



## ERG: How to leave the European Union

- EU law is only given force in the UK as a result of domestic legislation
- Article 50 is not the only way leave the EU in international law
- Domestic legislation could be started prior to the UK leaving the EU

### Domestic and international aspects of EU membership

The UK is a 'dualist' state in that international law only has force in the UK as a result of domestic legislation. With the European Union, the UK's international obligations have force in the UK as a result of the European Communities Act 1972.<sup>1</sup> In domestic terms the UK could leave the European Union by repealing the Act and transferring any EU laws it wished into domestic legislation.

However, the UK is signed up to the EU treaties and as a matter of international law would wish to seek a way to withdraw from these treaties. Under the EU Treaties Article 50 is the specific 'exit article'. However international law is also guided by the Vienna Convention on the law of treaties 1969.

Looked at from the EU's point of view, if the UK does not leave the EU according to its own rules its European Court and administration would continue to treat the UK as a member, granting rights to UK companies and citizens. As it is difficult for the EU27 states to amend their treaties to exclude the UK it is highly advantageous for both sides to come to an agreement.

### Using Article 50

Article 50 of the Treaty on European Union, the EU's exit clause, was inserted into the EU treaties at the time of the Lisbon Treaty. Under Article 50, the UK would have to negotiate its terms of exit with the European Commission, based on guidelines set out by the EU27. The parameters of the negotiation would be:

*"arrangements for its withdrawal taking account of the framework for its future relationship with the Union"*

If an agreement is forthcoming it would then be agreed by Qualified Majority Voting (QMV) in the European Council. As EU trade agreements that include shared EU competences, which are the majority of them, require unanimity using Article 50 alone would probably limit agreement to a basic limited trade agreement.<sup>2</sup> Article 50 may have been intended for a limited aim of agreeing issues such as the UK's remaining budget contribution and the other technical aspects of the UK's withdrawal from the EU administration.

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<sup>1</sup> 1972 Act; <http://www.legislation.gov.uk/ukpga/1972/68/contents>

<sup>2</sup> <http://www.consilium.europa.eu/en/council-eu/international-agreements/>

If no such agreement is forthcoming the UK would no longer be legally bound by the EU after a period of two years.

The problems with using Article 50 as the mechanism for leaving the EU are well rehearsed. It artificially places the initiative in the hands of the European Commission and the EU27, it imposes a rigid two year cut off period and is unclear as to what can be agreed. Using this method of leaving the EU is unlikely to produce the best outcome for the UK.

### **Alternatives to using Article 50**

#### **– Negotiate without triggering the Article**

Instead of triggering Article 50 the UK could negotiate with the EU27 and the Commission prior to (or instead of) using the Article 50. This negotiation could be conducted, while remaining an EU member, on a number of levels: bilaterally with key states, with the Commission. Article 50, if needed at all, could then be triggered once all the details of the UK's new relationship had been conformed.

#### **– Use the Vienna Convention's clauses on Treaty termination**

If the EU27 and Commission are unwilling or refuse to negotiate outside of the confines of Article 50 the UK could seek to leave the EU in a number of other ways as set out in the Vienna Convention of the Law of Treaties 1969.

Firstly the UK could argue under Article 56 that the EU Treaties do not provide for a usable termination clause and thus under international law the UK is entitled to withdraw (See Annex).

Secondly the UK could argue that the referendum has created a "Fundamental Change in Circumstances" and as such has invalidated the EU Treaties as they apply to the UK. This is contained in Article 62 of the Vienna Convention and has been recognised at the International Court of Justice.<sup>3</sup>

### **UK Domestic legislation**

In addition to the external negotiation of the UK's exit the UK will have to adapt its internal legislation to take account of the repeal of EU membership.

#### **- A 'European Union (UK Withdrawal from Membership) Bill'**

EU law has legal force within the UK as a result of the European Communities Act 1972. If this were repealed the UK would as a matter of domestic law no longer be an EU member.

The repeal of the 1972 Act would require domestic legislation to achieve a number of aims:

1. To repeal the Act and end the primacy of EU law.
2. To convert existing EU laws into domestic EU legislation
3. To regularise the position of EU Citizens currently in the UK
4. Ratify a new EU agreement if needed

The passage of the European Union (UK Withdrawal from Membership) Bill through Parliament could be completed before the UK actually leaves the EU if the provisions of the

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<sup>3</sup> ICJ, FISHERIES JURISDICTION CASE (UNITED KINGDOM v. ICELAND) (JURISDICTION OF THE COURT) Judgment of 2 February 1973; <http://www.icj-cij.org/docket/index.php?sum=302&p1=3&p2=3&case=55&p3=5>

Act allow for it to come into force on a date specified by the Minister. It could in addition also specify a 'drop dead' date a number of years after the start of negotiations. The timing of the various parts would need to be staggered.

Once enacted all existing EU law could then be either left intact or gradually amended or repealed as Parliament chooses.

## UK Legislation

As well as repealing the European Communities Act 1972 domestic UK legislation would need to address a number of issues, the effect of EU legislation in the UK, the primacy of new EU law, the transfer of funds to the EU and the position of EU citizens already in the UK.

Provision	Date of coming into force
Conversion of EU law into domestic legislation	Immediate
Ending of primacy of new EU law	On ministerial approval, but no later than two years after beginning of negotiations
Own resources decision	Immediate
EU Citizens rights embedded into UK law	On ministerial approval

For a draft please see Annex B<sup>4</sup>

### - Legislation for a new Free Trade Agreement

Legislation to end the 1972 Act is likely to be separate to any legislation that may be required to enact any continuity trade agreement with the EU. This new legislation is unlikely to require amendment of the European Union Act 2011 (the Referendum lock) as it would not be ratifying an EU treaty.

Legislation may also be required to convert the EU's existing 3<sup>rd</sup> party trade agreements into UK law, assuming the counter-parties were amenable.

### Timeline: A Bill to revoke the European Communities 1972 Act

	Talks on Administrative and budget issues	UK Legislation	EU Trade Agreement
June 23 2016		European Union (UK Withdrawal from Membership)	
2016	Final EU Budget Contribution agreed	Passage of Bill through Parliament	Negotiation on a new EU/UK relationship
		Existing EU Law moved into UK domestic law	
2018	Final EU Budget contribution paid	Final provisions come into force	A modern free trade agreement

<sup>4</sup> Based on a version suggested by Sir Bill Cash MP.

## ANNEX A

### Full Text of Article 50 (TEU) (emphasis added):

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.<sup>5</sup>

### Vienna Convention on the law of treaties (with annex). Concluded at Vienna on 23 May 1969

Article 56. DENUNCIATION OF OR WITHDRAWAL FROM A TREATY CONTAINING NO PROVISION REGARDING TERMINATION, DENUNCIATION OR WITHDRAWAL

1. A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless:
  - (a) It is established that the parties intended to admit the possibility of denunciation or withdrawal; or
  - (b) A right of denunciation or withdrawal may be implied by the nature of the treaty.
2. A party shall give not less than twelve months' notice of its intention to denounce or withdraw from a treaty under paragraph 1.<sup>6</sup>

### Fundamental Change of Circumstance: "*clausula rebus sic stantibus*"

<sup>5</sup> EU Treaties; [http://europa.eu/pol/pdf/consolidated-treaties\\_en.pdf](http://europa.eu/pol/pdf/consolidated-treaties_en.pdf)

<sup>6</sup> Vienna Convention on the Law of Treaties 1969:

<https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf>

**Vienna Convention on the law of treaties (with annex).  
Concluded at Vienna on 23 May 1969**

Article 62. FUNDAMENTAL CHANGE OF CIRCUMSTANCES

1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:

- (a) The existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and
- (b) The effect of the change is radically to transform the extent of obligations still to be performed under the treaty.

2. A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty:

- (a) If the treaty establishes a boundary; or
- (b) If the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

3. If, under the foregoing paragraphs, a party may invoke a fundamental change of circumstances as a ground for terminating or withdrawing from a treaty it may also invoke the change as a ground for suspending the operation of the treaty.

## **ANNEX B**

Draft

### **European Union (UK Withdrawal from Membership)**

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Make provision to effect the withdrawal of the United Kingdom from membership of the European Union; to repeal the European Communities Act 1972; and to make provision for the Secretary of State to repeal or amend any enactment which has been a consequence of the European Communities Act 1972.

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

#### **1. Withdrawal from membership of the European Union**

The United Kingdom shall cease its membership of the European Union.

## **2. Repeal of the European Communities Act**

- (1) The European Communities Act 1972 is repealed.
- (2) Secondary legislation made under that Act shall continue in force unless and until subsequently amended or repealed, and any such amendment or repeal may be made by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament.
- (3) Any European Union legislation which, in accordance with the Treaties, is directly applicable at the date upon which this Act comes into force shall continue in force as a measure under the authority of the sovereign Parliament of the United Kingdom unless and until subsequently amended or repealed, and any such amendment or repeal may be made by order made by statutory instrument.
- (4) No order may be made under subsection (3) unless a draft of the order has been laid before and approved by a resolution of each House of Parliament.
- (5) Any statutory instruments made under this section or section 3 may deal with matters which are within the legislative competence of the Scottish Parliament, the National Assembly for Wales or the Northern Ireland Assembly.

## **3. End of automatic financial transfers to the European Union**

Section 2 (3) of the European Communities Act 1972 is repealed.

## **4. Consequential provisions**

- (1) The Secretary of State may by order made by statutory instrument amend or repeal any Act or measure which becomes ineffective, is rendered obsolete or is otherwise adversely affected by virtue of the repeal in section 2.
- (2) The Secretary of State may by order made by statutory instrument repeal or amend any Act or measure in consequence of any change to EU law adopted after the coming into force of this Act or any judgment of the Court of Justice delivered after the coming into force of this Act.
- (3) No order may be made under subsection (1) or (2) unless a draft of the order has been laid before and approved by a resolution of each House of Parliament.

## **5. European Union Citizens**

All European Union Citizens resident in the United Kingdom on xxxx 2016 having been resident and working in the United Kingdom for more than one year, or a dependent of a resident and working in the United Kingdom for more than one year, will be granted leave to remain and work in the United Kingdom for five years, renewable at that time.

## **6. Treaties**

The Secretary of State must immediately after this Act comes into force, put in place measures to commence the withdrawal from or denunciation of the Treaties defined as such under section 1 of the European Communities Act 1972.

## **6. Extent, commencement and short title**

- (1) This Act extends to England and Wales, Scotland and Northern Ireland.
- (2) Sections 3 will come into force on 1 May 2019 or on such earlier day as the Secretary of State may appoint by order made by statutory instrument.
- (3) Section 4 will come into force on Royal Ascent
- (4) Section 5 will come into force on such earlier day as the Secretary of State may appoint by order made by statutory instrument
- (5) This Act may be cited as the European Union (UK Withdrawal from Membership) Act 2016.