



Interview | 16 March 2017

Brexit and a Multi-speed Europe: a Lawyer's Perspective

On 25 March 2017 the European Union celebrates the 60th anniversary of the Treaty of Rome. With Brexit around the corner and the EU searching for its future strategy, we talk to EU law Professor Federico Fabbrini on the legal challenges ahead.

Looking ahead at the Brexit negotiations what are, in your view, the three most important legal uncertainties concerning the Article 50 process and how can they be addressed? What happens legally if and when the EU27 and UK cannot find an agreement in two years' time? Can you walk us through the different steps?

The decision by the United Kingdom to withdraw from the European Union is unprecedented and has created a whole set of political and legal questions.

A first question has been whether the UK government could trigger Article 50 TEU on its own and start the process of withdrawal without the involvement of the UK Parliament. In January 2017, the UK Supreme Court resolved this

question in the Miller case, ruling that the June 2016 referendum did not automatically empower the UK government to start the withdrawal process without authorization from the UK Parliament. As a result, the UK government submitted a withdrawal bill to Parliament. The bill easily passed in the House of Commons, and despite the House of Lords' willingness to propose amendments, it was eventually approved in its initial version by the House of Commons on 13 March 2017. This will allow the UK government to invoke Article 50 TEU and commence the withdrawal process before the end of March 2017.

A second question regards how the withdrawal negotiations unfold. According to Article 50 TEU, these should both handle the untangling of a departing member state from the EU legal order

and define the new relationship between that country and the EU post-withdrawal. Article 50 TEU sets a two-year timeframe to agree on the terms of both the divorce and the new relationship, after which the exiting member state is simply out of the EU – the so-called cliff-edge. The European Council can extend the deadline, but this requires unanimous consent by the remaining 27 member states. Negotiations on liabilities are going to be contentious, and the EU has never concluded a comprehensive trade pact in just two years. So it is highly uncertain if the UK and the EU can manage to agree on a complete withdrawal deal and define the new relationship after the divorce within the given timeframe.

A third question arises, finally. Even if the UK and the EU are able to conclude a withdrawal agreement which covers both past and future relations, several uncertainties surround the process of ratification of this accord. On the basis of the EU Treaties, the European Parliament must ratify the agreement and the UK government has committed to submit the deal to an “up-or-down” vote before the UK Parliament. If either of these parliaments vetoes the agreement, the UK government and the EU institutions may be forced back to the drawing board, or leave with no deal. Some have suggested that to prevent this from happening the UK government may go for snap elections so as to buttress its parliamentary majority. Others have suggested that if the deal is vetoed before the end of the two-year deadline the UK government may even withdraw its Article 50 TEU notice, effectively reversing the outcome of the June 2016 referendum. This might remain a hypothetical option though: legally, the UK Supreme Court has mentioned in passing but without elaborating further that once Article 50 has been invoked it cannot be revoked, and politically this scenario seems unlikely.

Uncertainties around Brexit and Article 50

1. Role of UK Parliament vis-à-vis UK government in triggering Article 50
2. Feasibility of two-year negotiation time and contours of a “cliff-edge” separation
3. Ratification of divorce settlement and role of European and British parliaments

EU chief Brexit negotiator Michel Barnier has stated that UK will have to pay a “Brexit bill” of up to €60 billion before it can leave the EU. The British side contends that it is under no obligation to do so. From a legal perspective, who is right and why? What are the implications for the new EU budget?

The issue is highly contentious and both parties have a plausible legal claim to make. On the one hand, the UK will claim that after withdrawal it will no longer be subject to EU obligations – and specifically to the obligations to pay into the EU budget. According to Article 50(3) TEU, the EU treaties cease to apply to a withdrawing member state. Because the obligation to contribute to the EU budget derives from the EU treaties themselves, after a member state withdraws from the EU it will be relieved of its duty to pay its share: this position has been explicitly endorsed by the House of Lords in a report published in early March 2017.

On the other hand, the EU also has a plausible claim. Article 70 of the Vienna Convention on the Law of Treaties – an international agreement which is regarded as codifying principles of customary international law binding on all civilized nations – indicates that withdrawal from a treaty does not affect any right, obligation or legal situation created through the execution of the treaties prior to withdrawal. According to this position, therefore, Brexit does not alter the commitments that the UK made prior to withdrawal, including that of paying contributions into the 2014-2020 EU multi-annual financial framework.

If the matter went to litigation it may not be easy to obtain a judicial settlement. The EU could sue the UK before the European Court of Justice, but the UK may claim that after withdrawal it is no longer subject to the ECJ’s jurisdiction. At the same time, the International Court of Justice only hears cases between states, so the EU could not be technically summoned before it. In the end, as is often the case in international negotiations, power as much as law will determine which side of the argument prevails, and the “Brexit bill” may be settled on diplomatic grounds.

Irrespective of the final Brexit bill, the UK's departure has broader consequences for the EU budget. Even with the rebate it has enjoyed since the Thatcher era, the UK is the fourth net financial contributor to the EU. After withdrawal, the EU institutions and the remaining member states will need to decide how to address the resulting fiscal shortfall, and either cut spending or raise new revenues. Since neither of these options is likely (cutting spending would be opposed by member states which are net beneficiaries of the EU budget, while raising new resources would be opposed by those which are net contributors) this may compel the EU-27 to consider seriously the [proposals](#) recently articulated by the High Level Group on Own Resources chaired by Mario Monti, including introducing forms of new EU taxes.

Brexit may also present a window of opportunity. Do you see any potential legal upsides for the single market after Brexit? Do you expect any progress with previously contentious issues?

Yes, I am convinced Brexit represents an excellent window of opportunity for the EU – but not in the area of the internal market. In fact, the UK has traditionally been one of the EU member states pushing for more deepening of the internal market in goods and services, often against the protectionist preferences of many continental European countries. So, the withdrawal of the UK may in fact weaken pressures in favour of further internal market integration. Yet Brexit may also create more room for the EU to move integration forward – both in other substantive policy areas, and as far as the EU's institutional architecture is concerned.

From a substantive point of view, the UK's departure will facilitate efforts at enhancing EU common foreign and security policy – a development the UK traditionally opposed as a duplication of NATO. It may increase possibilities for the EU to move forward in creating a genuine area of freedom, security and justice, including a better management of external borders – a realm where the UK, despite its advanced counter-terrorism capacities, was not entirely willing to cooperate. And it will open up space for further

integration in Economic and Monetary Union: while there are another eight EU countries besides the UK that do not currently use the euro as their currency, the UK was an obstacle to further developments in Eurozone governance. This was demonstrated by UK resistance to specific measures devised in response to the euro-crisis, such as adopting the Fiscal Compact or using EU money to support countries in fiscal distress through the European Financial Stability Mechanism.

From an institutional point of view, the UK's departure will provide an opportunity to tackle the legitimacy deficit of the EU. Brexit will require changes to the EU treaties, as well as to important EU laws that allocate seats in the European Parliament and regulate the financing of the EU budget. Given the constitutional nature of these changes, EU institutions and the remaining member states will mostly likely have to embark on high-level political negotiations and strike a grand bargain. Within this framework, bold institutional proposals such as the one recently brought forward by the European Parliament on [fiscal capacity and EU governance](#) could be considered as part of a package deal of reforms aimed at improving the EU's effectiveness and legitimacy.

A multi-speed Europe, where some countries move ahead with new common projects while others stay behind, seems to be gaining support among some EU member states. If this becomes the EU's official strategy, what will this mean for the common legal order? What would be the legal relationship between the new 'Ins' and the new 'Outs'?

A multi-speed Europe is nothing new. In legal terms, it has existed for 25 years. Since the Maastricht Treaty of 1992, EU treaties have allowed for opt-outs exempting some member states from participating in some EU projects. And since the Amsterdam Treaty of 1997 EU treaties have created the enhanced cooperation procedure, allowing member states that are willing to move forward to do so within the EU legal order. As a result, Europe has developed in variable geometry: two countries (the UK and Denmark) have a derogation from adopting the

common currency; two (the UK and Ireland) have an opt-out from the Schengen free-movement zone; and three (the UK, Poland, and the Czech Republic) have obtained a protocol that seeks to exempt them from applying the EU Charter of Fundamental Rights. In addition, 25 EU member states have concluded outside the EU the Fiscal Compact; 25 countries have also embarked on the process of enhanced cooperation to set up a Unitary Patent Court; and ten Eurozone members are now discussing the introduction of a financial transaction tax.

Rather than a multi-speed Europe, what we have been increasingly witnessing during the last few years is a multi-directional Europe. Multi-speed Europe is based on the idea that all member states proceed in the same direction, toward “ever closer union”, albeit at different speeds. The reality is that member states are not moving in the same direction: The UK has decided to secede, the possibility that Greece may leave the Eurozone has clouded responses to the euro-crisis, and several countries of Central and Eastern Europe are blatantly flouting core EU principles such as respect for democracy, the rule of law and the protection of human rights, including those of migrants entering the EU. EU member states, in other words, do not share the same vision on the future destination of the European integration project.

In February 2016, to prevent UK withdrawal, the European Council agreed upon a special settlement for the UK within the EU. That international agreement acknowledged the reality of a multi-directional Europe, by exempting the UK from participating in “ever closer union”. Yet, the deal was UK-specific, and following the decision of the British voters to leave the EU, it has lost any legal value. However, the EU should address more forcefully the perils of disintegration, and re-think the ways of staying together. Following Brexit, what is required is a new constitutional framework that reframes the links between the EU member states that want to move towards Political Union with those which merely wish to be part of a common market.

In a future multi-speed Europe, do we need additional or different institutions to ensure democratic control if only some EU members decide to move forward? How would you interpret this development in the context of the 60th anniversary of the Treaty of Rome?

The celebrations of the 60th anniversary of the Treaty of Rome represent the perfect context in which the disintegrative pressures currently pulling the EU apart should be addressed. The EU has served Europeans well over the past decades, but its current set-up is unable to weather ongoing and forthcoming challenges. Clearly, there is a group of member states, mostly in Western Europe, which are willing to move forward with the project of integration, sharing sovereignty in more and more areas – from migration to fiscal policy, from internal security to external defence. However, besides the UK, there is also a sizable group of member states that does not share these political ambitions and would rather revert the EU to a simple free trade zone, focused solely on the internal market and a few other functional policies. The recent Commission white paper, with its lack of a single vision, simply reflects this reality.

Heads of state and government meeting in Rome on 25 March 2017 must re-think the architecture of the EU, creating a framework in which countries with different priorities can coexist. Member states which share a common currency and a common external border need to move in the direction of a federal union, in which the joint mechanisms of decision-making are enhanced and new capacities for action are established. In particular, the Eurozone should be endowed with a proper budget, financed by real own resources, and managed by a new executive authority, legitimated via an adequate democratic process. Meanwhile, member states which do not share this vision, and do not plan to move in this direction, should re-organize around the common market, making this the bulk of their inter-state cooperation. Certainly, the project of deeper integration should remain open to those countries which do not want to be part of it, now or forever. However, if the EU wants to

overcome the current stalemate, these countries cannot block the others from moving forward.

The EU treaties procedurally require that member states unanimously consent to any changes in EU architecture – and this allows a single member state to veto any reform. Nevertheless, during the last few years member states have repeatedly resorted to international treaties outside the EU legal order to deepen integration against the objection of few holdouts. Moreover, the rules of the game can be changed in so-called “constitutional moments”. For example, the American Constitution of 1787 was technically adopted in violation of the procedure set out in the Articles of Confederation of 1781. While the latter required unanimous agreement between the 13 states for amendment, the Philadelphia Convention drafted a Constitution for the United States that would enter into force after ratification by nine states only: this was the crucial factor in ensuring that the US Constitution was eventually approved.

Much like the American federation, the EU was established after World War II to ensure the unity of its states and citizens. The European founding fathers who met in Rome in 1957 created a Union which ensured domestic tranquillity, promoted the general welfare, and secured the blessing of liberty for the longest uninterrupted period ever in Europe. Yet, the 60th anniversary of the Treaty of Rome should not be simply a moment for sterile self-congratulation. Major challenges lie ahead and the best way to honour past achievements is to rethink the European dream for the future. The Union of Europe must be made more perfect, and the only way to do so is to strengthen its constitutional foundations. It is uncertain whether the EU is preparing for a “constitutional moment”. What is certain, however, is that it needs one more than ever.

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