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Brexit Briefings

NEGOTIATING BREXIT

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These Brexit briefings focus on the impact leaving the EU will have on devolved government and public policy in Scotland, Wales and Northern Ireland and also on Ireland.

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Tom Mullen reviews the Brexit negotiation process both from a UK-EU perspective and a UK constitutional perspective.

The UK is about to begin negotiating its withdrawal from the European Union, possibly the most complex and difficult set of international negotiations it has ever undertaken. This briefing explains the legal and political framework for the negotiations. There is both an external and an internal aspect to the negotiations. The former concerns the process whereby the UK Government negotiates with the EU and what they will negotiate about. The latter aspects concerns how far, and in what ways, the UK Parliament and the devolved governments can influence the United Kingdom Government's negotiating stance. I will start with the external aspect then move on to the internal aspect.

The timetable and procedure

The procedure is governed by Article 50 of the Treaty on European Union (TEU), supplemented by Article 218(3) of the Treaty on the Functioning of the European Union (TFEU)

The UK gave the notice of its intention to withdraw from the EU as required by Article 50 on 29th March 2017. The Treaties constituting the EU and setting out its policies will automatically cease to apply to the UK two years later, i.e. 29th March 2019 unless one of two things happen: (i) there is a withdrawal agreement and it specifies a different date, or (ii) the European Council unanimously decides to extend the period and the UK agrees.

The timetable is, therefore, uncertain but it might look something like this (the first three steps have already occurred):

29 Mar 2017	UK gives Article 50 notification
29 Apr 2017	European Council (EU27 format) adopts guidelines for Brexit talks
3 May 2017	European Commission recommends to the Council that it opens negotiations
Jun 2017	Negotiations between EU and UK begin
Nov 2017	UK Parliament enacts the Great Repeal Bill
Jan 2018	Discussions begin on post-Brexit trade deal
Oct/Nov 2018	Time by which a 'deal' negotiations must be agreed between UK and EU Council.
Nov 2018 - Mar 2019	Both EU Parliament and UK Parliament must approve deal
29 Mar 2019	UK leaves the EU (subject to extension of timetable)

The parties, the process and the issues

On the UK side, responsibility for negotiations and preparation for Brexit is divided between three UK departments (the Department for Exiting the EU (DExEU), the Foreign and Commonwealth Office and the Department for International Trade) with the Department for Exiting the EU having the leading role.

On the EU side, there is a negotiating team led by its Chief Negotiator, Michel Barnier. However, all the key institutions of the EU will have an input. They are the European Council (the group of the Heads of Government of Member States), the Council (which has a rotating membership of ministers of Member States depending on the topic under discussion), the European Commission and the European Parliament. The European Parliament has indicated the importance it attaches to its role by appointing its own co-ordinator for the negotiations, Guy Verhofstadt. The European Council adopted guidelines for negotiations on 29th April 2017 and further negotiating directives were proposed by the Council on 3rd May 2017. Negotiations proceed 'in the light of' the guidelines' and Article 218 (3), TFEU.

The basic structure of the negotiations will make it difficult for the UK to achieve its aims. There is a large number of veto players. Each of the 27 other Member States will be considering what is in their own interests as well as what they perceive to be in the EU's interests. No one state can block a deal on its own, but the final decision to approve the deal requires a qualified majority. This means at least 72% of the votes cast in the Council provided also that those voting representing Member States which together comprise at least 65% of the EU population. In practice, this means at least 20 of the Member States must vote for the agreement, but three large states voting together would be enough to block any agreement because of the population requirement.

It is also necessary for the European Parliament to agree. It cannot be assumed that the Parliament will endorse whatever the Council agrees. The Council is a forum to represent governments, but the Parliament is not controlled by Governments. So, the EU and UK negotiators need to come up with a deal that they can sell to the European Parliament as well as to the Governments of the Member States. However, only a simple majority of the 751 MEPs is required to indicate the Parliament's consent. Finally, depending on what is included in the agreement, ratification may require parliamentary approval or a referendum in some Member States. The agreement is concluded on behalf of the EU by the Council (i.e. Council of Ministers), acting by a qualified majority.

There are major differences between the negotiating positions of the two sides. One concerns the phasing of the negotiations. The UK wants to negotiate an ambitious trade deal with the EU at the same time as discussing the terms of its exit. Whereas, the EU position is that the terms of break-up must be discussed first and that at most an overall understanding (but not a concluded agreement) on the future relationship could be reached during the

second phase of negotiations. More substantively, the UK's desire for a 'wide reaching, bold and ambitious free trade agreement with the EU' is incompatible with the EU's insistence that the future relationship cannot offer the same benefits as membership and that access to the single market comes as a package; one cannot pick and choose the obligations one is willing to accept. There is also disagreement over the size of the 'exit bill' for current and continuing commitments and whether and in what form the rights of EU citizens in the UK and UK citizens in other Member States will be guaranteed.

We can expect the position of the parties to change as the negotiations proceed but it is difficult to predict what the ultimate outcome will be. Given the very short time scale and the number and complexity of the issues to be discussed it is very unlikely that a long-term deal will have been reached at the end of the two year negotiation period envisaged by Article 50. It is more likely that a deal settling certain issues comes into effect at the end of the two years, with many aspects of EU law and policy continued for several more years as a transitional arrangement during which period the long-term relationship with the EU in each policy area can be settled.

UK internal processes

The Government has promised that the House of Commons will be able to vote on the final agreement reached in the negotiations on a take it or leave it basis; no amendment will be possible. But there is no statutory requirement to consult Parliament during negotiations.

Having said that, by constitutional convention, Ministers are accountable to Parliament and the usual techniques of enforcing accountability – parliamentary questions, debates and committee inquiries – are available. Ministers have stressed that they will not provide a running commentary on the Brexit negotiations but Parliament could use the usual techniques to force Ministers to

explain what they are doing if MPs and Lords choose to do so.

Majority governments are usually able to exert a high degree of control of the Parliamentary process but that does vary according to political circumstances. Thus far, in the Brexit process, Parliament has largely done what ministers have wanted. The coming general election is likely to lead to a much increased Conservative majority. It is uncertain whether that will increase or diminish the Government's control over Parliament.

Withdrawing from the EU is an action taken on the international plane. UK Legislation will be required to give legal effect to Brexit within the UK's three legal systems. That is the purpose of the 'Great Repeal Bill' which the Government has promised to introduce. According to the white paper, the Bill will (i) repeal the European Communities Act 1972, (ii) convert the existing *acquis* of EU law into domestic law and (iii) end the general supremacy of EU law and ensure that laws made by the EU after Brexit will have no authority as such in the UK's legal systems. The Government expects the Bill to be enacted before the end of negotiations so that it is ready to take effect on the date that the UK leaves the EU.

What threatens to be the most difficult aspect of the internal UK processes from the Government's perspective is the devolution angle. This is for two reasons. The first is that Brexit will require amendment of the devolution legislation as, in all three schemes, any legislation or executive action by the devolved institutions which is incompatible with EU law is incompetent.

The second is that the Brexit may lead to changes in the devolution settlements. The UK government has not guaranteed that all the powers currently devolved, e.g. agriculture fisheries and the environment will remain so after Brexit. Whilst, as a matter of law, such changes would be within the power of the UK

Parliament and Government, there are also non-legal constitutional obligations imposed by the Sewel convention. The Sewel convention says that legislation relating to devolved matters and legislation altering the competence of the devolved Parliaments and assemblies requires their consent. So, for example, both the amendments to the Scotland Act 1998 implied by Brexit and taking currently devolved powers back to the centre require the consent of the Scottish Parliament. However, the Scottish Parliament is unlikely to agree to its powers being reduced. If it did not, this would leave the UK Government with the choice of backing down or forcing the legislation through without the consent of the Scottish Parliament. That might increase constitutional conflict within the UK and place unwelcome pressure on a UK government facing the already tricky task of negotiating Brexit.

Conclusion

At this stage, it is impossible to say how long the Brexit process will take or what long-term relationship between the UK and the EU will be. The end of the two year period may see the formal exit of the UK from the EU but much will remain to be negotiated, not merely in our relationship with the EU but also in our relationship with the rest of the world as our current membership of the World Trade Organisation, and therefore, our trading relationship with many other countries depends on our membership of EU. There is also great uncertainty as to the content of the agreements that will be reached. Both sides have some strong cards to play in the negotiations but the timetable, the complexity of the issues and balance of political forces suggest that the EU has more good cards in its hand, although it would be foolish to try to predict the outcome at this stage.

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