

# Client Update

## Brexit: So What Happens Next?

### LONDON

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While nothing has changed in terms of the UK's relationship with the EU since last week's historic referendum, businesses are beginning to look at how the legal and political landscape will change post Brexit, and when and how the UK will begin the process of withdrawing from the EU.

The stated process for withdrawing from the EU is set out at Article 50 of the Treaty on European Union. However, the precise mechanics of Article 50 are rather vague and leave much unsaid. This has led to much uncertainty as to how, exactly, the UK will start the process of terminating its membership of the EU, and whether the UK will start its withdrawal discussion with the EU even before Article 50 is formally invoked.

In response to the questions we have received relating to the withdrawal process, we outline the legal and political aspects to the UK's withdrawal under Article 50, and also look briefly at whether any legal challenge may be possible to prevent the withdrawal process.

### IS THE REFERENDUM LEGALLY BINDING?

The result of the referendum is advisory only and not legally binding; the Government could simply decide to ignore the result. However, this course of action seems highly unlikely. The Government has indicated on numerous occasions that a 'leave' vote would mark the beginning of the process by which the UK would leave the EU and at present there appears to be limited political appetite to depart from this position.

### WHAT IS ARTICLE 50?

As noted above, Article 50 sets out the process by which a Member State may withdraw from the EU. Under Article 50:

- Should a Member State decide to leave the EU, it must do so “in accordance with its own constitutional requirements.” As the UK is one of only two countries in the world without a written constitution, there is room for interpretation as to exactly what steps are required to reach that decision. This has led to a wide-ranging debate as to whether an Act of Parliament is required before the Article 50 notification can be given (discussed further below) or whether the Government can give notice without one.
- A Member State that wishes to leave the EU must notify the European Council of its intention to leave. No details are given in Article 50 as to the form this notification should take, but it appears that this notification can be made orally or in writing.
- Once an Article 50 notification has been given, that Member State and the EU must begin negotiating the terms of the withdrawal. Any withdrawal agreement requires the consent of the European Parliament voting by simple majority followed by the approval of a qualified majority of the European Council.
- The negotiations for withdrawal should take account of the “future framework for its future relationship with the Union.” It is not altogether clear whether this means that the withdrawal agreement should include details of the future relationship between the withdrawing member and the EU or whether this would be done in two separate agreements.

### HOW LONG WILL THIS NEGOTIATION PROCESS TAKE?

Article 50 provides that all treaties of the EU “cease to apply” to the withdrawing State from the date of entry into force of the withdrawal treaty, or in the absence of an agreement, two years after the date the Article 50 notice is provided. This two-year period can be extended, but this requires the unanimous consent of the European Council – effectively the agreement of all the remaining 27 Member States. It is important to note that the UK continues to be a member of the EU, and must continue to comply with its EU Treaty obligations, until the end of this period.

### WHEN WILL THE UK MAKE AN ARTICLE 50 NOTIFICATION?

The short answer to this question is that no-one knows. The timing of an Article 50 notification is at this point a political, rather than legal question.

Legally, there is no requirement that the Article 50 notification be made within a particular timeframe. EU leaders have put significant pressure on the UK this week to make the notification as soon as possible. Legally, however, there is no

mechanism for the EU to force the UK to make such a notification or to dictate when such notification should be made.

Before the referendum, Prime Minister David Cameron said that in the event of a leave vote, the Article 50 process would be started straight away. However, following the referendum and David Cameron's resignation as Prime Minister, the Government appears to have done something of a u-turn on this point. David Cameron has now stated that it is for his successor to decide when to trigger the Article 50 notification.

As the new Prime Minister will not be in office until early September, it appears that the Article 50 notification will not be made until then at the very earliest. Indeed Theresa May (who is currently one of the leading candidates to replace David Cameron as Prime Minister) has stated that Article 50 should not be invoked before the end of the year.

### **CAN THE UK START NEGOTIATING ITS WITHDRAWAL BEFORE IT MAKES AN ARTICLE 50 NOTIFICATION?**

Legally, there is nothing to prevent the UK commencing negotiations over the terms of its withdrawal and any future relationship before it triggers the Article 50 notification. Indeed, it is unlikely to be in the UK's interest to start the Article 50 process too soon because once the UK triggers the Article 50 notification, it has only two years to negotiate a deal with the EU. If no deal is reached in two years, the UK's membership of the EU will automatically cease, and the UK will be at a significant disadvantage if it has not secured at least agreement on the outline of a trade deal by the end of this period. This puts significant pressure on the UK to agree a deal within the two-year period.

However, the European Commission and the remaining 27 Members of the European Council have stated that no negotiation with the UK will take place until the Article 50 notification is given at the earliest, or possibly not until after the UK has left the EU. This means that for now, there is something of a stand-off and it is not clear who will be the first to yield.

### **IS AN ACT OF PARLIAMENT REQUIRED BEFORE AN ARTICLE 50 NOTIFICATION IS MADE?**

The answer to this question has led to significant debate amongst constitutional law experts. Under UK law, the power to conduct foreign affairs and to enter into, and withdraw from treaties is exercised by the Government pursuant to the royal prerogative (special rights and powers vested in the Crown at common law). The traditional view is that powers exercised under the royal prerogative do not need

to be approved by Parliament. The Government's position before the referendum was that it has authority to trigger the Article 50 notification without Parliament's consent.

However, since then, some constitutional law experts have argued that an Act of Parliament would be required before an Article 50 notification can be made. They point to the fact that the royal prerogative cannot be exercised in a manner which conflicts with the intention of Parliament. The argument is that triggering the Article 50 notification would be inconsistent with the European Communities Act 1972 (which sets out the terms of the UK's membership with the EU), because it commits the UK to withdrawing from the EU.

However, the Government may nonetheless decide to consult Parliament before making an Article 50 notification, and therefore, irrespective of whether it is strictly necessary to consult Parliament from a legal perspective, politically it may nonetheless be unavoidable.

#### **CAN A LEGAL CHALLENGE BE BROUGHT AGAINST THE GOVERNMENT IF IT ISSUES A NOTIFICATION WITHOUT CONSULTING PARLIAMENT?**

If Article 50 is triggered without Parliamentary consent questions may arise as to whether it would be possible to challenge the decision in the English courts by way of judicial review or by seeking a declaration from the English courts as to the legality of the Article 50 notification. These remain matters that need to be determined.

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Please do not hesitate to contact us with any questions.