward planning and continuity would be weaknesses for the UK. On the other hand, there would be some issues we would want to stay in on: for example, common foreign and security policy and sanctions against rogue states. The UK has an enormous influence, and our interests are served by that. We would not want to disengage politically from decisions such as that.⁴¹

⁴¹ Revised transcript of evidence, 8 March 2016.

4. The withdrawal agreement

Summary

It is unclear from the terms of Article 50 TEU how far arrangements for the leaving State's future relationship with the EU would be included in the withdrawal agreement.

There are different opinions as to what else a withdrawal agreement might include; the content would be up to the negotiators. Transition arrangements in policy areas covered by the EU Treaties would have to be settled. They might negotiate, alongside the withdrawal agreement, agreement(s) with the rest of the EU on the post-exit relationship (e.g. membership of EFTA or the EEA). This/these would be signed and ratified after withdrawal.

There are particular concerns about the continuation of the UK's trading relations with third states and there is a question about possible vested rights for individuals and companies.

Under Article 50 TEU Qualified Majority Voting (QMV) is required to agree a withdrawal agreement. But voting on any separate post-exit agreement would be different and could require the unanimous agreement of EU Member States and EP consent.

The other EU Member States could reject a withdrawal agreement, but they could not stop the UK from leaving the EU.

4.1 What would the withdrawal agreement cover?

The scope of the withdrawal negotiations could be as narrow or as wide as the negotiators chose, because Article 50 TEU does not specify how far-reaching a withdrawal agreement should be.⁴²

It is not clear from Article 50 TEU whether all the arrangements for the withdrawing State's future relationship with the EU would be included in the withdrawal agreement, or require the negotiation of a separate agreement with the EU. Article 50(2) TEU refers only to negotiating and concluding arrangements for withdrawal, 'taking account of the framework for [the exiting State's] future relationship with the Union'.

Some commentators believe the withdrawal negotiations and agreement would focus on the mechanics of withdrawal and the transition period, before a separate agreement on the withdrawing State's future relationship with the EU came into force. Christophe Hillion, for example, thinks the Article 50 procedure might not envisage "far reaching EU commitments in terms of future cooperation with the withdrawing state", but be limited to "setting out the arrangements for [the] withdrawal of a technical nature, possibly to areas where the EU has exclusive powers, such as trade".⁴³

He has argued that although the framework for a future relationship would be left to a later more comprehensive agreement, the withdrawal agreement would aim to tackle policy issues such as "the movement

⁴² Eszter Zalan, [EUObserver, 24 February 2016](#).

⁴³ Hillion, p. 140.

and treatment of citizens from the withdrawing state, and of citizens from other Member States resident in that state".⁴⁴

According to a European Parliament Research Service (EPRS) briefing on the withdrawal process, a withdrawal agreement would be "merely declaratory" because "the withdrawal takes place even if an agreement is not concluded". The authors argue that the agreement between the EU and the withdrawing State would be about the "arrangements for its withdrawal" and the framework for future relations, but not the withdrawal itself.⁴⁵

Whatever the withdrawal agreement looked like, it would have to be compatible with the EU Treaties, and the Court of Justice of the EU could be asked to rule on this or on the decision to conclude it.

4.2 What would need to be settled?

The policy areas that would need to be discussed in the course of withdrawal negotiations are considered in Commons Briefing Paper 7213, [EU referendum: impact of an EU exit in key UK policy areas](#), 12 February 2016. Other implications of EU withdrawal and post-exit scenarios are discussed in CBP 7214, [EU referendum: UK proposals, legal impact of an exit and alternatives to membership](#), 12 February 2016.

The Government Report, [The process for withdrawing from the European Union](#), looked at key matters that would need to be tackled in the negotiation of withdrawal and transition provisions. The list included the following:

- unspent EU funds due to UK regions and farmers;
- cross-border security arrangements including access to EU databases;
- co-operation on foreign policy, including sanctions;
- transfer of regulatory responsibilities;
- arrangements for contracts drawn up in accordance with EU law;
- access to EU agencies that play a role in UK domestic law, such as the European Medicines Agency;
- arrangements for the closure of EU agencies headquartered in the UK;
- departure from the Single European Sky arrangement;
- access for UK citizens to the European Health Insurance Card;
- the rights of UK fishermen to fish in traditional non-UK waters, including those in the North Sea;
- continued access to the EU's single energy and aviation markets;

⁴⁴ Hillion, p.141.

⁴⁵ EP Research Service, [Article 50 TEU: Withdrawal of a Member State from the EU](#), Eva-Maria Poptcheva, February 2016.

- the status of the UK's environmental commitments made as party to various UN environmental conventions and currently implemented through EU legislation.⁴⁶

Many commentators believe the UK's contributions to and receipts from the EU Budget would simply be reduced each month over the two-year period until withdrawal took effect.⁴⁷ But Allan Tatham suggested: "It's a moot point as to whether or not the withdrawing Member State would be obliged to pay its outstanding contributions to the Union or even reimburse monies to the Union".⁴⁸

4.3 External agreements

Leaving the EU would take the UK out of the Common Commercial Policy under which the EU has concluded hundreds of free trade and other agreements with third countries worldwide. EU competence only agreements would simply not apply to the UK, but what about mixed agreements, which are concluded by the EU and each of the Member States in their own right? Would they have continuing effect? The Government has said the withdrawal agreement would have to include "transition arrangements for UK exit from EU Free Trade Arrangements with third countries".⁴⁹ Many argue that the UK would have to re-negotiate all its relations with third states on a bilateral basis.

Lord Lawson [told](#) BBC Radio 4's World at One on 29 February 2016 that all the UK's trading arrangements would "remain totally unchanged", but this view is not shared by many analysts. Thomas Sebastian⁵⁰ thought the UK would remain a treaty party to mixed agreements after withdrawal, but that in "most cases", it would not be able to take the benefit of mixed trade agreements. This is because the trade sections of these agreements are "generally written as applying to the EU and the country it's signing an agreement with. Each provision in each mixed agreement would have to be scrutinised to see how it applied to a post-Brexit Britain".⁵¹

Dr Markus Gehring⁵² made a similar point, but he thought mixed agreements "could be subject to automatic termination as far as the UK is concerned",⁵³ because of provisions determining the application of the agreement, or a clause defining State Parties as Member States of the EU, or clauses which determine the territorial scope of the agreement.⁵⁴

⁴⁶ Cm 9216, [The process for withdrawing from the European Union](#), February 2016.

⁴⁷ See, e.g. Ian Milne, [Time to Say No. Alternatives to EU Membership](#), Civitas, 2011, and Ben Clements, Institute of Economic Affairs Brexit prize finalist, "[Britain outside the European Union](#)", 2014.

⁴⁸ "Don't Mention Divorce at the Wedding, Darling!: EU Accession and Withdrawal after Lisbon", from *EU Law after Lisbon*, Eds Biondi et al, 2012.

⁴⁹ [The process for withdrawing from the European Union](#), Cm 9216, February 2016.

⁵⁰ Barrister at Monckton Chambers.

⁵¹ InFacts, [Lawson wrong on keeping EU trade deals post-Brexit](#), Sam Ashworth-Hayes, 4 March 2016.

⁵² Lecturer in Law, University of Cambridge.

⁵³ EU Law Analysis, 6 March 2016, [Brexit and EU-UK trade relations with third states](#).

⁵⁴ He gives the example of Article 360 of the Association Agreement between the EU and Central American States, which restricts the application of the agreement to countries in which the EU Treaties apply.

4.4 Vested rights?

The UK would be released from EU obligations on withdrawal. However, there is a question mark over possible “vested rights”. There is nothing in the EU Treaties which states that vested rights (also referred to as ‘executed’ or ‘acquired’ rights) acquired during the currency of the EU Treaties would automatically continue after leaving the EU. Unlike many international treaties, there is no ‘survival clause’ with rules on the protection of acquired rights of citizens and businesses or the possible survival of claims based on EU law.

The withdrawal agreement would have to address this. Article 2 of the [Protocol](#) attached to the Greenland Treaty clarified that there would be a transitional period during which Greenlanders, non-national residents and businesses with acquired rights under EU law would retain these rights.

This question is commonly raised in the context of the free movement of people: would British citizens and businesses in Europe (and European citizens and businesses in the UK) continue to enjoy some ‘vested’ rights either under EU law or general international law? Is there any protection afforded by the European Convention on Human Rights, the European Charter of Fundamental Rights or UK common law?

This issue is discussed in chapter 4, ‘Could EU rights disappear?’ Commons Briefing Paper 7214, [EU referendum: UK proposals, legal impact of an exit and alternatives to membership](#), 12 February 2016.

4.5 How could other EU Member States influence the withdrawal agreement?

Other EU Member States, if they were so minded, could ensure that the UK did not secure the withdrawal agreement (QMV) or post-exit relationship it wanted (QMV or unanimity, depending on the areas covered).

Fabian Zuleeg of the European Policy Centre emphasised that it would be up to the rest of the EU Member States to determine what kind of a negotiation they wanted to have with the UK. He thought: “The political realities would not be very accommodating to the UK”, and it would be on EU negotiators’ minds “that a costless divorce which still gives access to the single market, would prompt questions from other member states”.⁵⁵ He said it would not be “in the political interest of the rest of the EU countries to concede a lot to the UK”.⁵⁶

There is a big question mark over the likelihood of this happening, but the Government acknowledged the possibility in its [Report](#) on the withdrawal process:

The precise process for negotiating that agreement would depend on its content, but an ambitious agreement could need the

⁵⁵ [EUObserver, 24 Feb 2016](#).

⁵⁶ *Ibid.*

unanimous agreement of all 27 Member States in the Council.⁵⁷ Any such process would clearly add to the complexity and hence, very probably, to the length of the overall negotiations. If the agreement needed unanimous agreement in the Council, it would be open to any Member State to seek to block it, or to extract a price for agreeing any element of the agreement.

There would also be a risk of other Member States gaining from the need for unanimous agreement on an extension of the two-year negotiating period, and the Government [pointed to](#) the possibility of other Member States failing to ratify an agreement arranging future EU-UK trade relations.

4.6 Would the withdrawal agreement have to be ratified?

By the EU

The Council of the EU (excluding the UK) would adopt the withdrawal agreement, having obtained the consent of the EP by a simple majority.⁵⁸ The EP would therefore have a right of veto over the withdrawal agreement, but not over withdrawal itself.⁵⁹

The Council (excluding the UK) would act by an enhanced majority under Article 238(3)(b) TFEU. This requires 72% of Council Members (i.e. 20 of the remaining 27 Member States) representing at least 65% of the total population of these States.⁶⁰

By the Member States

There is no mention in Article 50 TEU of ratification of the withdrawal agreement by Member States, but this might be necessary under international legal norms. Christophe Hillion speculated that “the silence of Article 50 TEU could indeed be read as precluding [Member States’] participation”. He suggested this might be to help its entry into force and avoid “disruptive effects” (which national ratification can cause, particularly if a referendum is held).⁶¹ This could be an argument for putting as much as possible into the Article 50 TEU agreement.

EU Treaty amendment would not be required for withdrawal, although as a matter of house-keeping, the remaining Member States would need to amend Article 52 TEU (application of EU Treaties), Article 355 TFEU (territorial scope) and the protocols and other provisions relating to the UK opt-out and opt-in arrangements. An amendment or protocol

⁵⁷ For instance, an agreement focused solely on trade would need to be approved by the European Parliament and a qualified majority of the Council. A full association agreement that provided for trade and wider co-operation would need to be agreed by the European Parliament and unanimously by the Council.

⁵⁸ Whereas the application of a new Member State requires the consent of the majority of the EP’s component members.

⁵⁹ The EP’s views could be taken into account at other times throughout the process: the [framework agreement](#) on relations between the Commission and the EP provides that the Commission keeps the EP informed, and the Commission undertakes to take due account of what the EP says.

⁶⁰ Whereas entry of a new Member State is decided by unanimity in the Council.

⁶¹ Christophe Hillion, “EU withdrawal law”, *The Oxford Handbook of European Union Law*, edited by Anthony Arnall, Damian Chalmers, 2015

might be needed to refer to any new UK status in relation to the EU.⁶² This would be made in accordance with Article 48 TEU and would be ratified by all Member States.

By the UK

In the UK the withdrawal agreement would probably follow the usual procedures for treaty ratification: it would be laid before Parliament with a Government Explanatory Memorandum for 21 sitting days and debated before it could be ratified.

In the view of one expert, although an Act of Parliament would be required to formally leave the EU and to repeal all or part of the ECA, “it may not be required for the purposes of Article 50(1)”.⁶³

If the future relations agreement is a mixed agreement, including elements of a free trade agreement between the EU Member States and the UK as a third state, it would need to be ratified by the UK and all EU Member States according to their constitutional requirements.

4.7 Transitional arrangements

Some take the view that Article 50 TEU provides for the negotiation of a withdrawal agreement only, taking into account the withdrawing State’s future relationship with the EU to the extent that it would regulate a transition period before an agreement on the future relationship entered into force. This would be necessary to avoid a hiatus between the State’s withdrawal and an agreement on the future relationship.

Professor Wyatt thought “Co-ordination between the withdrawal treaty on the one hand and the future relations treaty on the other would be important. The UK’s aim would be to have a smooth transition between the past in the EU and the future in the new arrangement”.⁶⁴

In 2003 the Convention Praesidium made clear that an “associate status” need not form part of a withdrawal agreement,⁶⁵ referring to what is now Article 8 TEU on the EU’s relationship with its neighbours. Outside the EU, the UK would remain a part of the EU’s immediate environment - as the Prime Minister acknowledged in his [Bloomberg speech](#) in January 2013.

4.8 Could the UK be prevented from leaving?

Some argue that the UK could be prevented from leaving the EU, but this is not the case.

While it is true that the other Member States could veto a withdrawal agreement, the UK could not be prevented from leaving the EU two years from notification. Under Article 50(2) TEU the withdrawing State

⁶² In the case of Greenland, Protocol (No 34) to the [TEU](#) on Special Arrangements for Greenland refer to the territory’s relationship with the EU. French Algeria became independent in 1962, but was not removed from the EU Treaties until later.

⁶³ Alisdair Gillespie, *The English Legal System*, 5th edition, 2015, p.608.

⁶⁴ Revised transcript of evidence, Lords EU Committee, 8 March 2016.

⁶⁵ Praesidium, [CONV 724/1/03, REV 1, VOLUME 1](#), 28 May 2003; [CONV 648/03, 2 April 2003](#).

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does not have an obligation to negotiate a withdrawal agreement, although the EU does.⁶⁶

A minority argue that a negotiated withdrawal is obligatory, implying that without one a State could not withdraw. Bartłomiej Kulpa thought this was implicit in the whole of Article 50 TEU, rather than in individual paragraphs:

It could also be suggested that according to the opening paragraph of the withdrawal clause a Member State has the unrestricted right to the withdrawal itself, ie without a waiting period. A serious weakness with this interpretation is that it is hard to translate this approach into reality. What is more, this construction might be challenged on the basis that Article 50 TEU ought to be interpreted in toto. Therefore, one has to concur with the opinion that analysis of all five paragraphs separately may lead to misleading conclusions.⁶⁷

But Article 50(3) TEU clearly provides that a State can withdraw from the EU; having no withdrawal agreement would not stop the UK from leaving the EU. The 2003 European Convention Praesidium commented, with regard to a similar provision in the European Constitution, that 'since many hold that the right of withdrawal exists even in the absence of an explicit provision to that effect, withdrawal of a Member State from the Union cannot be made conditional upon the conclusion of a withdrawal agreement'.⁶⁸

⁶⁶ See Tatham, "'Don't Mention Divorce at the Wedding, Darling!'" in EU Law After Lisbon (2012), p.152.

⁶⁷ EU Law Analysis, 19 January 2016, [Member States' Right to a Decision on Withdrawal from the EU: A Legal Analysis \(Article 50\(1\) TEU\)](#).

⁶⁸ Praesidium, [CONV 724/1/03, REV 1, VOLUME 1](#), 28 May 2003; [CONV 648/03, 2 April 2003](#).

5. Future relations with the EU

Summary

Many experts believe the future relationship between the UK and the EU would be contained in a separate agreement.

Leaving the EU would mean leaving the European Economic Area (EEA), but the UK could ask to rejoin the European Free Trade Association (EFTA) and the EEA. This could be negotiated separately but alongside the withdrawal agreement.

If the UK wanted to re-join the EU in the future, it would have to re-apply under Article 49 TEU

5.1 A separate agreement?

Many experts believe the detailed future relationship between the withdrawing State and the EU would be negotiated alongside the withdrawal agreement using the processes set out in the EU Treaties and put in a separate agreement, probably similar to an association agreement. Ideally, the two agreements would enter into force at the same time.⁶⁹

The withdrawal agreement, argued Professor Wyatt, could not “accommodate all the details of the future trading relationship”. He referred to the “shadow future relationship”, which could be “negotiated in parallel with the withdrawal agreement by analogy with the appropriate treaty base”. The procedure for negotiating a trade or association agreement is different from the Article 50 TEU procedure, involving unanimity in the Council rather than QMV, and requiring EP consent.

Professor Wyatt envisaged the timing as follows:

The withdrawal agreement would come into force (bringing about withdrawal) but would take effect a few days later. In those few days, the Council and Parliament would endorse the shadow agreement that had already been agreed in draft by reference to the appropriate treaty base: that is, with the appropriate majorities in the Council and the Parliament.⁷⁰

This “shadow agreement” could take some time to ratify, but provisional application could be made for certain parts of it until full ratification was complete.

Łazowski thought a withdrawal agreement could be a complex mixed agreement, accompanied by a Treaty amendment agreement and an EFTA/EEA accession agreement:

⁶⁹ Sir David Edward thought the [German translation](#) of Article 50 TEU⁶⁹ was different from the English translation and envisaged that “the structure of future relations will already have been established at the point when withdrawal takes place”, Revised transcript of evidence, [The Process of Leaving the European Union](#), 8 March 2016.

⁷⁰ Revised transcript of evidence, [The Process of Leaving the European Union](#), 8 March 2016.

Unless it is decided otherwise, a withdrawal treaty may have to be concluded as a mixed agreement, making the ratification procedure much longer and more complex as it will involve the member states. It has to be emphasised that a departing country will be treated as a third country during such negotiations. Moreover, unlike accession treaties, withdrawal agreements do not form part of EU primary law. Thus, unless a special formula is developed, they cannot amend the treaties on which the EU is based. This implies that alongside an international treaty regulating withdrawal, the remaining member states would have to negotiate between themselves a treaty amending the founding treaties in order to repeal all provisions touching upon the departing country. Further complexities may be added if a departing country chooses to make a rapid move from the EU to the European Economic Area (EEA) instead. That would necessitate a third treaty regulating the terms of accession to EFTA and a fourth to deal with the accession to the EEA. The latter would require the approval of the EU and its member states, the EEA-EFTA countries and the departing/joining country.

'Mixity' would depend on the content of the withdrawal agreement. If it is limited to withdrawal only and not future relations, it would not be a mixed agreement.

5.2 Would the UK stay in the EEA if it left the EU?

The European Economic Area (EEA) comprises all 28 EU Member States and three of the four European Free Trade Association (EFTA) States: Norway, Iceland and Liechtenstein. Membership is based on the [European Economic Area Agreement](#), which is a treaty between the EU Member States and the EFTA States.

If the UK left the EU, it would no longer be a member of the EEA. The UK would have to seek to re-join EFTA under Article 128 of the EEA Agreement and then apply to join the EEA. It's possible that this could be tackled in the course of withdrawal negotiations with a view to the UK acceding to EFTA and the EEA as soon as it had left the EU, but the move would not be automatic.

There is no precedent for a non-EU/non-EFTA state joining the EEA. EEA integration, either through EFTA membership or an association agreement directly with the EEA, has been discussed with reference to the microstates of Andorra, Monaco, and San Marino. In 2011 the EU conducted a review of EU relations with these microstates and published its results in November 2012, updated in 2013.⁷¹ The EEA was suggested as a possible framework for such integration, but the report concluded in section 5.4:

... given that the European Economic Area Agreement was concluded between two pre-existing trade and economic areas (the EU and EFTA), it would in principle be necessary for the small-sized countries first to become a member of either one in order to join the EEA.

⁷¹ See [COM\(2012\) 680 final/2](#).

However, there might not be much appetite to re-admit the UK, as Sir David Edwards pointed out in evidence to the Lords EU Committee:

Norway is a relatively small state. Iceland is a very small state. Liechtenstein is a mini-state. I am not sure that they would particularly welcome us in EFTA. It is often expressed that that is one of our choices, but I am not sure that it is.⁷²

5.3 Could the UK later re-join the EU?

Yes, but Article 50(5) TEU makes clear that a country which withdraws from the EU would have to re-apply under Article 49 TEU, following the usual application process for EU membership.

It is unlikely that if in the future the UK re-applied to be a member of the EU, it would gain membership with its current concessions, opt-outs and opt-in arrangements intact.

⁷² Revised transcript of evidence, Lords EU Committee, 8 March 2016.

6. Dealing with EU law the UK has implemented

Summary

The UK Government would have to decide whether to retain EU-derived UK laws, amend or repeal them. The starting point would be repeal of the European Communities Act 1972, with savings provisions.

UK primary or secondary law implementing EU law and directly effective EU law could continue if the Government wanted and/or to the extent practicable.

The devolved legislatures would have to deal with EU legislation they have transposed into Scottish, Welsh or Northern Irish laws. It would also be necessary to amend the relevant parts of the devolution legislation, which might require a Legislative Consent Motion under the Sewel Convention.

6.1 Political and legal questions

If the UK left the EU, the status of EU law that currently applies in the UK would come into focus. Withdrawal would not, as Phedon Nicolaidis emphasises: “entail either an obligation to remove all vestiges of EU law or that continued enforcement of transposed EU rules is necessarily contrary to the interests of the withdrawing country”.⁷³ The Government [Report](#) emphasised the need “to maintain a robust legal and regulatory framework where that had previously depended on EU laws”.

The Government would have to decide whether it wanted to keep any EU-derived law in UK domestic law, how such laws would remain in force, and how well-equipped the UK Courts would be to interpret continuing laws. Sir David Edward pointed to possible problems:

Under the current system of law, the courts are to interpret implementing legislation in light of the directive. If the directive no longer applies, you have to consider, “Do I have enough in the existing legislation for the courts to proceed without looking at the directive, or am I to instruct the courts to construe it in the light of the directive as if the directive applied?” There are many nitty-gritty legal complications; it is more than simply repealing the 1972 Act.⁷⁴

EU-derived UK law would not be subject to the jurisdiction of the European Commission or Court. Court of Justice interpretations made during the currency of UK membership would apply, but those made after withdrawal would be influential but not binding.

⁷³ Maastricht Journal, 2 (2013), Phedon Nicolaidis, [Withdrawal from the European Union: a typology of effects](#).

⁷⁴ Revised transcript of evidence, 8 March 2016.

Many analysts suggest the process of dealing with EU-derived laws could take years.⁷⁵ A European Law Monitor report estimated that the process would probably take “close to a decade” and would create uncertainty about the legal framework in which businesses and people were operating.⁷⁶

6.2 The European Communities Act 1972

Section 2(1) of the [European Communities Act 1972](#) (ECA) provides for directly applicable EU law – certain EU Treaty provisions and EU Regulations - to be “recognised and available in [UK] law,” and to be enforced, without further national implementation. They are also directly effective, which means they can be relied upon in UK courts.⁷⁷ With a repeal of the ECA 1972, on which their recognition depends, these would automatically no longer be valid in UK law. As a matter of politics the Government would need to decide (swiftly) whether to enact any such measures in UK law so that they continued to apply.

On the other hand, Section 2(2) ECA enables Ministers, by means of secondary legislation (Statutory Instruments) to implement EU Directives, which are not directly applicable. Any existing secondary legislation under that section would cease to have effect if the ECA were simply repealed.

A lot of EU law is implemented using other domestic law powers to adopt secondary legislation, and could continue to the extent practicable. The Extradition Act 2003, for example, gave effect to EU obligations under the European Arrest Warrant. Unamended, this Act could continue to provide a UK legal basis for extradition requests from EU Member States.

One option would be for the UK Act which repealed the ECA to include savings provisions, retaining selected secondary legislation which could then be amended or repealed as desired.⁷⁸

There have also been suggestions for amending rather than repealing the ECA. One is to amend Section 2(1) ECA to make what used to be directly applicable law part of UK domestic law on a temporary basis, and perhaps amend Section 2(2) to make clear that secondary legislation made under this Section up to withdrawal would remain in force temporarily, but other than as an “enforceable EU right”.⁷⁹

Another suggestion is to extend the current powers of Section 2(2) ECA to allow primary and secondary UK legislation which implemented EU obligations to be repealed or replaced after withdrawal by means of

⁷⁵ E.g. Professor Wyatt thought “It would take years for Government and Parliament properly to review the corpus of European law, jettison what was not wanted and keep what would be wanted—in my view, the majority”. Revised transcript of evidence to Lords EU Committee, 8 March 2016.

⁷⁶ European Law Monitor, [Brexit would cause legislative chaos](#), accessed 5 April 2016.

⁷⁷ See Eur-lex, [The direct effect of European law](#), for explanation.

⁷⁸ Repeals can be with or without savings, but a repeal with savings preserves the effect of the repealed statute for certain purposes.

⁷⁹ Peter Oldham QC, [The Legal Mechanics of Brexit](#), 1 March 2016.

secondary legislation under that Section. This would be a form of “Henry VIII clause”.

6.3 What would the devolved legislatures do?

Under the [Scotland Act 1998](#), the Government of Wales Act 2006 and the Northern Ireland Act 1998 the devolved legislatures are obliged not to legislate or act in a manner that is contrary to EU law. These Acts also provide concurrent powers (shared with the UK government) to observe, transpose and implement EU law.

Section 53 of the Scotland Act 1998 provides for the transfer to Scottish Ministers of the responsibility to observe and implement EU obligations in areas within the devolved legislative competence of the Scottish Parliament. When a Directive covers a devolved policy area the Scottish Government transposes it into Scots law. Under Section 80 of the [Government of Wales Act 2006](#) Welsh Ministers are generally responsible for the transposition of EU Directives in areas where legislative competence has been devolved to the National Assembly or where powers outside that competence have been transferred to them.⁸⁰

A report by the Scottish Parliament’s European and External Relations Committee, [EU reform and the EU referendum: implications for Scotland](#),⁸¹ looked at how, in the event of a UK withdrawal, the Scottish Government and Parliament might deal with EU laws they have implemented by secondary legislation under the authority of the Scotland Act. The Scottish Parliament would have to decide whether to retain, repeal or amend those laws, and the Report noted that this “could result in greater policy divergences between the constituent parts of the UK where currently EU law gives effect to a large degree of policy coherence”.

Section 29 of the Scotland Act 1998, which sets out the legislative competence of the Scottish Parliament, makes direct reference to EU law, so it would have to be amended. Similar changes would be needed in respect of Wales and Northern Ireland. There is a question mark over the use of the Sewel Convention, which gives effect to a UK Government commitment that “the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament”.⁸² The Report summarised the constitutional issues:

130. If the UK does leave the EU, and the European Communities Act 1972 is repealed, a question arises as to whether Westminster would seek the Scottish Parliament’s consent to amend the legislation on devolved matters, and, if it did, whether the Scottish Parliament would be willing to give that consent. In written evidence, Dr Mac Amlaigh recognised that, “It is a political convention which gives the legislative consent motion its bite such

⁸⁰ See Welsh Government, [European Law and Wales](#).

⁸¹ 19 March 2016, SP Paper 978, 2nd Report, 2016 (Session 4).

⁸² [Scotland Act 2016](#), amending Scotland Act 1998.

that any attempt by the Westminster parliament to act in breach of the convention would have significant political ramifications.”[123](#)[...]

132. In addition to the discussion on the constitutional implications of the legislative consent of the Scottish Parliament being sought, or not being sought, the evidence also referred to the question of whether the Scottish Parliament’s consent would be sought in relation to the repeal of the European Communities Act extending the legislative competence of the Scottish Parliament or the executive competence of the Scottish Ministers. Dr Mac Amhlaigh stated—

We are moving to a position in which it is generally accepted that modifying the powers—up or down—of the Parliament would require an LCM [[Legislative Consent Memorandum](#)]. One of the biggest restrictions on the Parliament is that it cannot legislate in violation of EU law. On those grounds, if the 1972 Act were to be repealed—if that encumbrance were removed so that EU law was no longer applicable—the powers of the Scottish Parliament would be massively expanded in the sense that it could freely legislate on matters of EU law that are within its competence. Other provisions would trigger an LCM, but that is probably the most obvious one.[125](#)

7. Further reading

Steve Peers Article 50 TEU: [The uses and abuses of the process of withdrawing from the EU](#), EU Law Analysis, 8 December 2014

Bartłomiej Kulpa, [Member States' Right to a Decision on Withdrawal from the EU: A Legal Analysis \(Article 50\(1\) TEU\)](#), EU Law Analysis, 19 January 2016

Dr Alan Renwick, [Does the Prime Minister have to trigger Brexit talks under Article 50 after a vote to leave the EU?](#), The Constitution Unit, 23 February 2016

Dr Alan Renwick, [What happens if we vote for Brexit?](#) The Constitution Unit, 19 January 2016.

Eva-Maria Poptcheva, [Article 50 TEU: Withdrawal of a Member State from the EU](#), European Parliamentary Research Service Briefing, February 2016

Adam Łazowski, [Withdrawal from the European Union and alternatives to membership](#), European Law Review, 2012

European Law Monitor, [Brexit would cause legislative chaos](#)

Ben Clements, [Britain outside the European Union](#), Institute of Economic Affairs Brexit prize finalist, 2014

Public Law for Everyone, [Brexit | Legally and constitutionally, what now?](#) Mark Elliott, 24 June 2016

UK Constitutional Law Association, [Pulling the Article 50 'Trigger': Parliament's Indispensable Role](#), Nick Barber, Tom Hickman and Jeff King, 27 June 2016

UK Constitutional Law Association, [Brexit, the Referendum and the UK Parliament: Some Questions about Sovereignty](#), Sionaidh Douglas-Scott, 28 June 2016

House of Lords, European Union Committee, 11th Report of Session 2015–16, HL Paper 138, [The process of withdrawing from the European Union](#), 4 May 2016

Cm 9216, [The process for withdrawing from the European Union](#), February 2016

The Constitution Unit, [The road to Brexit: 16 things you need to know about what will happen if we vote to leave the EU](#), Alan Renwick, 20 June 2016

The Constitution Society, [Brexit: The Immediate Legal Consequences](#), Richard Gordon QC and Rowena Moffatt, May 2016

Global Government Forum, 30 June 2016, A guide to Brexit, [Part 1](#): how Britain voted to leave the EU; [Part II](#): What's the process for negotiating a British exit from the EU? [Part III](#): Who'll run the negotiations?

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