LEAVE ALLIANCE

Brexit Monograph 4

Article 50 and Brexit negotiations

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(corrected1)

Introduction
Under normal circumstances, there should be no doubt whatsoever that the use of Article 50 of the Treaty of the European Union (TEU) is the only means by which the UK could or should seek an exit from the European Union.

This, according to a Government White Paper, is the only lawful route available to withdraw from the EU.[1] Furthermore, that view has been endorsed by two eminent lawyers, Sir David Edward and Professor Derrick Wyatt, who agree that Article 50 "would be the only exit route legally available".[2]

Doubtless, it the search was widened, numerous additional authorities could be found further to confirm the legal status of Article 50. Yet, despite this, some commentators are still suggesting that Article 50 could be by-passed or ignored altogether.[3]

Some say that the UK should rely on the Vienna Convention of the Law of Treaties (VCLT), specifically Articles 65-68 which deal with the ending of treaties.[4] By this means, it is held, the restrictive provisions of the EU formal

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[1] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/504216/The_process_for_withdrawing_from_the_EU_print_ready.pdf
[2] http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/european-union-committee/the-process-of-leaving-the-eu/oral/30396.pdf
[3] https://next.ft.com/content/f7764e16-5635-11e6-9f70-badea1b336d4
[4] For the official text, see: https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf, accessed 13 April 2014.

negotiations can be by-passed and the UK could dictate the terms and conduct of the proceedings. Others argue that Parliamentary sovereignty should be asserted, and the European Communities Act repealed, effectively bringing UK membership of the EU to an end within months.[5]

In this Monograph, therefore, we provide the evidence as to why there is no choice about invoking Article 50. We then look at the parallel issue of when the Article should be triggered, with special reference to the two-year time period initially set. Finally, we explore the question of whether, once invoked, the Article can be withdrawn.

Why Article 50 is not optional

Firstly, the important point to note is the nature of Article 50. Although it is asserted by some that it confers upon a Member State the right to leave the EU, that right lies outside the EU Treaties. The Treaties neither confer the right to leave or impose any conditions which might affect the decision.

Article 50(1) of the Treaty of the European Union (TEU) actually states: "Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements". This is to an extent ambiguous. It could be considered permissive, or a statement that recognises the state of the art.

In fact, it is self evident that abrogation of a treaty is the act of a sovereign nation, exercised as of right. While there is extensive literature on this subject, with widely varying views as to the exact application of international law, it should be appreciated that politics, not the law, is the dominant factor in treaty negotiations. In that context, the decision to leave is a political act, made by politicians. It is not a legal decision drafted by lawyers.

One thus calls to mind de Gaulle's famous remark that: "treaties are like maidens and roses, they each have their day".[6] In the early days of the negotiations on British entry, de Gaulle was quite prepared to abrogate the Treaty of Rome in order vary the deal on offer. Then, when France first rejected the UK application, the remaining "Five" were prepared to consider abandoning the Treaty in favour of an agreement with the UK, without involving France.

In a paper produced by the European Central Bank (written in the context of a euro member seeking to leave the common currency), it stated that "the assertion of an implied right of unilateral withdrawal from the treaties, even in exceptional circumstances, would be highly controversial", but then went on to concede a right to leave, "as a last resort in the event of … extraordinary circumstances affecting a Member State's ability to fulfil its treaty obligations".[7]

[5] https://next.ft.com/content/f7764e16-5635-11e6-9f70-badea1b336d4

[6] Duchêne, François (1994), *Jean Monnet – The First Statesman of Interdependence*. W W Norton and Co, New York, p. 330.

[7] European Central Bank, Legal Working Paper Series Number 10, December 2009, http://www.ecb.europa.eu/pub/pdf/scplps/ecblwp10.pdf.

This is a reference back to the Vienna Convention, endorsing the views of the Praesidium of the European Convention that the withdrawal procedure was partly "based on the procedure under the Vienna Convention on the Law of Treaties".[8][9] It subsequently considered that, since many hold that the right of withdrawal exists even in the absence of a specific provision to that effect, Article 50 had the effect only of setting a procedure for negotiating and concluding an exit agreement.[10]

Inserting a specific provision in the Constitution on voluntary withdrawal from the Union, the Praesidium felt, clarified the situation and allowed the introduction of a procedure for negotiating and concluding an agreement between the Union and the Member State concerned setting the arrangements for withdrawal and the framework for future relations.[11]

On this basis, it can be taken that Article 50 does not confer a right to leave. Article 50(1) is not permissive. It is a statement of fact. However, it was intended as more than that. The inclusion of the provision in the European Constitution (and then the Lisbon Treaty), in the view of the Praesidium, was "an important political signal to anyone inclined to argue that the Union is a rigid entity which it is impossible to leave".[12]

Given the function of Article 50, it cannot be argued that it is necessary to invoke it in order to leave the EU. That decision is taken independently by the State intending to withdraw and only once it has been made is the European Council notified, effectively starting off the negotiating process. The purpose of Article 50 is to allow the withdrawing State and the remaining EU members to negotiate an orderly exit.

The immediate consequence of Article 50, therefore, is to suspend the effect of the decision to leave. The withdrawing State, having notified the European Council of its decision, agrees to continue to be bound by the Treaties and remain a member of the EU until such time as negotiations are complete (or the elapse of two years, unless a time extension is agreed), in order to facilitate an orderly withdrawal.

As to the adoption of the procedures set out in Article 50, which take effect once the formal notification is lodged with the European Council, there is no other detailed framework on which the withdrawing State could rely. In the Vienna Convention (Articles 65-67), there is only an outline procedure.[13]

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[8] http://european-convention.europa.eu/pdf/reg/en/03/cv00/cv00648.en03.pdf
[9] See p.8 http://european-convention.europa.eu/pdf/reg/sv/03/cv00/cv00708.sv03.pdf
[10] European Convention, CONV 724/03, Annex 2, p.134, http://european-convention.europa.eu/pdf/reg/en/03/cv00/cv00724.en03.pdf
[11] *Ibid*.
[12] *Ibid*.
[13] Vienna Convention, *op cit*.

Here, adopting a pick 'n' mix approach is not an option. All states are bound by a fundamental tenet of international law, known as *lex specialis derogat legi generali* (special law repeals general law). In short, whenever two or more laws or treaty provisions deal with the same subject matter, priority goes to that which is more specific.[14] Since Article 50 makes specific provision for withdrawal, this takes precedence over more general provisions in the Vienna Convention.

Constitutional lawyers also argue on the basis of *Van Gend en Loos* that the EU is a "new legal order of international law" and that internally the relations of the Member States and their peoples in matters covered by the European treaties are governed by European law and not by general international law.[15]

Then, in more general terms, the UK as a party to the EU Treaties – which have been ratified in accordance with the provisions of the UK constitution – the Government is obliged to honour the treaties by virtue of Article 26 of the VCLT. This articulates (or codifies) the universally recognised provision of *pacta sunt servanda*: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith".

As one of the major guarantors of international law, it is inconceivable that Her Majesty's Government could countenance a deliberate treaty breach. The international ramifications would be profound, with implications far beyond relations with the Union and its Member States. It would gravely weaken the international standing of the United Kingdom.

Aside from all that, if the UK did take the view that the provisions of Article 50 could be ignored, and sought agreements directly with EU Member States, the exercise would be futile. Any "deal" agreed would have to be implemented by the EU and its institutions, yet outside the framework of the EU treaties, it would not have any binding effect.

Here, the *dictum res inter alios acta vel iudicata, aliis nec nocet nec prodocet* applies (two or more people cannot agree amongst each other to establish an obligation for a third party who was not involved in the agreement). This is translated into treaty law by Article 34 VCLT, which states that "a treaty does not create either obligations or rights for a third State without its consent".

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[14] There are numerous treatments of this principle, which is a standard, uncontroversial provision in international law, of very long standing. See for instance: Mark Eugen Villiger (1985), Customary International Law and Treaties, Kluwer Academic Publishers, Alphen aan den Rijn, Netherlands.

[15] Opinion: Referendum on the Independence of Scotland – International Law Aspects, by Professor James Crawford SC and Professor Alan Boyle, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/79408/Annex_A.pdf. See: Case 26/62, *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1, http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61962CJ0026&from=EN, both accessed 12 September 2014

In this context, the "third State" would be the EU and its institutions. They would not be party to any deal and could not be required to implement it.

Finally, breach is not a zero sum game. Where any party is in material breach of treaty provisions, by virtue of Article 60 of the VCLT the other parties are entitled to "invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part". Should the UK choose to repeal or amend the European Communities Act, or take any other unilateral action which has the effect of abrogating the treaty, before the conclusion of the Article 50 procedural steps, the other EU Member States could summarily eject the UK from the EU, with potentially catastrophic results.

Even if the other Member States do not take this drastic step, a treaty breach still puts the UK in a weak position. It will be reliant on the good faith of our negotiating partners, yet they can hardly be expected to work within the treaty and international law in general, if the UK refuses to do likewise.

Timing of the Article 50 Negotiation

There is no provision in treaty law as to when Article 50 should be invoked, and no means by which a Member State can be required to make a notification. In this context, the choice of timing is entirely a matter for the United Kingdom.

However, there is one dominant element which decides the choice. This is the time limitation of two years imposed by the Article. If no agreement has been reached by the end of the period, the treaties automatically cease to have effect and the UK ceases to be a member of the EU - unless a time extension is sought – which would require the unanimous approval of the European Council.

The problem here, as pointed out by the White Paper, is that one or more of the remaining 27 EU Member States might expect the UK to offer concessions in return.[16] This price could be unacceptable, forcing the UK to leave the EU without an agreement.

The further problem is that the possibility of reaching a comprehensive agreement within two years is extremely remote. There is no example in recent times of the EU ever having concluded a trade agreement of anything like the complexity involved in this set of negotiations, where one possible outcome is a comprehensive free trade agreement.

Even in the relatively straightforward Greenland exit from the EEC in 1985, the negotiations still took two years.[17,18] The current round of EU-Swiss talks,

[16] White Paper, *op cit*.

[17] The exit referendum took place in 1982 but the treaty changes which gave effect to the withdrawal did not come into force until 1 February 1985. See: http://en.wikipedia.org/wiki/Greenland_Treaty, accessed 27 August 2013.

[18] http://www.maastrichtjournal.eu/pdf_file/ITS/MJ_20_02_0209.pdf, accessed 15 May 2014.

which are taken as the basis for many of the exit models proposed for the UK, started in 1994 and took 16 years to conclude.[19]

Work on the EU-Canadian Comprehensive Economic and Trade Agreement (CETA) started in June 2007 and it took until October 2013 for its key elements to be agreed, a period of just over five years.[20] Nine years after the starting gun was fired, the agreement still has not been concluded.

Negotiations on the EU-South Korea FTA started in 2006 and the final agreement entered into force on 1 July 2011.[21] However, this was only the last stage of a process which had started in 1993.[22,23] Delivery of the current 1,336-page trading agreement, alongside a broader-ranging 64-page framework agreement on political co-operation, had taken almost 18 years.[24]

When considering the nature of the UK's exit negotiations, one must assume that any negotiations on any clean-sheet or "bespoke" agreement would take at least as long as the Swiss talks, if not longer. Generally, as time progresses, international negotiations are taking longer to conclude. This is evidenced by the length of successive GATT/WTO rounds, which are increasing over time.[25]

On this basis, it is highly improbable that a *de novo* (bespoke) bilateral agreement under the aegis of Article 50 could be concluded in two years - something which is being increasingly recognised.[26] Five years is probably more realistic. Whatever their attractions in theory, the bilateral options seem hardly viable, purely on the grounds of the time needed to negotiate them. To bring home an agreement within a reasonably short time, a different strategy will have to be considered.

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[19] European Parliament, Directorate General for Internal Policies, Internal Market beyond the EU: EEA and Switzerland, http://www.europarl.europa.eu/document/activities/cont/201003/20100315ATT70636/20100315ATT70636EN.pdf, accessed 3 December 2013.

[20] See: http://ec.europa.eu/enterprise/policies/international/facilitating-trade/free-trade/ and http://ec.europa.eu/trade/policy/countries-and-regions/countries/canada/, accessed 16 November 2013.

[21] Ministry of Foreign Affairs, Republic of Korea: FTA status of ROK: http://www.mofa.go.kr/ENG/policy/fta/status/effect/eu/index.jsp?menu=m_20_80_10&tabmenu=t_2&submenu=s_6, accessed 16 November 2013

[22] European Commission website: Taxation and Customs Union – Korea: http://ec.europa.eu/taxation customs/customs/policy_issues/international_customs_agreements/korea/index_en.htm, accessed 16 November 2013

[23] http://en.wikipedia.org/wiki/South_Korea%E2%80%93European_Union_relations, accessed 16 November 2013.

[24] See also: http://eeas.europa.eu/korea_south/docs/framework_agreement_final_en.pdf, and http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:127:0006:1343:en:PDF, accessed 16 November 2013.

[25] Moser, Christoph & Rose, Andrew K (2012), Why do trade negotiations take so long? Centre for Economic Policy Research, http://faculty.haas.berkeley.edu/arose/ON1111.pdf, accessed 17 January 2014.

[26] https://next.ft.com/content/289ccf00-573b-11e6-9f70-badea1b336d4

Without exposing the UK to the risk of having to seek a time extension, there are several possibilities. Firstly, the Article 50 notification might be delayed for as long as is possible, to enable informal talks to proceed, during which as many matters as possible might be settled. This reduces the burden on the negotiators in the formal, two-year period.

Secondly, a phased exit might be sought, with the first stage confined to negotiating a *de minimis* settlement, leaving the more substantive issues to be agreed during further talks, held after the UK had left the EU. This might be accompanied by opting for an off-the-shelf rather than a bespoke settlement, along the lines of the Efta/EEA Option (also known as the Norway Option), to limit the areas for discussion, and thus promote a rapid settlement.

This latter option might permit the conduct of parallel talks within the framework of the EEA, engaging with the EEA Council and the EEA Joint Council to secure amendments to the EEA Agreement, rather than working within the Article 50 framework. Formal negotiations could start before the Article 50 notification. They could be run in parallel with the Article 50 talks, with agreements timed to take effect at the same time the UK leaves the EU.

Further time could be saved by not seeking to renegotiate external trade deals. Instead, the UK could rely on the principle of "presumption of continuity" enshrined in international law.[27] Through this, the UK can seek the continuance of existing EU trade agreements. All the parties need do is to sign a document of continuation in force, an administrative procedure. Variants of this have been done repeatedly: after the Czech and Slovak "Velvet Divorce", after the break-up of Yugoslavia, or in the post-colonial transition.[28]

Conveniently, there is also a template which the UK could use, in the Vienna Convention on Succession of States in respect of Treaties, even though it is not a party to it[29]. The Convention sets out the procedures for carrying over treaties, where all parties agree to their continuation. It allows for the newly independent State – in this case the UK – to establish its status as a party to an existing treaty by way of a formal notification of succession, lodged with the depository of each treaty.

Nevertheless, participation in the treaties will normally require the consent of all the parties, and the newly independent State may establish its status as a party to these treaties only with such consent. It does not seem likely, though, that many (if any) parties will want to withhold consent.

As to delaying the Article 50 notification, there are probably limits to popular tolerance. The electorate may (and almost certainly will) become increasingly impatient if the delay drags on for many years. Even now, expectations are creating a political momentum that will be increasingly difficult to ignore.

[27] http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2531728
[28] http://self.gutenberg.org/articles/velvet_divorce
[29] http://legal.un.org/ilc/texts/instruments/english/conventions/3_2_1978.pdf

Prolonged delay would bring the negotiations into the general election period, whence they could have a considerable electoral impact.

To avoid potential electoral damage, the UK could agree to bring forward the Article 50 notification, in agreement with other Member States who would be asked to entertain an application for extra time as the very first item in the order of business. The UK could, for instance, apply for a three-year extension, making five years in all – thus taking the time-limit off the agenda.

The crucial issue is that other Member States themselves have been agitating for a early Article 50 notification.[30] The uncertainty is as damaging to them as it is the UK – if not more so. Thus, for a very brief window, the UK has some leverage. An early notification could be made conditional on the Heads of States and Governments (HSGs), within the framework of the European Council, agreeing to extend the Article 50 negotiating period before the start of formal negotiations.

Reversing the Article 50 notification

There are several schools of thought as to whether, once invoked, the UK can change its mind and decide not to leave, reversing Article 50.

Some commentators assert that, once the Article 50 notification has been lodged, the UK could withdraw its notification and that other Member States would readily permit that to be done, within the framework of the EU treaties – even though there is no formal procedure which permits this to happen.[31] Furthermore, Article 50(5) requires of a State which has withdrawn from the Union that, in order for it to rejoin, it must go through the full application procedure set out in Article 49.

This is the full entry process. No concessions are made for previous membership. Rejoining demands completion of the full candidature procedure. This would require a commitment to joining the euro, which does not allow for the inclusion of any previously negotiated opt-outs.[32]

If the view of the Praesidium of the European Convention prevails, and the decision to leave the EU has been made before Article 50 is invoked, this means that, by the time the notification is made, the withdrawing state has effectively left the EU but has decided to delay the implementation of that decision. On that basis, reversing the Article 50 notification would have no effect. To reverse the decision would require submitting to the Article 49 procedure.

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[30] http://www.dw.com/en/we-need-time-for-brexit-british-prime-minister-may-warns-merkel-and-hollande/a-19398868
[31] http://uk.businessinsider.com/brexit-how-does-article-50-work-2016-7
[32] See Appendix 3 for the text of Article 50. For the full text of the consolidated treaties see: http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%206655%202008%20REV%207, accessed 20 May 2014.

On the other hand, the Praesidium concedes that the right of withdrawal owes more to the VCLT than Article 50.[33] Here, there is Article 68 of the VCLT, which does permit an exit notification to be rescinded.[34] Thus by invoking Article 68, the UK could argue it has a right to reverse its decision to leave.

As in so many things, though, this could be a lawyers' paradise. Under legal guidance, the other EU Member States could invoke the principle of *ubi lex voluit, dixit; ubi noluit, tacuit*. Roughly translated, this means that where the law (treaty) has no wish to regulate a matter, it remains silent. The absence of any specific provision, it might be argued, excludes any possibility of a notification being reversed.

For those who would invoke the VCLT, *lex specialis derogat legi generali* might again be relied upon. The specific provisions (or the absence of them) of Article 50 might be regarded as over-riding the general provisions of the Vienna Convention. If that is a dominant view, a right to rescind an Article 50 notification cannot be assumed.

In deciding on such matters, lawyers will undoubtedly be consulted, and arguments will be made with reference to treaty law. But it is at the political level that talks will be held and decisions made.

As Sir David Edward, the first British Judge of the European Court of First Instance, remarked, while we are entitled to look for legal certainty, all that is certain is that EU law would require all parties to negotiate in good faith and in a spirit of cooperation before separation took place. "The results of such negotiation", he concluded, "are hardly, if at all, a matter of law".[35]

That is probably closer to the reality than is comfortable. Decisions made will undoubtedly be strongly influenced by political pressures – and personalities - even to the extent of discarding or contradicting treaty law. This is a domain where politics may take precedence over the letter of the law, the exercise of political power having its own force.

In such an environment, arcane constitutional points are unlikely to be entertained by the public or by the politicians engaged in negotiations. In practical European politics, treaties have a habit of meaning what the parties intend them to mean.[36] The legalities are then brought into line with the reality.

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[33] *Op cit*, European Convention, CONV 724/03, Annex 2, p.134 http://european-convention.europa.eu/pdf/reg/en/03/cv00/cv00724.en03.pdf, accessed 29 May 2014.
[34] Article 68 of the Convention permits a notification or instrument relating to the intended termination of a treaty to be revoked at any time before it takes effect.
[35] Scotland and the European Union, http://www.scottishconstitutionalfutures.org/OpinionandAnalysis/ViewBlogPost/tabid/1767/articleType/ArticleView/articleId/852/David-Edward-Scotland-and-the-European-Union.aspx, accessed 20 September 2014.
[36] See for instance: http://fordhamilj.org/files/2014/02/FILJ_Rieder_.TheWithdrawalClauseoftheLisbonTreatypdf.pdf, accessed 20 May 2014.

Conclusions
Taking the three issues discussed in the Monograph in turn, if we address the issue of whether the use of Article 50 is optional, it has to be said that there is so little doubt over this matter, that it surprising that it is even an issue.

There is absolutely no merit, whatsoever, in the argument that Article 50 can be ignored. We are bound in so many ways to following the Article 50 procedure that is should not even be worth discussing. It is worth noting, though, that Article 50 does not confer a right to leave. That is an inherent right, not dependent on any EU Treaty.

As to the timing of the Article 50 notification, there appear to be very few options available to the UK Government. The pressure on the one hand is for a speedy exit, which calls for an early notification. On the other hand, the constraints of the two-year negotiation period present almost insurmountable problems, while the consequences of failure are potentially severe.

To avoid the possibility of failure, it would seem appropriate in the first instance, to seek an extension of time before Article 50 negotiations start in earnest – a possibility that German officials seem to recognise as being realistic.[37] The chances of success will be further enhanced if the scope of the negotiations is kept as tight as possible. A phased exit, combined with the adoption of the Efta/EEA option, together with the transfer of detailed negotiation to the EEA forum, would then minimise the pressure on time.

Even with a fair wind, though, with every possible stratagem adopted, no realistic assessment will suggest that there is any reason for optimism. The chances of completing negotiations within two years have to be considered slight.

This brings us to the third issue – the possibility of reversing the Article 50 notification. This has been seen by some as the ultimate safety valve in that, should negotiations go badly wrong, the UK Government can "reboot" and revert to the *status quo ante*. Such an escape route may well be possible, but it is impossible to say whether it could be relied upon. Given the uncertainty, to build this in to any negotiating strategy would seem unwise.

The only certainty that we are able to confront is that, to achieve an orderly (and lawful) exit from the EU, the UK will need at some time to invoke Article 50.

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[37] http://uk.reuters.com/article/uk-britain-eu-germany-insight-idUKKCN1012AN?utm