

Brexit Insight Issue 2:

16 January 2017



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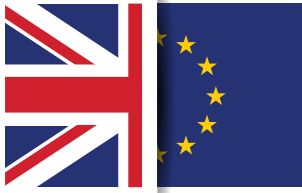


A Weekly Analysis for Senior Executives

Issue No.2 | 16 Jan 2017

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By Brendan Halligan



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Article 50 of the Treaty on European Union deals with a Member State withdrawing from the EU. It is fairly short but is silent on two key issues. The first is how a replacement for EU membership is to be negotiated and the second is whether the notice to withdraw can itself be withdrawn. The following analysis summarises current thinking.

What Article 50 Says

The wording of the Article is straightforward and simple. It says that:

- Any Member State may decide to withdraw from the Union;
- When it so decides it notifies the European Council of its intention;
- The Union will then negotiate and conclude an agreement with that State setting out the arrangements for its withdrawal;
- The Treaties will cease to apply to the state in question from the date of the entry into force of the withdrawal agreement;
- Or, failing that, two years after the notification of withdrawal;
- Unless there is unanimous agreement to extend the period.

Will the Negotiations be in Parallel or in Sequence?

There will be two sets of negotiations, the first dealing with withdrawal and second on a new EU/UK relationship. The problem is that a new relationship can only be concluded with the UK when it has left the EU and has become what is called “a third country” i.e. an outsider. This point was made by the EU 27 immediately after the referendum result when they said “any arrangements .. will be concluded with the UK as a third country”.

So, legally the position is clear: the negotiations will take place in sequence. But politically it is not so straightforward. There is nothing to stop the EU 27 from negotiating the new relationship with the UK in

parallel with the divorce proceedings and then concluding them (i.e. signing off) when the UK has actually left. That said, the EU 27 seem in favour of separating the two sets of negotiations while Mrs. May favours running them in parallel.

This issue has implications for business. The prospect of a time gap between the UK leaving and agreeing a new relationship will lead to uncertainty about the nature and duration of any transitional regime. So far, there has been little debate about how that uncertainty could be avoided.

It would be best to plan for a transitional period and to make sure that one's interests are protected for the duration.

Is Article 50 Reversible?

Probably, is the best answer. The uncertainty arises because Article 50 is silent on what happens if a Member State wants to reverse its decision to withdraw from the EU. To state the obvious, the Article does not prohibit a Member State from going so. Adopting the rule of thumb that what is not expressly forbidden in a treaty is permissible then Article 50 is reversible.

Furthermore, common sense suggests that if the UK has second thoughts about leaving, and if the other Member States want it to stay, then that's what would happen. Politics would prevail over any legal misgivings: the UK would be able to revoke the withdrawal notification and to continue its membership.

There are, of course, differing expert opinions on the question. Most political practitioners believe the UK could abort the withdrawal process. Lawyers are more divided but the former legal adviser to the Council of Ministers, Jean-Claude Piris, the leading expert on EU law, believes Article 50 can be reversed. So does Lord Kerr, the man who actually drafted the text.

At present, the reversibility of Article 50 is an academic question being outside the realm of practical politics as the British government will trigger Article 50 by the end of March and hopes to conclude the negotiations within two years. Nevertheless, the answer may have a bearing on the forthcoming Supreme Court decision on the UK government's power to go ahead without first seeking parliamentary approval.

The conclusion is that legal speaking Article 50 is reversible but politically impossible in present circumstances.

The Brexit Insight is produced by the IIEA Brexit Project Group chaired by Dáithí O’Ceallaigh, former Ambassador to the UK. This issue is written by Brendan Halligan, Chairman of the Institute.

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