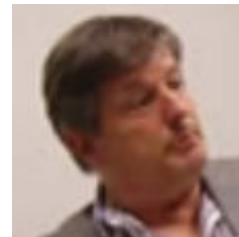


The seven days of Brexit: how a Leave government could bypass Article 50

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Most agree that leaving the EU would entail a negotiating period of at least two years, as set out in Article 50 of the Treaty on European Union. But, argue **Frank Vibert** and **Gunnar Beck**, this is not a certainty. If a Brexit vote – combined with a Commons majority in favour of Leave – were deemed to constitute ‘a fundamental change of circumstances’ under the UN’s Vienna convention on the Law of Treaties, Britain could leave the EU immediately. They set out a timetable that would see Britain leave the EU within a week.



The EU referendum campaign has been marked by exaggerated claims and personal abuse on both sides. The ending of the campaign is as far as it could be from the ideal world of reasoned discourse, described by the American political philosopher John Rawls as ‘reflective equilibrium’.



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Among the claims made by the Remain campaign is that there is ‘only one route to exit’. It is an important claim, not just in terms of the legal procedures for exit. A significant part of the estimates of the damaging short and long term effects of exit on the British economy rests on the view that the exit procedure will itself inevitably lead to a prolonged period of economic uncertainty (up to 10 years, according to the rhetoric). Added to other sources of economic fragility in the world economy, it is easy to understand the warnings issued by OECD and the IMF, in addition to the doom and gloom of the UK Treasury economic simulations of exit.

The one way of exit

The claim that the UK faces only one way of exit is a very much better grounded claim than many others made by either side. It rests on [Article 50 of the Treaty on European Union \(TEU\)](#) read in conjunction with [Article 54 \(a\) of the Vienna Convention](#) on the Law of Treaties (VCLT) of the United Nations.

Art.50 (TEU) is the only provision in the Treaty addressing exit and allows any member state to withdraw following its own constitutional procedures. It envisages a two year period of negotiation about the terms of withdrawal with the possibility of prolongation. The Treaty would remain in effect during this period until agreement is reached.

Art54 (a)VCLT stipulates that if a government, party to an international treaty, wishes to withdraw, then it shall do so in accordance with the terms of that treaty.

Thus the case that there is only one way for the UK to withdraw seems watertight. Moreover many observers, including the Lords select committee on the EU, have warned that the process could extend well beyond two years. In its [May 2016 report](#), the select committee accepted the advice given to it on withdrawal procedures by highly respected EU lawyers that Art 50 provides the only exit procedure. It warned that withdrawal could take 'several years'. It referred to 4-9 years for the EU to conclude trade agreements. [Even Vote Leave seems to be allowing](#) for a four-year period of uncertainty.

There remains, however, a possible case for an alternative exit route.

The alternative: a 'fundamental change of circumstances'

In VCLT Art. 54 (a) there is also an important 'or' clause regarding exit. In particular, VCLT provides an alternative exit route from a Treaty if there is a 'fundamental change of circumstances' (Art.62(1)(a)). In such an event the treaty envisages a normal minimum period of notice of withdrawal of three months, but less in exceptional circumstances. (VCLT Art. 65 (2)).

In the light of warnings from the IMF and others about the damaging impact of uncertainty on the world economy, and the modern day volatility of capital and exchange rate movements, there would be a case for immediate effect on notice of withdrawal. The UK's obligations under EU Treaties could thus be immediately suspended on notification by the UK to the UN of its withdrawal under VCLT Art62 (a).

The Court of Justice of the EU (CJEU) has long accepted that international law is binding on the EU. In the 1998 [Racke](#) case, the CJEU further ruled that the rules of international law concerning the termination and suspension of treaty relations by reason of a fundamental change of circumstances are binding upon Union institutions and form part of the Union legal order. On the facts of the case, the Court held that the outbreak of hostilities in a contracting party to a cooperation agreement with the EU constituted a fundamental change of circumstances.

The critical question about this possible alternative exit route is whether or not a referendum vote in favour of exit would constitute a 'fundamental change of circumstances'. Normally a fundamental change of circumstances would involve, for example, a change of government regime, a break-up of a state, the persistence of hostilities within a contracting state, or a fundamental change in the international situation relevant to the agreement.

Interpreting an exit vote

The EU referendum is only advisory. In practice, however, the result – in either direction – will be impossible for any British government to ignore. If there were to be a majority in favour of exit, the next stage of any exit would involve the formation of a government able to command a Commons majority in favour of Brexit. This would not be a foregone conclusion. At least some Conservative MPs might continue to oppose it. Possibly, a coalition of some sort between Conservative and Labour supporters of Brexit might need to be put in place.

If Britain voted to Leave *and* a pro-Brexit government formed that could command a majority in the House, then it

could be argued that a 'fundamental change of circumstances' had taken place.

There would be two reasons for this view. First, a Treaty is a contract that rests on the willing consent of the contracting parties. In many cases original consent is sufficient. However, in the case of the EU it involves a delegation of sovereign powers which requires ongoing consent. In the event of an exit vote the willingness on the part of the UK would no longer be there. Its original consent would be invalidated. Art. 2 (TEU) states that the EU is based on the value of democracy. In the event of a Leave vote, continued membership would be against the expressed will of the British people. In view of the EU Treaty commitment to respect the principle of democracy, this would create an unprecedented and fundamentally new situation.

This first concern is thus partly about the nature of contracts. It can be seen also, in the case of democracies, as reflecting the basic importance of democratic consent to a formal international obligation. The EU will not wish to fuel the existing perception that it suffers from a 'democratic deficit'.

The second concern is a practical one. There would be concern about the effectiveness of any Treaty that involved an unwilling contracting party. If there are questions about the effectiveness of a Treaty, or performance under it, it is likely to become discredited and a dead letter.

This second concern is usually reflected in specific, formal conditions before any Treaty can enter into effect (as in the case of the EU). However it also is about the on-going conditions of effectiveness. Thus, when General de Gaulle unilaterally removed France from NATO's integrated military command, France's NATO partners no doubt took the view that the command would be less effective if an unwilling participant was not let go.

The case that a fundamental change of circumstances had occurred would thus rest on the UK's withdrawal of willing consent, and the removal in practice of the conditions for the effectiveness of the Treaty.

Further questions about the effectiveness of the EU's Treaty base would arise if exit negotiations started under TEU Art. 50 and it were found that not all member states were negotiating in good faith but wished to exact retribution on the UK in some form – as indeed certain European leaders have intimated and Commission President Juncker recently inflamed when he called a possible Leave vote a 'desertion'. In this case they would be in breach of TEU Art.4(3) on the principle of 'sincere cooperation'. The Treaty would have broken down. The VCLT recognises breach of obligation as a ground for termination ((Art.47). The CJEU in the *Racke* case also recognized the importance of good faith in determining the validity of a treaty.

Contracts involve fidelity to the undertakings in a contract willingly entered into, mutual trust and good faith. Each would have been undermined. Circumstances would have changed fundamentally.

The timetable

If a Leave vote and the formation of a government commanding a majority in favour of Brexit were to be held to represent a fundamental change of circumstances, then exit could take place quickly and much of the economic uncertainty around it could quickly be set at rest. A hypothetical timetable might look as follows:

Day 1: immediate effect

The government informs other EU member states that it is leaving the EU under VCLT Art 62 (a) with immediate effect. It would inform the EU and the global community that in respect of trade relationships it will comply with World Trade Organisation obligations and become a free trade zone. This will still allow the UK to impose anti-dumping controls on, for example, steel from China.

Day 2: immigration

The government announces that all EU citizens who wish to work or reside in the UK will be admitted on the same terms and conditions as non-EU citizens, under a new 'points' system that would favour those who are well-qualified (for example to take up jobs in the financial sector or sectors with labour shortages.) Existing workers, or residents, as of the day of the referendum would be grandfathered. An exception would be made for Irish nationals who could continue to have free entry and the right to work and reside.

Day 3: deregulation

All existing EU regulations applicable to the UK would be declared valid by Parliament through appropriate legislation, as provided for under Art 18 of the 2011 Act on European Union. Domestic primary and secondary legislation adopted to give effect to EU law under the ECA 1972 before the referendum would remain in force. The Act providing legal continuity would however, at the same time, repeal the 1972 European Communities Act so that no post-referendum EU law would take effect, and the case law of the Court of the Justice of the EU would no longer be binding, in the UK.

The continuity of EU based law would remain intact, pending sector by sector review and cost/benefit analysis by British bodies. In particular, regulations flowing from international obligations, such as those accepted from the G20 and its Financial Stability Board, would remain in force. This would provide a basis for the mutual recognition of the equivalence of standards between the UK, US and EU in respect of the financial sector.

Day 4: farming

The government would announce income subsidies to cushion farmers from the effect of the end of the EU's Common Agriculture Policy and the removal of tariffs on agricultural and food imports. Income support would be limited to small farmers and to environmentally sensitive areas.

Day 5: financial stabilisation

A mini budget would be presented to reassure investors that the UK remained on course to reduce its budget deficit.

Day 6: human rights

The government would announce its withdrawal from the European Convention on Human Rights and repeal of the Human Rights Act 1998. Although the EU is not yet party to the ECHR, the latter has effect on and through the development of EU law. Judge-made law under ECHR has strayed far from the original purpose of ECHR to prevent a return to fascism.

Day 7: The Brexit government rests.

Worst outcomes

The worst outcome of the referendum for the UK would arguably be a close result that perpetuated continuing debate in the UK and continuing unease in the EU about British membership. In such a situation, there would be a case for the UK to try to negotiate a form of associate membership. There is no provision for this in the Treaties. In this situation, Art. 50 TEU would not be relevant.

This post represents the views of the authors and not those of the BrexitVote blog, nor the LSE.

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2011).

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