



BREXIT: LEGISLATION PASSED ALLOWING THE UK TO GIVE NOTICE UNDER ARTICLE 50

The European Union (Notification of Withdrawal) Act 2017 gives the UK Government the authority the Supreme Court decided it required in order to notify the European Council under article 50 of the Treaty on European Union of the UK's intention to leave the EU. The Government can therefore deliver the UK's withdrawal notice by its self-imposed deadline of the end of March 2017. The UK will then leave the EU on the entry into force of a withdrawal agreement between the UK and the EU or, failing that, in late March 2019.

Delivery of the UK's article 50 notice later this month will end a domestic saga and start an international process. Behind the brevity of the legislation and the likely simplicity of the UK's article 50 notice, there is a myriad of complex issues between the UK and the EU that should, ideally, be resolved before departure. Although it is two years before probable departure, in reality the period in which to reach agreement is shorter. Before negotiations can begin, the European Council must set negotiating guidelines for the EU's main negotiator, the European Commission. Political events in Europe (eg French and German elections) and in the UK (eg a Scottish independence referendum) may distract from serious negotiation. At the end of the process, the European Parliament must consent to any agreement, and the UK Government has also pledged to allow the UK Parliament a say. There is even a possibility of the Court of Justice of the European Union being involved. In the light of all this, the period for negotiation may, in reality, be not much more than 15 months.

Important issues and points about the period leading to departure include:

- The two year period ending in late March 2019 can be extended by unanimous agreement between the UK and all the EU's member states. Even if the UK were to seek an extension, unanimity cannot be assured.
- It remains unclear whether the UK can unilaterally withdraw its article 50 notice (though the UK Government has said that it will not do so).
- It is open to question whether a withdrawal agreement can itself postpone the departure date beyond March 2019. In any event, postponement may be politically problematic on both sides of the Channel. As a working assumption, late March 2019 looks like the UK's probable departure date.
- A withdrawal agreement between the UK and the EU is distinct from an agreement governing the trading and other relations between the UK and the EU after the UK's departure. The withdrawal agreement is covered by article 50, while any agreement on future relations falls under article 207 of the Treaty on the Functioning of the European Union for the trade aspects and other treaty provisions for the non-trade aspects. The procedures for these different agreements are not the same.
- What can properly be included in a withdrawal agreement remains uncertain. For example, can a withdrawal agreement address anything more than the most basic consequences of withdrawal, such as the continuing residence rights of EU citizens in the UK and vice versa and

KEY ISSUES

- As a working assumption, late March 2019 looks the likely time for the UK's departure from the EU
- The period for negotiation will in practice be less than two years
- There is much that must be negotiated in this limited time
- Success in the negotiations will require goodwill on all sides

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payments (if any) owed by the UK for accrued obligations to the EU or by the EU for the UK's share of its assets (see *Brexit: will the UK have to pay to leave the EU?*)?

- Any agreement between the UK and the EU on their future relations will probably be a "mixed agreement", ie an agreement that does not fall within the exclusive competence of the EU. This means that, in addition to ratification by the UK and the EU, each member state must also ratify the agreement in accordance with its constitutional requirements. This commonly takes a period of years after the agreement has been signed, and gives a veto to each member state - and, in some instances, to regional assemblies within a member state (eg the recent example of Wallonia regarding the Canadian treaty).
- The sequencing of discussions may be critical, especially given the limited time. The UK would like all strands to proceed in parallel, while the Commission has indicated that it will prioritise the withdrawal agreement, including residence rights and payments due on withdrawal, which may prove controversial topics.
- Many have argued that, for legal and practical reasons, it will be difficult for the EU and the UK formally to conclude an agreement on the terms of withdrawal and on future relations within the abbreviated two year period. If there is no agreement on future relations by the time of departure, transitional arrangements may be needed in order to avoid a "cliff edge". But transitional arrangements may prove just as difficult to agree as final arrangements, and will raise challenging legal and political issues (for example, if EU rules continue to apply to the UK for a period, must the UK accept the jurisdiction of the CJEU?).
- It may look easier for the EU and the UK to reach agreement on future relations on a sector by sector basis. However, this is probably not feasible. The WTO's overriding "most favoured nation" requirement (ie a trading concession given to one country must be given to all) allows an exception for comprehensive agreements freeing trade in goods and services. Anything less than an agreement on substantially all areas opens the risk of being obliged to offer the same terms to the rest of the world. Further, the EU may view a sector by sector approach as an attempt by the UK to cherry pick the EU policies it likes, an approach the EU has consistently rejected.
- While the prime focus has been on arrangements between the UK and the EU, the UK must also address its future relations with third countries, particularly where those relations are currently conducted under agreements between the relevant country and the EU (eg EEA member states, South Korea and Switzerland). It would be damaging if British exports were left sitting on the dockside while local officials worked out what, if any, tariffs were applicable and whether they had requisite standards certifications.
- The likely outcome of negotiations may not be clear until near the end of the process. Firms will have to decide whether to continue to wait and see or to act now – or, at least, soon. (See *The future of trade for the UK: A guide for business.*)

Difficulty is not the same as impossibility. But the next two years, and probably longer, will require intensely hard work and, more importantly, an almost inexhaustible supply of goodwill on all sides.

CONTACTS

Simon James, Partner
Chris Bates, Partner
Kate Gibbons, Partner
Jessica Gladstone, Partner
Simon Gleeson, Partner
Dan Neidle, Partner
Mark Poulton, Partner
Phillip Souta, Head of UK Public Policy
Malcolm Sweeting, Senior Partner

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Clifford Chance, 10 Upper Bank Street, London, E14 5JJ

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