

Brexit: the next stage – 12 questions answered

31 March 2017



The next stage of Brexit has begun. Nine months after the referendum, the UK has taken the formal step required to notify the EU of its intention to leave. 29 March 2019 can be pencilled into calendars as the date on which the UK will exit the EU – unless a different date is agreed between the EU and the UK.

The uncertainties regarding the economic and regulatory consequences of the UK's exit will extend beyond the UK, to the rest of the EU and to other countries with which the EU has trading relationships.

This note discusses key issues on the Brexit negotiation process and some of the possible outcomes.

A full collection of Brexit materials is available on our dedicated [Brexit microsite](#) on the Client Knowledge Portal.

For more information please get in touch with your usual Linklaters contact or any of the contacts listed [here](#).

1. What does the UK's Article 50 notice say?

On 29 March 2017 Sir Tim Barrow, the British ambassador to the EU, delivered to European Council president Donald Tusk the UK's official notice, under Article 50(2) of the Treaty on European Union, of its intention to withdraw from the EU and from Euratom (the European Atomic Energy Community). The notice was delivered in the form of a six-page letter, which reiterated the key objectives set out in the UK Government's White Paper published on 2 February 2017 (see Question 2 below for further details).

The letter is written in a polite tone with no sign of the previous "no deal is better than a bad deal" rhetoric and is generally focussed on cooperation. The letter sets out the UK's position as follows:

- > **the UK process** – The UK will negotiate as "one United Kingdom" – an implicit reference to the pressures the Prime Minister may face from the administrations in Scotland, Wales and Northern Ireland – the Scottish government is calling for a referendum on Scottish independence
- > **economy, trade and security** – The UK proposes a partnership with the EU taking in economic and security cooperation. The UK understands that leaving the EU will mean the UK loses influence over rules affecting the European economy and will have to align with rules of EU institutions of which the UK is no longer a part
- > **rights of citizens** – The UK and EU should aim to strike an early agreement about rights of citizens of the EU27 living in the UK and UK citizens living in the EU

- > **a comprehensive agreement** – It is necessary to agree the terms of the future partnership alongside the withdrawal agreement
- > **minimal disruption and maximum certainty** – To avoid a cliff-edge, the UK and EU would benefit from implementation periods to adjust in a smooth and orderly way. This should be agreed in principle early in the process
- > **the unique relationship with the Republic of Ireland** – The negotiations must include avoidance of a hard border, maintenance of the Common Travel Area and ensuring no harm to the Republic of Ireland and the peace process
- > **technical talks on detailed policy areas as soon as possible, prioritising the biggest challenges** – Agreeing a high-level approach is an early priority. The UK will also propose a free trade agreement covering financial services and network industries. As the UK and EU have matching regulatory frameworks and standards, evolution of frameworks and dispute resolution should be prioritised

2. What else has happened since the referendum?

Since the UK voted to leave the EU last June, the UK Government has both a new Prime Minister and two new government ministries, the Department for Exiting the European Union (DExEU) and the Department for International Trade (DIT). The Government has set out to learn as much as possible from every sector of UK trade and industry about the possible impacts and opportunities of Brexit.

Calls from Parliament to be kept informed of the Government's plans led to the publication in February of a White Paper "The United Kingdom's exit from and new partnership with the European Union". This made some important points clear:

- > the UK Government is hoping to secure a bespoke arrangement (a "new partnership") with the EU and to continue cooperation with the EU in many areas
- > it is recognised that a phased process of implementation may be needed to ensure a smooth Brexit
- > domestically, to ensure certainty and minimise disruption, the UK will retain most of the substance of existing EU regulation at the point that Brexit takes effect

(See our publication "[The Future EU-UK Relationship: The UK's vision](#)" for details on how the UK's relationship with the EU might look.)

Following the Supreme Court's ruling in the Miller¹ case that Parliament's approval was needed to initiate the withdrawal process, the UK Government passed the European Union (Notification of Withdrawal) Act 2017 in March. On 30 March, the UK Government published a White Paper setting out its plans for the Great Repeal Bill (see Question 7 below for details).

Meanwhile, in Brussels and the capitals of the other EU member states (the EU27) politicians, business leaders and technocrats have also been busy examining the risks, opportunities and legal implications of Brexit. While some countries have been courting businesses to relocate from the UK, it has become increasingly apparent that the EU itself will need to make adjustments in some areas to avoid disruption on the exit of one of the Union's largest members.

3. How will the negotiations work?

In broad terms, there are three critical areas to be covered in the negotiations:

- > [the withdrawal agreement](#) – in effect, to manage the "divorce" settlement, and determine how to apportion liabilities that will cease on exit: Article 50 clearly contemplates this
- > [the future \(ie post-divorce\) relationship between the EU and the UK](#) – under Article 50 the withdrawal terms should take account of the new framework for the relationship between the EU and the departing state but it does not require conclusion of a future relationship agreement as part of the withdrawal process
- > [the timing of when the withdrawal agreement and any new relationship agreement come into effect](#) – Article 50 sets a two-year deadline for reaching a withdrawal agreement, without which the terms of the EU treaties cease to apply to the departing state. This means there could be a sudden exit with no deal – the "crash-out" scenario. Achieving an orderly exit implies not only reaching a deal, but also having an implementation period between reaching terms and the time they come into effect (as with most complex agreements or legislation). The "crash-out" scenario is being treated as a real possibility by the UK Government

The sequencing of these negotiations will be critical. What is acceptable as regards withdrawal terms may be dependent on the nature of the new future relationship. This would suggest negotiations on withdrawal terms and the future relationship should run concurrently. However, there have been indications from the EU that it is determined to deal with the withdrawal terms, before discussing the future relationship.

Both sides may try to use the "cliff edge" threat of the Treaties ceasing to apply if no withdrawal agreement is reached within two years, to their negotiating advantage. UK Prime Minister Theresa May has increased the stakes by saying that "no deal is better than a bad deal".

Under the terms of Article 50, the negotiations will be conducted on the basis of guidelines to be issued by the European Council (the EU27's heads of state or government, without the participation of the UK). The European Council published the draft guidelines to the EU27 states on 31 March 2017. The European Council's statement on the UK's notification, published on 29 March, confirmed that President Tusk has convened the European Council on 29 April 2017 to finalise the guidelines.

Formal negotiations are not expected to begin until after the guidelines are finalised. Moreover, the negotiations on the terms of the withdrawal agreement will need to have been concluded well before March 2019 to allow for the EU and UK parliamentary approval processes. In reality, therefore, an agreement probably needs to be reached at the latest by the end of 2018.

Note that the European Parliament has a role under Article 50 in approving the withdrawal agreement. The EU Parliament's lead negotiator on Brexit has said it will publish its position and "red lines" on Brexit within weeks of the Article 50 notice being served.

For a visual overview of the negotiation process, see our publication "[A timeline of Brexit negotiations and associated actions](#)".

4. What are the key issues in the negotiation going to be?

From the UK perspective, the Government's key objectives as set out in the White Paper are to negotiate a new free trade agreement and ensure that future customs arrangements between the EU and the UK are as "frictionless and seamless as possible". Continued cooperation with the EU on security and counter-terrorism issues is also a key objective and one where the mutual interest is obvious.

The public position of many EU leaders is that the UK cannot "cherry-pick" to get some benefits of EU membership while leaving aside the bits (such as freedom of movement) that it does not want.

Although the EU27 will negotiate as a single block, the negotiations on future trading terms will be framed by the potentially competing national interests and agendas of the different member states and of different sectors, from financial services to fisheries and from energy to agriculture. Apart from the main EU treaties there are many other institutions such as Euratom (nuclear energy) and the European Investment Bank on which negotiations will be needed.

In short, the negotiations will be a huge task which will be highly difficult to complete in two years. Based on what has already emerged from the EU and the UK, among the first things on the table are likely to be:

- > [negotiations about the negotiations themselves](#) – in particular, about the order in which they cover withdrawal terms, the future relationship, and transitional arrangements, or the timing of implementation
- > [money](#) – the EU Commission's chief negotiator, Michel Barnier, has put forward a figure of around €60bn representing the UK's alleged outstanding financial commitments to the EU. This so-called "exit bill" promises to be highly contentious, as the legal basis for many of the financial claims that have been suggested is uncertain, and the basis of valuation of any particular liability open to much argument. The EU budget is hugely complicated but parts are agreed until the end of 2020, so arguably the UK should continue its payments until then. Other issues will include what elements of the EU's pension liabilities and other future funding commitments are attributable to the UK, and whether the UK can offset any liabilities by claiming a proportion of the EU's assets
- > [people](#) – the UK Government has been criticised at home for using people as a "bargaining chip" by not guaranteeing

the rights of EU citizens living in the UK. While making reassuring statements, it has been reluctant to do this without securing reciprocal guarantees for the UK nationals who live in the EU. The White Paper states that the Government “would have liked to resolve this issue ahead of the formal negotiations” but although this was not possible it is “ready to reach a reciprocal deal with our European partners at the earliest opportunity”. The Government’s Article 50 notice reiterates this intention

- > **timing of implementation** – as mentioned above, the question of how much time businesses will have in practice to adjust is a critical one. The White Paper and Article 50 notice refer to the need for a “phased process of implementation” which would be in the mutual interest of the UK, the EU institutions and other member states, as well as businesses. Clarity at an early stage that there will be no “cliff-edge”, including a specific agreement on what happens if no withdrawal agreement is reached, is one of businesses’ key “asks” for the UK Government. Without any certainty that they will have time to prepare for change, some businesses are likely to execute contingency plans based on the worst-case “crash-out” scenario
- > **dispute resolution** – the UK Government is committed to leaving the jurisdiction of the Court of Justice of the European Union (CJEU) but recognises that it will be essential to have other arrangements for resolving disputes that arise over the withdrawal treaty or under any future relationship with the EU

5. Could the UK still decide at some point not to leave the EU after all?

At the moment it seems unlikely that the UK public, or the UK Government, will perform a U-turn on Brexit, and it has always been the Government’s position that the referendum result would inevitably lead to the UK’s withdrawal from the EU.

Throughout the Miller case, in both the High Court and the Supreme Court, it was a central assumption that a notice of withdrawal under Article 50 could not be given conditionally or, once given, withdrawn: triggering Article 50 was like firing a gun – a bullet cannot be pulled back. Rights under EU law would inevitably be affected by the service of the notice under Article 50. Both sides agreed the point, but some political expediency may have accounted for this from the Government’s perspective, because disputing the implications of Article 50 might have led to a reference to the CJEU.

However, the view that the notice to withdraw is irrevocable may be contested. An opinion published by some very senior constitutional lawyers in the UK suggests that there are, at least, strong arguments that the Article 50 notification could be withdrawn if the ultimate terms of withdrawal from the EU are not approved by the UK Parliament.² This is because Article 50 refers to a member state’s decision to withdraw “in accordance with its own constitutional requirements”. Following the logic of the Supreme Court in the Miller case, it is arguable that the approval of the UK Parliament is a constitutional requirement for approval of the terms of withdrawal. On this basis, Article 50 would not operate to eject a member state from the EU contrary to its own constitutional requirements.

Equally if the UK changed its mind and the EU27 agreed that the UK should stay, it seems unlikely that a way would not be found to stop the Article 50 “bullet”. But after two years of negotiations this might be an unlikely scenario.

6. What will the UK Parliament’s role be in the withdrawal process?

Although the UK Supreme Court confirmed the need for legislation to trigger the Article 50 process, there was no ruling on what right of approval the UK Parliament should have over the terms of the withdrawal agreement or a future trade agreement with the EU.

The Act authorising the triggering of Article 50 was eventually passed without amendments which would have required the prior approval of both Houses of Parliament for the withdrawal agreement, for any decision by the Prime Minister to withdraw without an agreement and for the terms of any future relationship agreement with the EU. However, the UK Government has committed to put the final deal agreed between the UK and the EU to a vote in both Houses of Parliament. Brexit Minister David Jones has said the intention is that the UK Parliament’s vote will cover both the withdrawal agreement and the agreement as to the future relationship of the UK with the EU, and that the UK motion will be proposed before the European Parliament debates and votes on the final agreement.

In the White Paper the Government promised to ensure that the UK Parliament receives “as much information as that received by members of the European Parliament”. Under the Framework Agreement on Relations between the European Parliament and European Commission, the European Parliament must be provided with any relevant information at the same time as the Council. It is kept up-to-date throughout the negotiating process and can offer its opinion to the Commission.

The UK Parliament will also have to approve the “Great Repeal Bill” which is expected to be tabled in the next few months. See Question 7 below.

There are likely to also be a number of other domestic Bills required to deal with the legal consequences of Brexit and which may need to be on the statute book before the UK leaves the EU. These Bills will cover areas such as immigration, sanctions, fisheries, agriculture, data protection, tax, trade and customs arrangements. Additional Bills may also be required depending on the outcome of negotiations between the UK and EU.

7. What will the Great Repeal Bill do?

The symbolic role of the Great Repeal Bill will be to repeal the European Communities Act 1972, which makes EU law effective in the UK. However, the Great Repeal Bill might as accurately be called the Great Continuity Bill, as it will be the vehicle for achieving the Government’s intention to adopt the European “acquis” into UK law where necessary, so as to minimise changes to existing law in the UK at the point the UK actually leaves the EU. As part of ensuring a smooth transition, the vast majority of EU laws will be adopted and any substantive regulatory changes will be made separately by new legislation passed by Parliament. Post-Brexit, UK courts will not be required to consider jurisprudence of the Court of Justice of the European Union (CJEU) and historic CJEU case law will be given the same status as UK Supreme Court decisions.

On 30 March 2017 the UK Government published its White Paper on the Great Repeal Bill, “Legislating for the United Kingdom’s withdrawal from the European Union” which, whilst relatively light on detail, confirmed the Government’s overall approach as regards this process.

Given that much EU regulation deals with cross-border matters, converting it into UK law which works on a freestanding basis outside the EU will be a complex task. The task of identifying the parts of EU law that don’t work in the UK-alone context (“inoperables”) will be hugely involved, especially in areas such as financial services or data protection where the single market is enshrined through mutual recognition of licences and authorisations.

The White Paper confirms that the Great Repeal Bill will convert existing EU laws into UK law not by “copying out” regulation by regulation, but rather by making it clear that EU regulations (as they applied immediately prior to exit day) will continue to apply in the UK on exit. The White Paper also indicates that powers will be given to Government under the Great Repeal Bill to amend the statute book for issues, such as references to the EU and Member States, involvement of EU institutions and information sharing with the EU.

The White Paper confirms that amendments to legislation to fix inoperables will be made through secondary legislation and subject to either an affirmative (for substantive changes) or negative (for mechanical changes) parliamentary approval process. It expects the number of statutory instruments needed to be around 800-1,000. These powers may become a bone of contention between Parliament and the Government, as Parliament is wary of the potential abuse of extensive delegated powers ("Henry VIII clauses"). These are seen as potentially undermining the sovereignty of Parliament because the opportunity for Parliamentary scrutiny of delegated legislation is very limited. Satisfying Parliament that the scope of amending powers is appropriate and will not be abused may therefore be a major challenge for the Government in the passage of the Great Repeal Bill.

Additional complexities might arise in areas which have been devolved to the Scottish, Welsh and Northern Irish administrations, since it would not normally be within the scope of the UK (Westminster) Parliament to legislate in these areas. The White Paper touches on the fact that common UK frameworks may be required in relation to the UK single market and to allow the UK to strike free trade agreements with third countries. It also confirms that amending powers, as discussed above, will also be given to devolved ministers in relation to devolved legislation.

8. Why is the WTO important in the context of Brexit?

The EU and the UK, in its own right, are both members of the World Trade Organisation. If the UK leaves the EU without agreeing a new trade relationship, WTO terms will apply by default to trade in goods and services between the EU and the UK. For information on how the WTO rules will impact trade post-Brexit, including how tariffs will be determined between the UK and EU, see our publications "[Brexit preparations – Supply Chain Mapping](#)" and "[The Future EU-UK Relationship: The UK's vision](#)".

9. Will there be restrictions on the free movement of workers and visitors between the EU and the UK?

Theresa May has made it clear that, from the time the UK leaves the EU, it will no longer benefit from the EU's fundamental freedoms, which includes free movement of people and free movement of workers. Mrs May has also made it clear that she will not accept free movement in its current form, therefore national laws on immigration will apply and visitors' visas and work permits may be required for UK nationals visiting/working in the EU and vice versa. There has been no indication as to how future UK immigration policy might operate, however the Prime Minister has said that seeking to guarantee the rights of EU citizens already living in the UK and UK citizens already living in the EU will be a priority.

10. What will happen to the EU's trade agreements with the rest of the world?

The EU has over 50 free trade agreements with third countries, including the new Comprehensive Economic and Trade Agreement (CETA) with Canada, the Southern African Development Community Economic Partnership Agreement and the EU-South Korea Free Trade Agreement. The economic and commercial effect of these agreements could be significantly affected by the UK's departure from the EU. This may lead to the parties wishing to renegotiate with the EU and the UK. Whether such negotiations would be carried out on a trilateral or bilateral basis is not clear. Equally, it is not clear where these negotiations would fit in the UK's and the EU's order of priorities. Renegotiations of these agreements may not be able to be completed until the nature and details of the new relationship between the EU and the UK are clear.

11. Will the UK enter into trade agreements with other countries?

One of the Government's main messages is that it wants a "global Britain" and the mission of the Department of International Trade is that it intends to negotiate new trade agreements outside the EU.

Technically, while the UK remains part of the EU it cannot enter into trade deals with third countries, as this remains within the competence of the EU, but it can engage in trade promotion, including discussions with third countries. The Government's White Paper confirmed that the UK has already engaged in discussions of this kind with Australia, New Zealand and India and that China, Brazil and the Gulf States have expressed interest in enhancing trading relationships with the UK.

As with other trade agreements, one of the difficulties for those negotiating potential agreements will be prioritising and sequencing negotiations. While the UK may be keen to secure a deal with the United States, for example, there may be caution from both sides in giving away too much before the outcome of EU negotiations is known. The UK is likely to prioritise trade deals with Switzerland, South Korea, Australia, New Zealand, Canada and the U.S.

12. What will happen to the regulatory institutions and decentralised agencies of the EU?

The powers of EU institutions and agencies would, barring any agreement to the contrary between the UK and the EU, fall away, so far as the UK is concerned, upon the UK exiting. This means that by the time of withdrawal, the UK will need to have in place its own alternatives to fill the roles of European bodies such as the European Securities and Markets Authority (ESMA), the European Banking Authority (EBA), the European Medicines Agency (EMA) and the European Chemicals Agency (ECHA). EU authorities which currently have their headquarters in London such as the EBA and the EMA are expected to relocate to a remaining EU member state. During its negotiations with the EU, the UK may seek continued participation in certain institutions and agencies. Some agencies already involve non-EU participation, such as the European Aviation Safety Agency (EASA). The UK's status in EASA and other such agencies will depend on the political will of both sides.

¹ R (Miller & Another) v. Secretary of State for Exiting the European Union [2017] UKSC 5

² https://www.bbindmans.com/uploads/files/documents/Final_Article_50_Opinion_10.2.17.pdf