

## BREXIT: LEGAL AND CONSTITUTIONAL IMPLICATIONS

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When we hear about Brexit, one of the most heard (and abused) expressions is: “in the old days we knew where we were, nowadays we are where we are”. Perhaps it may be useful to examine how we got where we are.

**“We wouldn’t have had a referendum at all had it not been for the Conservative Party – and had not been for David Cameron” \***

During the 2015 general election campaign, David Cameron, then leader of the Conservative Party and Prime Minister, included in his manifesto commitment that he and the Conservative Party would introduce legislation for a referendum on the UK’s membership of the European Union. Cameron and the Conservative Party won the general election and Cameron was appointed for the second consecutive term in sequence as Prime Minister.

The planned referendum was included in the Queen's Speech on 27 May 2015. The European Union Referendum Bill 2015, which authorised it, went before the House of Commons just three weeks after the election. The Scottish National Party voted against it. In contrast to the Labour Party's position prior to the 2015 general election under Miliband, acting Labour leader Harriet Harman committed her party to support a EU referendum by 2017.

To enable the referendum to finally take place, the European Union Referendum Act 2015 was voted and passed by Parliament in Westminster and received Royal Assent on 17 December 2015.

The question that appeared on ballot papers in the referendum before the electorate under the act were:

*Should the United Kingdom remain a member of the European Union or leave the European Union?*

with the responses to the question being (to be marked with a single (X)):

*Remain a member of the European Union*     

*Leave the European Union*

The referendum was held on Thursday 23 June 2016. Leave won by 52% to 48%. The referendum turnout was 71.8%, with more than 30 million people voting.

England voted strongly for Brexit as did Wales. Scotland and Northern Ireland both backed remaining in the EU. Scotland backed Remain by 62% to 38%, while 55.8% in Northern Ireland voted Remain and 44.2% Leave.

Shortly after the referendum, David Cameron (a Remain campaigner) resigned from his office and Theresa May was appointed as Prime Minister in his place.

**“There is no opt-out from Brexit”\***

From a strictly legal point of view, the referendum did not repeal or abolish any existing legislation. It has only firmly advisory value under the EU Referendum Act 2015. Therefore, although politically the Government is taking into account the results of the referendum, the legal position grants the Government the freedom to ignore them.

Theresa May in relation to the EU referendum was also part of the “Remain” camp. The political agenda of Theresa May shortly after her appointment became: “Brexit means Brexit”.

**“Brexit means Brexit”\***

Theresa May has set up a new government department, to be headed by David Davis, a Leave campaigner, to take responsibility for Brexit. Liam Fox, who also campaigned to leave the EU, has been given the job of international trade secretary and Boris Johnson, who led the Leave campaign, is foreign secretary.

The “Three Brexiteers” have been empowered to conduct negotiations with the EU and seek out new international agreements, with Theresa May having the final say. It is now clear that the government had not carried out any emergency planning for Brexit ahead of the referendum to assist in the negotiations of the withdrawal from the EU and to assess the best possible outcome that Britain could negotiate.

**“We will invoke Article 50 no later than the end of March next year”\***

The process of severance from the EU will only start when a formal notice is given by the Prime Minister to the European Council in accordance with art. 50 of the Treaty on the Functioning of European Union (TFEU also known as the Lisbon Treaty) (“Notice”).

Once the Notice is given, the clock will start ticking and a maximum period of two years (“Notice Period”) will run during which the UK will remain a Member State and will have to negotiate the terms of a withdrawal agreement with the European Union.

Once the Notice is given it cannot be withdrawn (there is no provision to this effect in art. 50 TFEU). Should the United Kingdom wish to change its mind, it needs to make a fresh application (pursuant to art. 49 TFEU) as any other applicant State wishing to join the EU.

Once the Notice is given the United Kingdom will remain full member of the EU during the course of the withdrawal negotiations – albeit its credibility as a member will be severely undermined - and it will no longer be a Member State of the EU in the following circumstances:

- (a) before the expiry of the Notice Period, if the withdrawal agreement has been entered into;
- (b) on the expiry of Notice Period (and the TFEU will cease to apply to it even if the terms of the withdrawal agreement have not yet been agreed); or
- (c) after the expiry of the Notice Period, if there is consent of the United Kingdom and unanimous vote the remaining 27 Member States accepting an extension of the Notice Period).

For the withdrawal agreement to be finalised, the draft has to be approved first by the European Parliament by simple majority vote and second by the European Council by qualified majority vote or unanimity depending on the nature of the provisions in the agreement.

Any withdrawal agreement reached by the Government will then necessarily have to be ratified by Parliament by legislation in order to be recognised and enforced in the domestic system of laws in force in the UK.

**“It is not for the House of Commons to invoke Article 50 and it is Government alone”\***

Article 50 (1) of the TFEU states:

“Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements” [emphasis added].

In the United Kingdom, there is no written constitution which serves as a basis of the country's legal system. The source of constitutional law is the legislation made by the Parliament, the judicial precedent (also known as common law) and constitutional conventions.

A domestic constitutional conflict has now arisen between Government and Parliament.

The Government's position expressed in the statement above is that, following the referendum, the Government has taken a decision to leave the European Union and the Government has the power and the authority using the royal prerogative to notify the European Council of that decision without seeking prior authorisation from Parliament; in other words, the Government enjoys complete discretion about as to serve the Notice.

For clarity, the royal prerogative is a collection of executive powers held by the Crown, since the Middle-Ages, and by the Government to enable them to perform their constitutional functions. Such powers are not set out in statute or written legislation.

Parliament has instead expressed the view that the Government should not trigger Article 50 without consulting Parliament and that it is constitutionally appropriate that Parliament should make the decision to act following the referendum. The Selected Committee on Constitution of the House of Lords expressly stated: *“Parliament should play a central role in the decision to trigger the Article 50 process, in the subsequent negotiation process, and in approving or otherwise the final terms under which the UK leaves the EU”*.

Proceedings for judicial review have been brought in the High Court of Justice in London before The Lord Chief Justice, The Master of the Rolls and Lord Justice Sales in order to obtain a declaration from the Court on whether, under UK constitutional laws, the Government can lawfully use prerogative powers to give notification to the EU under art. 50 of the Lisbon Treaty without the Parliament's formal authorisation. The argument before the Court is that only Parliament has the power to invoke art. 50.

A judgment is expected in the following weeks and it is certain that the matter will be “leapfrogged” to the Supreme Court for a final decision in the event of an appeal.

A similar action in respect of the Brexit process was commenced in Northern Ireland in the High Court of Belfast and judgment has been reserved.

**“Let’s get this plan for Brexit right”\***

The negotiating process is certainly not straightforward and it is enormously complex. Any negotiation will have to be based on three fundamental issues: single market for goods and services, immigration and undertakings made by the UK to contribute to European budgets, which has been estimated in the region of €20 billion. The outcome will determine a “hard Brexit” or a “soft Brexit” in consideration of the level of agreement (or disagreement) reached with the EU.

The Government has suggested repealing the European Communities Act 1972 (which currently implements the rights and duties of the EU treaties into UK domestic law) with the Great Repeal Bill which would convert all existing EU law (estimated in the number of 12,295 regulations) into national law with one statute and perhaps with no proper debate in the House of Commons. It is suggested, however, that this will be insufficient.

Brexit has not been started yet and we are still a long way from it. It will only commence with the triggering of Art. 50 of the Lisbon Treaty and at moment we can only wait and see who will eventually decide on its exercise – Parliament or Government.

\* The headings of this article are extracts from Theresa May’s speech to the Conservative Party conference on 2<sup>nd</sup> October 2016.

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