

Article 50 is flawed: could the ECJ extend the two-year withdrawal period?



*The two-year time limit stipulated in Article 50, argues **Philip Allott (University of Cambridge)**, is wildly unrealistic: its drafters never anticipated that a large member state would ever leave the EU. In this legal opinion, he sets out how the ECJ could extend the withdrawal period, thereby allowing the UK to leave in an orderly fashion.*

The UK's scheduled withdrawal from the EU next March – quite possibly without a deal – has led to general legal confusion. It may be useful to identify legal aspects of the situation which are, in my opinion, beyond reasonable doubt. The underlying legal situation might now be irremediably corrupted, but it may still be worth setting out a legal opinion that could have been given at any time during the Article 50 process and which, in my view, still applies. One purpose of a framework legal opinion of this kind is to allow other people to express their own opinion on the same matters as precisely as possible.

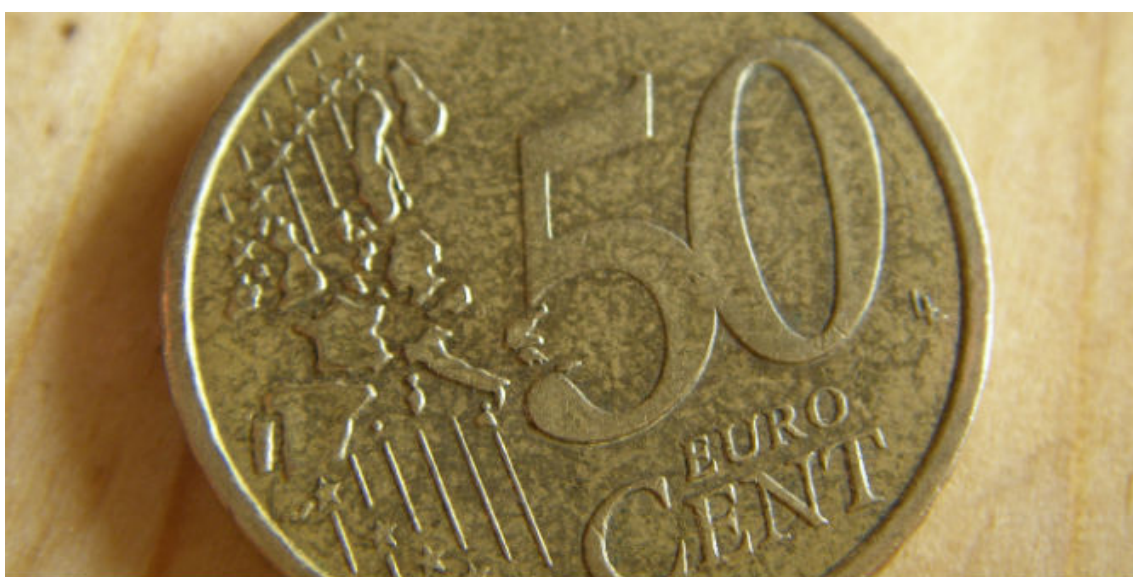


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1. The UK notification of intention to withdraw from the EU may be withdrawn at any time. It is a notification of intention to withdraw. It is not a notification of withdrawal, notwithstanding the erroneous title of the European Union (Notification of Withdrawal) Act 2017. (Section 1(1) of the Act is correct.) If the intention changes, the European Council could be so informed and the negotiation of a withdrawal agreement could cease. Many treaties contain a provision allowing for 'notification of withdrawal' by a contracting party (not including the word 'intention').

2. The period of negotiation of a withdrawal agreement can be extended beyond 29 March 2019. Article 50, paragraph 3, of the Treaty on European Union provides as follows. "The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period."

(a) Given the catastrophic consequences, in the UK and the EU and across the world, of a UK withdrawal without an agreement, it would surely be a grave breach of public responsibility on both sides to fail to extend the period of negotiation – a failure that could constitute a breach of UK public law and/or of EU law.

(b) The negotiation of international agreements on a large scale always takes many more than two years. A withdrawal agreement between the UK and the EU would affect every aspect of two vastly complex constitutional and substantive law systems, from the broadest to the most detailed levels, and the constitutional and substantive law systems of 27 other states, not to mention its worldwide effects.

(c) It could not possibly be expected to enter into force two years after the start of its negotiation, given that, to enter into force, it must be concluded by the European Council, with the consent of the European Parliament, subject to ratification by 28 states – processes that could typically take many years.

(d) Such a wildly unrealistic two-year time-limit suggests that the drafters of Article 50 had in mind that there was no realistic prospect that it would ever apply to one of the largest member states. One of the principal drafters has confirmed this.

(e) Article 50(3) could have been drafted to refer to ‘the conclusion of the withdrawal agreement’ as the fact that cancels the two-year time-limit. It was not so drafted. It refers to ‘the entry into force of the withdrawal agreement’. A withdrawal agreement with the UK could not have been expected to enter into force within two years from the date of the UK’s notification of intention to withdraw (see para. 2(b) and (c) above).

(f) It follows that the European Court of Justice of the EU could well decide that the correct interpretation of Article 50 of the Treaty on European Union is that the article cannot be applied as it stands in the case of the notification of an intention to withdraw by one of the largest member states. This matter could be before the European Court directly or by way of a request from a national court for a preliminary ruling.

(g) A ‘general rule’ for the interpretation of treaties is set out in Article 31 of the Vienna Convention on the Law of Treaties (1969). “(1) A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose...”

(h) Article 32 sets out ‘supplementary means of interpretation’. “Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.”

3. Extending the period of negotiation would allow a perfectly orderly UK withdrawal from the EU.

(a) In the light of the precedent of UK accession to the European Communities, there could be an interim period between the conclusion of a withdrawal agreement and its entry into force. During that time, the UK would remain a member state and would be subject to EU law and would be entitled and obliged to participate in the work of the EU and the decision-making of its institutions.

(b) A withdrawal agreement could not change that situation, since any such change would require amendments to the EU Treaties, amendments which would only take effect on the entry into force of the withdrawal agreement.

(c) In the light of the same precedent, there could be a transitional period after the entry into force of a withdrawal agreement when the UK, no longer a member state, and the EU institutions are dealing with consequences of the new situation. The UK would not participate in the decision-making of the EU institutions during that period, except to the extent that the withdrawal agreement provided otherwise.

This post represents the views of the author and not those of the Brexit blog, nor the LSE.

Philip Allott is Professor Emeritus of International Public Law at Cambridge University and a Fellow of Trinity College Cambridge. As a Foreign and Commonwealth Office legal adviser, he participated in the UK’s accession negotiations to the European Communities and was the first Legal Counsellor in the UK Permanent Representation to the European Communities in Brussels.