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# What next? An Analysis of the EU law questions surrounding Article 50 TEU

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## Introduction

On June 23, the UK voted by a margin of 52% to 48% to leave the EU.<sup>1</sup> Within hours of the result, significant questions, which hardly surfaced during the long campaign, about the process of withdrawal and the possible terms on which it might take place began to emerge. The majority of these are political; as developments within both the Conservative and Labour parties amply testify. But many are legal. Much attention has, quite rightly, focused on questions of UK constitutional law – with lively debate about the status of referendums, the relationship between Parliament and the royal prerogative, and the role of the Scottish Parliament and Northern Irish Assembly. EU law has also been discussed, with Article 50 TEU, the provision introduced in the Treaty of Lisbon enabling a Member State to withdraw from the EU, being the principal focus.

In this short paper, I offer a tentative analysis of the EU law questions surrounding withdrawal from the EU; focusing on the interpretation and application of Article 50 TEU. The text of Article 50 contains a number of ambiguities, and the answers to many of the legal questions which arise are shrouded in uncertainty. This uncertainty contributes towards the volatility of the current situation, damaging the European economy. I offer some thoughts on the mechanisms through which answers might emerge. Throughout, I suggest possible answers to the legal questions. These are informed by the current political context, and are designed to ensure that the withdrawal process produces an outcome which is legitimate from the perspectives of both the UK and the EU.<sup>2</sup>

At the outset, it is worth emphasising two important points, which might otherwise be obscured.

First, it is all too easy in this context, as I have above, to refer to ‘the UK’ and ‘the EU’. This leads to the belief that both are monolithic entities with set objectives, one ranged against the other as the withdrawal process begins. This is of course not the case. The referendum has made it clear that the UK is a divided nation. England and Wales voted to leave, while Scotland and Northern Ireland voted to remain. There are also painful divisions between urban and rural areas, and the young and the old. Leave campaigners were not forced to, and (at least insofar as their objective was to win the referendum,

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\* I would like to thank Albert Sanchez-Graells and the many other friends and colleagues with whom I have been discussing Article 50 since June 23.

<sup>1</sup> See [http://www.bbc.co.uk/news/politics/eu\\_referendum/results](http://www.bbc.co.uk/news/politics/eu_referendum/results).

<sup>2</sup> In this paper I do not engage with the literature on legitimacy; though it would be interesting to develop a more overtly theoretical approach. The core concern is with the social and normative acceptability of the withdrawal process, in both the UK and the EU.

sensibly) did not choose to articulate a clear vision of the future relationship between the UK and the EU. As a result, the referendum does not offer a clear mandate to the UK government, or to Parliament, which it might use to guide it in withdrawal negotiations. The EU is also divided. The EU institutions, and the governments of the Member States did not want 'Brexit', and cannot be expected to be united in their response. Many governments have trade interests which they want to protect. Others see economic opportunities in adopting a harder line against an always reluctant partner. All have an eye on the domestic political context. It is not immediately obvious what sort of deal with the UK best serves the 'EU interest'.

Second, the legal analysis presented here is, as stated above, tentative. This paper is written in the immediate aftermath of the UK's vote to leave the EU. I have little doubt that various elements of the legal argumentation can (and hopefully will) be further developed. It is also inevitable that some of the analysis presented here will be overtaken by events, and that much may in the end depend on the resolution to questions not posed here. There is nevertheless, I hope, some utility in producing this analysis at this stage, with the explicit aim of informing the debate among the key actors involved in the Brexit negotiations in this key period before the positions of the European institutions and the governments of the Member States begin to crystallise.

### **The Article 50 TEU process**

The Treaty of Lisbon, via Article 50 TEU, introduced a specific EU law mechanism through which States may withdraw from the European Union. One searches in vain for an analysis of the provision in the main EU law textbooks. The origins of the provision lie in the draft Article I-60 of the Treaty establishing a Constitution for Europe.<sup>3</sup> As such, Article 50 is 'an integral part of the EU constitutional(izing) package, rather than an element of the de-constitutionalization course instigated by the 2007 Intergovernmental Conference, following the rejection of the Constitutional Treaty'.<sup>4</sup> It has not been used, or tested.<sup>5</sup> In the context of the referendum in the UK, the Article was analysed in detail by the UK Government,<sup>6</sup> and the House of Lords European

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<sup>3</sup> OJ C 169/1 [2003].

<sup>4</sup> See C Hillion, 'Accession and Withdrawal in the Law of the European Union' in A Arnall and D Chalmers (eds), *The Oxford Handbook of European Union Law* (OUP, 2015) 126 at 149. See also A Lazowski, 'Withdrawal from the European Union and Alternatives to Membership' (2012) 37 *ELRev* 523. Hillion references the scholarly scrutiny the provision has received at note 46.

<sup>5</sup> There is some discussion of Article 50 in *Re Ratification of the Treaty of Lisbon* [2010] 3 *CMLR* 13, before the German Constitutional Court at [305]-[306]; and in *Re Ratification of the Lisbon Treaty* [2010] 1 *CMLR* 42, before the Latvian Supreme Court. It was also referred to in the High Court in the UK in *Shindler* [2016] *EWHC* 957 (Admin).

<sup>6</sup> HM Government, 'The Process for Withdrawing from the European Union', Cm 9216, February 2016, available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/503908/54538\\_EU\\_Series\\_No2\\_Accessible.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/503908/54538_EU_Series_No2_Accessible.pdf).

Committee,<sup>7</sup> and the European Parliament.<sup>8</sup> In the days following the vote in favour of leaving the EU, the Houses of Parliament have produced further reports,<sup>9</sup> and the withdrawal procedure has been the focus of much analysis and speculation.<sup>10</sup>

As Hillion says, 'a common critique in the literature is that the procedure of Article 50 is formulated in an 'incomplete', 'unclear', if not 'cryptic' fashion, thus generating 'uncertainty'.<sup>11</sup> As will become clear below, the text of the provision does not provide answers to many of the key legal questions. Were the interpretation of the Article to come before the Court of Justice, and there is some discussion below of the circumstances in which this may occur, it could therefore be expected to apply a flexible purposive approach.<sup>12</sup> Hillion argues, and some may find this rather paradoxical, that Article 50 has a specific function in relation to the integration process in that it 'bolsters the normative basis for a negotiated withdrawal' and 'points towards a strong post-withdrawal engagement by the Union with the former Member State'.<sup>13</sup> My analysis below builds on this approach, seeking to interpret the provision in the context of the current situation in a way which ensures that the UK is best able to maintain a working relationship with the EU, and achieves a settlement in which the interests of citizens of the EU are, as far as possible, protected. Any other approach, such as one, for example,

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<sup>7</sup> House of Lords European Committee, 11th Report of Session 2015-16, 'The Process of Withdrawing from the European Union', May 2016, available at <http://www.publications.parliament.uk/pa/ld201516/ldselect/ldeucom/138/138.pdf>.

<sup>8</sup> European Parliament Briefing, 'Article 50: Withdrawal of a Member State from the EU', February 2016, available at [http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/577971/EPRS\\_BRI\(2016\)577971\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/577971/EPRS_BRI(2016)577971_EN.pdf).

<sup>9</sup> House of Commons Briefing Paper Number 7551, 'Brexit: How does the Article 50 process work?', 30 June 2016; House of Lords Library Note, 'Leaving the EU: Parliament's Role in the Process', 30 June 2016.

<sup>10</sup> See for example: A Renwick, 'The Road to Brexit: 16 Things You Need to Know about the Process of Leaving the EU', The Constitution Unit, available at <https://constitution-unit.com/2016/06/24/the-road-to-brexit-16-things-you-need-to-know-about-the-process-of-leaving-the%E2%80%AFeu/#more-5134>, N Barber, T Hickman and J King, 'Pulling the Article 50 'trigger': Parliament's Indispensable Role', UK Constitutional Law Association Blog, available at <https://ukconstitutionallaw.org/2016/06/27/nick-barber-tom-hickman-and-jeff-king-pulling-the-article-50-trigger-parliaments-indispensable-role/>, K Armstrong, 'Push Me, Pull You, Whose Hand on the Article 50 trigger', UK Constitutional Law Association Blog, available at <https://ukconstitutionallaw.org/2016/06/27/kenneth-armstrong-push-me-pull-you-whos-hand-on-the-article-50-trigger/>, S Douglas-Scott, 'Brexit, The Referendum and the UK Parliament: Some Questions about Sovereignty', UK Constitutional Law Association Blog, available at <https://ukconstitutionallaw.org/2016/06/28/sionaidh-douglas-scott-brexit-the-referendum-and-the-uk-parliament-some-questions-about-sovereignty/>, E O'Dell, 'Would it fly? A possible Article 50 route to a second referendum', available at <http://blogs.lse.ac.uk/politicsandpolicy/article-50-route-to-a-second-referendum/#Author>, A Duff, 'Everything you need to know about Article 50 (but were afraid to ask)', available at <http://verfassungsblog.de/brexit-article-50-duff/>, A Georgopoulos, 'Brexit', Article 50 and the Constitutional Significance of the UK Referendum', available at <http://www.ejiltalk.org/brexit-article-50-teu-and-the-constitutional-significance-of-the-uk-referendum/>, 'S Peers, 'Article 50: Can the UK force the pace of Brexit', The Conversation, available at <https://theconversation.com/article-50-can-the-eu-force-the-pace-of-brexit-61626>, P Syrpis, 'Once the UK triggers Article 50 to start Brexit, can it turn back?', The Conversation, available at <https://theconversation.com/once-the-uk-triggers-article-50-to-start-brexit-can-it-turn-back-61727>.

<sup>11</sup> Hillion, n4 above at 135.

<sup>12</sup> See G Conway, *The Limits of Legal Reasoning and the European Court of Justice* (2014, CUP).

<sup>13</sup> Hillion, n4 above at 150-51.

based on the safeguarding of the interests of the EU27 at the expense of the interests of the withdrawing State, should be rejected.

Article 50 provides that a Member State 'may decide to withdraw from the Union in accordance with its own constitutional requirements'. It 'shall notify the European Council of its intention'. A process of negotiation ensues, 'in the light of the guidelines provided by the European Council'. Paragraph 3 makes it clear that 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', 'unless the European Council, in agreement with the State concerned, unanimously decides to extend this period'. Thus, the withdrawing state remains a full member of the EU until the process has run its course, though paragraph 4 does provide that 'for the purposes of paragraph 2 and 3, the member of the European Council or of the Council representing the withdrawing Member State shall not participate in the discussions of the European Council or Council or in decisions concerning it'. Finally, paragraph 5 states that 'if a State which has withdrawn from the Union asks to rejoin, its request shall be subject to the procedure referred to in Article 49'; that is the normal accession procedure.

The operation of Article 50 raises a number of difficult legal questions. In the sections below, this paper considers a) whether it is possible to withdraw from the EU without using the Article 50 process; b) who makes the decision to trigger Article 50; c) whether there should be informal negotiations prior to the triggering of Article 50; d) whether it is possible to rescind an Article 50 notification, or otherwise stop the withdrawal process; e) the scope of the withdrawal negotiations; f) the extension of the two-year time period; g) the status and likely influence of the UK during the negotiation process; and h) the conclusion of the withdrawal agreement. It then considers the ways in which any disagreements as to the operation of Article 50 may be resolved; before concluding with an analysis of way in which the EU law might be developed in such a way as to ensure that a legitimate outcome will emerge.

a) Is it possible to withdraw from the EU without using Article 50?

Prior to the Treaty of Lisbon, there was academic debate over whether it was even possible to withdraw from the European Union or Community, given the commitment to 'ever closer union' in the Treaties, and the 'unlimited' duration of the enterprise.<sup>14</sup> It seems clear that withdrawal must always have been legally possible;<sup>15</sup> in the absence of

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<sup>14</sup> See Case 6/64 *Costa v ENEL* [1964] ECR 585.

<sup>15</sup> See also Lazowski, n4 above at 525: 'it is widely accepted that that lack of an exit clause does not preclude the possibility of withdrawal from an international organisation'. In relation to the EU, withdrawal has been contemplated at various times in various states; in particular in the UK, which held a referendum in 1975 on whether the UK should stay in the European Community (Common Market). In relation to the 'idiosyncratic' situation of Greenland, see F Harhoff, 'Greenland's Withdrawal from the European Communities' (1983) 20 *CMLRev* 13.

specific EU law provisions, withdrawal would take place under public international law rules, in particular the rules established in the Vienna Convention on the Law of Treaties.<sup>16</sup> The inclusion of Article 50 in the Treaties in 2009 ‘reflects the intention to submit [withdrawal] to the canons of the EU legal order, instead of leaving it to the vicissitudes of international law’,<sup>17</sup> and to establish a withdrawal process which is able to lead to an orderly exit from the EU, in which levels of disruption and uncertainty are minimised. In the operation of Article 50, these objectives should be borne in mind.

Within the domestic debate there has been discussion of whether there are alternatives to Article 50. There have been suggestions, in particular among leave campaigners,<sup>18</sup> to the effect that it would be possible to effectuate withdrawal via repeal of the European Communities Act 1972, and thereby reclaiming the ability to legislate domestically free from EU law constraints. This would open up the possibility for legal action to be brought against the UK, under EU and international law.<sup>19</sup> The House of Lords in May 2016 stated that Article 50 provides the only means of withdrawing from the EU consistent with the UK’s obligations under international law: ‘A Member State could not fall back on the Vienna Convention on the Law of Treaties to avoid the withdrawal procedures in Article 50, because the Vienna Convention had to be read in the light of the specific procedures for treaty change laid down in the EU Treaties’.<sup>20</sup> As opinion in the UK has quickly coalesced around the proposition that withdrawal will be pursued via the Article 50 route, the rival arguments are not considered further here.

#### b) Who makes the decision to trigger Article 50?

The decision to trigger Article 50 is said to be for the withdrawing state, ‘in accordance with its constitutional requirements’. The EU institutions, including the governments of the EU27, cannot impose legal pressure on the withdrawing State; though of course they may be able to exert some political pressure,<sup>21</sup> seeking, for example, to ensure that the economic and political uncertainty following the UK’s vote on 23 June is minimised. As a matter of UK constitutional law, it is clear that the referendum only has advisory status.<sup>22</sup> There have been debates within the UK about the extent to which the decision to trigger Article 50 is for the Prime Minister, acting under prerogative powers,<sup>23</sup> or for

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<sup>16</sup> See also *re Secession of Quebec* [1998] 2 SC 217, before the Canadian Supreme Court.

<sup>17</sup> Hillion, n4 above at 149.

<sup>18</sup> See eg

[http://www.voteleavetakecontrol.org/a\\_framework\\_for\\_taking\\_back\\_control\\_and\\_establishing\\_a\\_new\\_uk\\_eu\\_deal\\_after\\_23\\_june](http://www.voteleavetakecontrol.org/a_framework_for_taking_back_control_and_establishing_a_new_uk_eu_deal_after_23_june)

<sup>19</sup> See also Duff, n10 above.

<sup>20</sup> House of Lords European Committee Report, n7 above at [9].

<sup>21</sup> See eg: <https://theconversation.com/article-50-can-the-eu-force-the-pace-of-brexits-61626> and <http://www.theguardian.com/politics/2016/jun/25/eu-emergency-talks-brexit-berlin>

<sup>22</sup> See European Union Referendum Act 2015; discussed in Douglas Scott, n9 above.

<sup>23</sup> See <http://www.theguardian.com/politics/2016/jul/05/brexit-can-go-ahead-without-parliament-vote-article-50-government-lawyers-say>.

Parliament;<sup>24</sup> and also questions about the extent to which the Scottish Parliament may be able to influence, or perhaps even veto, any decision to pull the Article 50 trigger.<sup>25</sup> To the extent that the decision to trigger Article leads inexorably to a process through which the UK withdraws from the EU, with a resultant effect on a range of legal rights, protected by virtue of EU law and the operation of the European Communities Act 1972, it seems as though the approval of Parliament is required.<sup>26</sup> And, it is certainly legally possible that, notwithstanding the referendum result, Parliament might decide not to trigger Article 50.<sup>27</sup>

While the EU institutions cannot impose legal pressure on a State to trigger Article 50, the process of withdrawal is governed by EU law. A notification for the purposes of Article 50, should only be treated as a notification if it is made according to the conditions laid down in Article 50. Thus, where a notification is presented to the European Council, it should ensure its admissibility. As discussed below, it may be possible for questions relating to the validity of any notification to come before the courts. However, given that the only substantive condition relating to the notification of the intention to withdraw relates to compliance with domestic constitutional requirements, it is to be anticipated that, in any case before it, the European Court of Justice will tread carefully.<sup>28</sup> As far as possible, it should leave questions of national constitutional law to be determined within the Member State.

c) Should there be informal negotiations before Article 50 is triggered?

The Article 50 process, to the extent that it is outlined in the Treaties, only begins once a valid notification has reached the European Council. As such, it seems that questions relating to whether there may or may not be informal negotiations between the withdrawing state and the EU institutions relating to the withdrawal process are to be determined in the political rather than the legal realm.<sup>29</sup>

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<sup>24</sup> See eg: <https://publiclawforeveryone.com/2016/06/24/brexit-legally-and-constitutionally-what-now/>

<sup>25</sup> See Scottish Parliament European and External Relations Committee, SP Paper 978, 16 March 2016, [http://www.parliament.scot/S4\\_EuropeanandExternalRelationsCommittee/Reports/EUS042016R02.pdf](http://www.parliament.scot/S4_EuropeanandExternalRelationsCommittee/Reports/EUS042016R02.pdf)

<sup>26</sup> See e.g. David Pannick in *The Times*, <http://www.thetimes.co.uk/article/why-giving-notice-of-withdrawal-from-the-eu-requires-act-of-parliament-dz7s85dmw>; and Barber, Hickman and King, n9 above.

<sup>27</sup> See e.g. AC Grayling, <https://www.nchlondon.ac.uk/2016/07/01/professor-c-graylings-letter-650-mps-urging-parliament-not-support-motion-trigger-article-50-lisbon-treaty-1-july-2016/>.

<sup>28</sup> See by analogy the case law relating to Article 4(2) TEU, discussed in A von Bogdandy and S Schill, 'Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty' (2011) 48 *CMLRev* 1471.

<sup>29</sup> The 'EU side' appears, publically at least, to be refusing to open informal negotiations with the UK until the decision to trigger Article 50 is made. See <http://www.theguardian.com/politics/2016/jun/27/europe-leaders-crunch-talks-brexit-fallout>.

The legal position is also unclear in relation to when the 'guidelines provided by the European Council', in the light of which the Union is to negotiate and conclude an agreement with the withdrawing state, are to be adopted, or what their scope might be. By virtue of paragraph 4, it is said that the withdrawing state shall not participate in the discussions in the European Council 'for the purposes of paragraph 2 and 3' or 'in decisions concerning it'.

In this paper, it is argued that these guidelines are likely to assume much importance, in particular in relation to the current situation, in which Article 50 may be triggered for the first time. It is suggested that it is important that agreement is reached between the European Council and the UK, in relation to full details of the withdrawal process, the scope of a withdrawal deal, and the mechanisms through which the deal will be concluded and ratified; and crucially, that this should occur before the decision to trigger Article 50. The legitimacy of withdrawal process will be enhanced to the extent that the UK Government is as fully aware as possible of the consequences entailed by triggering Article 50, and is able to secure informed constitutional consent for embarking on the withdrawal process.<sup>30</sup> Thus, it is to be hoped that the European Council, in the wake of the referendum result, and before any decision to trigger Article 50, is working on the preparation of these guidelines, and is consulting with representatives of the UK in relation to their content. If the EU institutions are unwilling to provide guidelines, the UK government should apply whatever legal and political pressure it is able to muster in order to obtain clarification from the EU institutions in relation to the conduct of the withdrawal process; making it clear that the levels of uncertainty over the process of withdrawal are likely to delay the decision to trigger Article 50.

d) Is it possible to rescind an Article 50 notification or otherwise stop the process?

Perhaps the most fundamental question to which a legal answer is required is whether it is possible for the withdrawing State, having notified its intention to withdraw, to rescind or revoke the notification, or, in any other way end the withdrawal process. Article 50 does not explicitly contemplate this possibility, but neither does it explicitly rule it out. There has been very little academic comment on this issue, but given the uncertainties surrounding the way in which the UK Government might seek to act following the referendum, it is an urgent question. Paragraph 4 indicates only that 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... unless the European Council, in agreement with the State concerned, unanimously decides to extend this period'. That may be read as meaning that once the trigger is pulled, the

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<sup>30</sup> It is certainly possible to finesse any legal objections to the participation of the UK in the process of drawing up the European Council guidelines, notwithstanding the wording of Article 50(4). One can argue that the guidelines are a necessary precursor to the commencement of the withdrawal process; and that prior to the triggering of the Article 50, the UK remains a full member of the European Council.



inexorable outcome is either withdrawal from the EU on the basis of the negotiated deal, or, in the event that a deal is not agreed within the two year period and there is no unanimous agreement to extend it, a default 'no deal' position, in which the UK's relationship with the EU is governed by standard WTO rules. However, if it is possible to read in the option for the withdrawing Member State to 'stop the clock', it may be that there is a third possible outcome: a decision, taken within the two-year negotiating period, to rescind or revoke the notification and remain within the EU.

The clearest statements on this point were made in the evidence presented to the House of Lords in February 2016. Sir David Edward and Sir Derrick Wyatt QC were clear that it is possible to reverse a decision to withdraw at any point before the date on which the withdrawal agreement takes effect. In the words of Professor Wyatt:

"There is nothing in the wording to say that you cannot. It is in accord with the general aims of the Treaties that people stay in rather than rush out of the exit door. There is also the specific provision in Article 50 to the effect that, if a State withdraws, it has to apply to rejoin *de novo*. That only applies once you have left. If you could not change your mind after a year of thinking about it, but before you had withdrawn, you would then have to wait another year, withdraw and then apply to join again. That just does not make sense. Analysis of the text suggests that you are entitled to change your mind."<sup>31</sup>

Other commentators take a different view. Barber, Hickman and King, for example, proceed on the basis that the Article 50 process is irreversible; 'there is no turning back once Article 50 has been invoked. If no acceptable *withdrawal* agreement has been reached within two years, the exiting Member State is left without any deal with the EU'. They conclude that the UK 'could not safely assume that it is entitled to withdraw its notification on the basis of the terms of Article 50'.<sup>32</sup>

The Treaty of Lisbon appears to have been drafted with the assumption that Article 50 would only be triggered, in accordance with constitutional requirements, once a clear consensus had been reached within the withdrawing Member State. Regardless of the arguments now raging in the UK about the authority and legitimacy of the referendum, the responsibility of Parliament, and the role of the Scottish Parliament and Northern Irish Assembly, it seems at the very least possible that the decision by a Member State to withdraw from the EU might be politically contested, and subject to significant internal scrutiny. After all, it is widely anticipated that the negotiation of any withdrawal agreement would take two, or perhaps more years. Within such a time period, political constellations are likely to shift appreciably. It is also, and this is a point to which I return in the final section, only once negotiations with the EU have begun, that the

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<sup>31</sup> House of Lords European Committee Report, n7 above at [10].

<sup>32</sup> Barber, Hickman and King, n10 above. See also European Parliament Briefing, n8 above, which states that 'most commentators' argue that it is impossible, or at least doubtful from a legal point of view, to unilaterally revoke an Article 50 notification.

nature of the withdrawing State's future relationship with the EU, and together with that, the practical consequences of withdrawal, will begin to emerge.

All this militates in favour of a reading of Article 50 which makes it possible for the Member State to revoke a notification.<sup>33</sup> It is, for example, possible to envisage the following scenario. A decision to trigger Article 50 provokes turmoil in a Member State. A general election follows. A decisive majority is attained by parties advocating remaining within the EU. In such circumstances, it seems ludicrous to hold the State to the commitment to negotiate a withdrawal agreement from the EU, and then afford it the opportunity to apply for readmission under Article 49. It is clearly far simpler to allow the withdrawal process to be stopped.

Given the uncertainty here, and the clear link between ascertaining an answer to this question and making the decision to pull the Article 50 trigger, it seems imperative that an answer is found either via the European Council guidelines, or, if necessary, in an action before the Court of Justice to interpret EU law.

e) What is the scope of a withdrawal agreement?

The agreement to be concluded with the withdrawing State, is, according to Article 50(2), to set out 'the arrangements for withdrawal taking account of the framework for its future relationship with the Union'. This appears to envisage a distinction between the withdrawal agreement (or 'divorce settlement'), and any future framework, which might be 'left for a more comprehensive agreement, to be negotiated at a later date'.<sup>34</sup>

Legally, it seems as though even the 'divorce' may well require more than one agreement. According to Lazowski, 'agreements on withdrawal, falling under the category of international Treaties [concluded in accordance with the procedure laid down in Article 218(3) TFEU], cannot amend EU primary legislation but can regulate non-primary law matters only. This implies that alongside an international treaty regulating withdrawal, the remaining Member States will – most likely – have to negotiate between themselves a treaty amending the Founding Treaties in order to repeal all provisions touching on the departing country'.<sup>35</sup>

When one considers the relationship between the divorce agreement and any agreement on the envisaged future relationship between the withdrawing State and the

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<sup>33</sup> See Duff, n10 above: 'Within that two year period – for instance, following a British general election and change of government or, less likely, after a second referendum - it would be perfectly possible for the UK to revoke its decision to quit. That Article 50 is silent on the matter of revocation does not mean that a change of direction would be illegal under EU law (as long as the CJEU were convinced that the switch was constitutional). The EU is well practised in the art of the stopped clock. Given the collateral damage done to the remaining EU by Brexit, a notification that London had changed its mind would be met with very great, if somewhat exasperated relief.'

<sup>34</sup> Hillion, n4 above at 140.

<sup>35</sup> Lazowski, n4 above at 529.

European Union, the picture becomes still murkier. If the aim is to reach agreement between the withdrawing State and the EU within the two year time period, the withdrawal agreement should be limited in scope. If on the other hand, the objective is to set the course for the future relationship, the agreement will of course need to be broader. It is certainly necessary for the withdrawal agreement to 'bridge the gap' between the old EU regime and the new future relationship,<sup>36</sup> and to deal with the issues surrounding the acquired rights of individuals and companies which might, over time, be phased out. A 'catalogue of dossiers would have to be developed';<sup>37</sup> with due consideration of what can and should be included within the withdrawal agreement, and what is to be determined in other treaties.

In line with the approach adopted throughout this paper, it is argued that these issues should be addressed in the guidelines provided by the European Council, and, as far as possible, agreed with the withdrawing Member State before the decision to pull the Article 50 trigger is made. In the last section, I argue for a broad interpretation of the scope of the withdrawal agreement, so that the contours of the future relationship between the withdrawing State and the EU are known before the end of the notification period.

f) Can the time period be extended?

Article 50(3) provides that the Treaties shall cease to apply to the withdrawing State from the date of entry into force of the withdrawal agreement, or, failing that, two years after the notification 'unless the European Council, in agreement with the State concerned, unanimously decides to extend this period'.

Thus, it is not clear, even at the date on which Article 50 is triggered, when withdrawal might occur, or indeed on which terms. One possibility, though this seems unlikely, is that the agreement relating to withdrawal is reached swiftly. In this case, the Treaties will cease to apply to the withdrawing State from the date on which the withdrawal agreement enters into force.

If it is not possible to reach a swift agreement, and as the two-year time period comes towards an end, the prospect of a withdrawal without a negotiated agreement will begin to loom large. This would mean exit from the EU without a withdrawal agreement, with no option but to fall back on the trading terms derived from membership of the World

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<sup>36</sup> House of Lords European Committee Report, n7 above at [25]. See also [31]: Coordination between the withdrawal treaty on the one hand and the future relations treaty on the other would be important. The UK's aim would be to have a smooth transition between the past in the EU and the future in the new arrangement.

<sup>37</sup> Ibid at 529-33.

Trade Organisation.<sup>38</sup> Transitional arrangements would be handled unilaterally by each side. The view of Sir David Edward is that 'the long term ghastliness of the legal complications is almost unimaginable.'<sup>39</sup>

It is in the best interests of all, in particular of individuals and companies with acquired rights in the UK and the remainder of the EU27, for exit without an agreed withdrawal deal to be avoided. There are, it seems to me, two ways in which this may be accomplished.

First, Article 50 expressly provides for the two year time period to be extended, but only on the basis of the unanimous agreement of all States. That agreement cannot be guaranteed; and at this stage it is impossible to speculate about the likely pressures within various Member States which may affect the decisions of their governments about whether to agree to an extension of the negotiations. Thus, it seems that this is possible, but politically very uncertain. In relation to the extension of the time period, there is also what I take to be a mischievous suggestion by O'Dell that the negotiated period could, with the agreement of all, be extended indefinitely, with the result that withdrawal cannot take place.<sup>40</sup>

Second, if, as argued in this paper, it is possible to revoke the Article 50 notification, it becomes possible for the withdrawing State to make a unilateral decision to avoid the prospect of a disorderly exit, and to remain within the EU. The ramifications of this are considered more fully in the final section.

g) What is the status of the UK during the negotiation process?

As discussed above, subject to application of paragraph 4, which deals with participation in discussion in the European Council and Council relating to the withdrawal process, the withdrawing State remains a Member State of the EU, with rights and obligations intact.<sup>41</sup>

As regards the rights of the withdrawing State, certain interpretive difficulties may arise in any attempt to delineate the situations in which the withdrawing State may, and may not, be involved in European Council and Council decision-making. Once again, this is an area in relation to which the guidelines provided by the European Council may provide clarity. In practice it seems almost inevitable that the role and influence of the

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<sup>38</sup> Note however that even this option may not be straightforward, and will require agreement within the WTO. See <http://www.ft.com/cms/s/0/745d0ea2-222d-11e6-9d4d-c11776a5124d.html#axzz4Dd5Y4Uki>.

<sup>39</sup> House of Lords European Committee Report, n7 above at [49].

<sup>40</sup> See <http://blogs.lse.ac.uk/politicsandpolicy/article-50-route-to-a-second-referendum/>

<sup>41</sup> Nationals of the withdrawing State will, in principle, retain their positions in the EU institutions pending the entry into force of the withdrawal agreement. It is interesting in this regard that there seem to be no plans to replace Lord Hill, the UK Commissioner who resigned in the wake of the referendum result.

withdrawing State will inevitably diminish. It is unclear whether the State will have an interest in influencing the making of decisions at EU level which might well never concern it; and arguable that it is not legitimate to afford it such a role. The power of the argument against involvement will of course depend on the extent to which it is envisaged that the withdrawing State aspires to continue to have a relationship with the EU.

As regards obligations, the UK will continue to be bound by EU law rules until the withdrawal agreement enters into force.<sup>42</sup> This includes new EU legislation adopted after Article 50 is triggered, but before the withdrawal agreement enters into force.<sup>43</sup> While the UK is due to assume the Presidency of the Council in the second half of 2017, it is anticipated that alternative arrangements will be made in order to ensure the efficient functioning of the Union.<sup>44</sup> The principle of sincere cooperation enshrined in Article 4(3) TEU would continue to apply, and there are suggestions that it might be used in relation to the conduct of the withdrawing State during the process of withdrawal.<sup>45</sup>

#### h) How is the withdrawal agreement concluded?

Finally, there are significant uncertainties relating to the conclusion of the withdrawal agreement, both by the EU and the withdrawing State.

Let me begin with the position as regards the EU. The withdrawal agreement itself is negotiated as an EU external agreement, as is made clear by the reference to Article 218(3) in Article 50. Paragraph 2 provides that the agreement is to be concluded 'on behalf of the Union by the Council acting by qualified majority after obtaining the consent of the European Parliament'.<sup>46</sup> Thus, it is possible for an agreement to be reached without the approval of all 27 Member States; and, unlike in the case of accession, for the scope of the Union to be altered notwithstanding the lack of the unanimous consent of the Member States. Equally, it is possible for an agreement not to be concluded notwithstanding the fact that it is approved by the governments of all the Member States. No agreement can be concluded if a majority in the European Parliament vote against it. It is also possible, as discussed in e) above, that alongside any withdrawal agreement, there will be another agreement, or set of agreements, dealing with the future relationship between the withdrawing State and the Union. To the extent that any such agreements are mixed agreements, they require ratification by all

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<sup>42</sup> It should be noted that there may be complications in relation to the enforcement of EU law against the withdrawing Member State; whether before the Court of Justice, under Article 258-260, or before the national courts. See further below.

<sup>43</sup> House of Lords European Committee Report, n7 above at [58].

<sup>44</sup> It seems that Estonia, due to hold the Presidency in the first half of 2018, will assume the Presidency in the second half of 2017; see <https://euobserver.com/political/134109>.

<sup>45</sup> See Hillion, n4 above at 139-40.

<sup>46</sup> On the possibility of a turf war between the EU institutions, see Duff, n4 above.

Member States, a process which will inevitably slow down the conclusion of the negotiation process.<sup>47</sup>

On the side of the UK, the withdrawal agreement would require ratification in Parliament, in accordance with the UK's constitutional requirements. This point is further developed in the final section.

### **How might these questions be settled?**

The discussion so far indicates that many of the EU law questions relating to the process of withdrawal from the EU are unresolved. Nevertheless, given the uncertainty inherent in Article 50, it is contended here that it is possible, perhaps probable, that there will be litigation in relation to the process. There is the potential for such litigation to occur at both the national and the European level. It is difficult, at this stage, to predict the form which such litigation might take, but there are a range of claims which it is possible to envisage.

Claims may come before the European Court of Justice in the following ways. The most obvious basis for legal action will be in relation to the content and scope of any withdrawal agreement. Such an action might relate both to the procedures through which the withdrawal agreement was reached, and the substantive terms of any such agreement; and might come before the Court either directly in an Article 263 TFEU judicial review action, or indirectly, via a preliminary reference from a national court under Article 267 TFEU. It may, in addition, be possible to seek an advisory opinion from the Court via Article 218(11) TFEU as to whether the agreement is compatible with the Treaties. Actions may also be brought at earlier stages in the process, for example in relation to whether the negotiation process is compatible with EU law. As has been mentioned above, it is possible to envisage the making of claims against the withdrawing State, not only by the Commission under Articles 258 and 260 TFEU, but also, potentially, by the European Council and Council under Article 7 TEU.

There is already discussion of legal action in the UK on the basis of the conduct of the referendum campaign, and over the constitutionality of any decision to pull the Article 50 trigger.<sup>48</sup> Such litigation is likely to raise questions relating to the interpretation of EU law (most obviously, in relation to the interpretation of Article 50, perhaps based on the points discussed above), which the UK courts may decide to refer to the Court of Justice. At each stage of the process, legal action is possible – for example in relation to the conduct of the negotiations, and of course, in relation to the scope and substantive content of the withdrawal agreement(s).

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<sup>47</sup> See Lazowski, n4 above at 528.

<sup>48</sup> See <https://www.theguardian.com/law/2016/jul/03/parliament-must-decide-whether-or-not-to-leave-the-eu-say-lawyers> and <http://www.theguardian.com/politics/2016/jul/05/deadline-approaches-government-response-brexite-legal-challenge-article-50>.

This paper suggests that, in order to avoid the risk of litigation, the rules of the process should be clarified via the guidelines to be provided by the European Council. So as to be able to fulfil this function, the guidelines must be provided prior to any decision by the UK to trigger A50, and should provide as much clarity as possible in relation to the key questions discussed above, including in particular in relation to the ability of the UK to rescind the notification process, the scope of the withdrawal agreement(s), the status of the UK during the withdrawal process, and the mechanisms through which the withdrawal agreement(s) may be concluded. It is recommended that the UK government be fully involved in the drawing up of these guidelines. It may, of course, be that agreement is impossible to attain, or that the European Council refuses to provide guidelines before the decision to trigger Article 50. In such circumstances, it may be that there is litigation in relation to the Article 50 process, with courts playing a key role in shaping the process of withdrawal.

### **A suggested way forward**

It hardly needs to be said that this is a crisis situation for the European Union. The prospect of the withdrawal of the UK from the EU is fraught with economic and political risk. Article 50 is intended to provide for the orderly exit of States from the Union. Whether or not this goal is achieved will largely depend on the conduct of the withdrawing State and the process of negotiation. Nevertheless, the legal framework in which the negotiations take place is also significant, as it determines the parameters within which the range of political actors involved will frame their strategies. The text of Article 50 provides very few answers. Nevertheless it envisages the provision of guidelines by the European Council. These may operate as the vehicle through which the answers to the legal questions identified in this paper are developed. In order to be able to play this role, they should, in the wake of the referendum outcome, be provided in advance of any decision by the UK to trigger Article 50. And, to the extent that this is possible, they should, notwithstanding the wording of Article 50(4), be agreed in negotiation with the UK, in order to minimise the risk of what may prove to be complex litigation, across more than one jurisdiction, in relation to the conduct of the withdrawal process.

I have argued above for Article 50 to be interpreted in a way which ensures that the UK is best able to maintain a working relationship with the UK, and achieve a settlement in which the interests of citizens of the EU are best protected. This suggests that the European Council guidelines should provide not only for a withdrawal agreement, but also for an agreement which defines the future relationship between the UK and the EU. To the extent that this objective is not achievable within two years, the European Council should commit to extending the time period. Most importantly, it should be made clear it is possible for the UK to rescind its notification, together with any procedural steps to be taken in order to stop the process.

Once there is more clarity, the UK will be able to consider its response. The calls to refuse to pull the Article 50 trigger are increasing, with legal efforts within the UK directed to imposing pressure on Parliament, either as a result of the conduct of the referendum campaign, or a result of the rights affected by the withdrawal process, not to trigger Article 50. While this option might be constitutional as a matter of UK law, it would carry with it a multitude of social risks, furthering poisoning relationships between the political elite and the people, who may feel that the result of the referendum has been ignored.<sup>49</sup>

It would be far better for Parliament to accede to the will of the people, and trigger Article 50; but only once the Article 50 process has been clarified; and it is argued here that this should be via European Council guidelines relating to the process of negotiation. Parliament has a role in scrutinising these guidelines, and in providing full guidance to the government and the people in relation to the substantive content and scope of the negotiations, the negotiation timetable, and the steps to be taken in relation to the conclusion and ratification of the resulting agreement(s).

As has been argued above, it should be made clear that it is possible for the UK to rescind the Article 50 notification. The European Council should commit to negotiations with the UK in relation not only to a narrow withdrawal agreement, but also to a broader agreement on the future relationship between the UK and the EU. It is only if these two conditions are met – and it may be possible for the UK to exert not only political but also legal pressure on the European Council in relation to the content of the guidelines – that it is possible to envisage a legitimate outcome to this crisis.

The clarification of the uncertainty surrounding the Article 50 process will enable the UK to make an informed decision in relation to the pulling of the Article 50 trigger. The UK government must then work on its negotiating strategy, and seek to reach an agreement with the EU27 which deals with withdrawal and the future relationship between the UK and the EU. It is only during the process of negotiation that it will become clear what leaving the EU will actually entail. There will, presumably, be a range of difficult decisions, for example in relation to the UK's desire to control immigration, and to retain access to the single market (and we will all learn a lot about the operation of the EEA, and Switzerland's relationship with the EU); and about the acquired rights of EU citizens in the UK, and UK citizens in the EU. In the time period in which negotiations will occur, there will no doubt be significant economic and political change within both the EU and the UK. Towards the end of the negotiation period, it will be possible for the UK to make an informed choice; either a) to rescind its notification and remain within the EU, b) to accept the negotiated deal, or c) to exit the EU without a deal. That decision will be for the UK, in accordance with its constitutional requirements. Parliament will of

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<sup>49</sup> See also R Ekins, 'The Legitimacy of the Brexit Referendum', UK Constitutional Law Association Blog, available at <https://ukconstitutionallaw.org/2016/06/29/richard-ekins-the-legitimacy-of-the-brexit-referendum/>.



course be involved, and consideration will no doubt be given to allowing the people to have a further say, either via a general election or indeed a second referendum.

The process of withdrawal is not going to be easy. The EU law framework surrounding the operation is very unclear, with the provision of guidelines by the European Council representing a key moment in which it is possible to contribute towards the legitimacy of that process. This paper offers a number of recommendations. It is to be hoped that it prompts careful consideration of the options ahead, so that it is possible to arrive at a legitimate outcome, in which the interests of citizens of the EU are, as far as possible protected.