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# **LEGAL ASPECTS OF WITHDRAWAL FROM THE EU: A BRIEFING NOTE**

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Rebecca Williams, Alison Young

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# LEGAL ASPECTS OF WITHDRAWAL FROM THE EU: A BRIEFING NOTE

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## Abstract

*The withdrawal of the UK from the EU (or 'Brexit') as a result of the referendum of June 23 is certain to have profound implications for all aspects of the law of the United Kingdom. As soon as the result became known, legal commentators rushed to offer some kind of guidance. Surprising as it may seem, the pre-referendum debate focused mostly on what the EU is and does. There was very little debate on what the post-EU options would look like. As soon as the result was known, a gap in public awareness on what happens next was immediately evident. A group of academics from the Law Faculty at the University of Oxford met a few days after the referendum to discuss some of the potential legal effects. We decided to publish some of our preliminary thoughts as soon as possible in various blog posts in order to contribute, if we could, to the public debate. We also decided collect these in a single paper that would become available online on SSRN. The result is a collective briefing note, edited by Pavlos Eleftheriadis, on various legal aspects of withdrawal from the European Union.*

# LEGAL ASPECTS OF WITHDRAWAL FROM THE EU:

## A BRIEFING NOTE

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# Introduction

PAVLOS ELEFThERiADiS

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The withdrawal of the UK from the EU as a result of the referendum of June 23 is certain to have profound implications for many aspects of the law of the United Kingdom. It will take a long time to study these effects in detail. But there is an urgent need to take stock. Surprising as it may seem, the pre-referendum debate focused mostly on what the EU is and does. There was very little debate on what the post-EU options would look like. As soon as the result was known, a gap in public awareness on what happens next was immediately evident.

A group of academics from the Law Faculty at the University of Oxford met a few days after the referendum to discuss some of the potential legal effects. We decided to publish some of our preliminary thoughts as soon as possible as blog posts in order to contribute, if we could, to the public debate. We also decided to collect our contributions in a single paper that would become available online on SSRN. I agreed to act as the editor. The result is this collective briefing note on various legal aspects of withdrawal from the European Union. Our note aims to address the urgent need for authoritative legal commentary and information. It is not intended by any means to be the final word on any of these issues.

The situation the United Kingdom is finding itself now is relatively clear. The referendum has not brought about any legal change. The UK remains a member of the EU with full rights and duties. All EU nationals have full rights in the UK and all British nationals have full rights in the EU, for now. The process of withdrawing from the EU will have to be initiated by the UK government, under the process of Article 50 TEU. Article 50 of the Treaty of the European Union provides that 'any member may decide to withdraw from the Union in accordance with its own constitutional requirements'. It also states that if the withdrawal agreement is not concluded within two years of notification, the treaties 'shall cease to apply to the state in question'. This means that unless the member states decide otherwise, at the end of the two years all rights and duties arising out of EU law for UK nationals and companies will be extinguished. There is no other step.

This is politically very significant, because merely by the passage of time the UK will lose access to the single market. Its products would thus begin to be subject to the common external tariff. This also means that at the end of the two years or at the time agreed by the EU member states, the European Communities Act 1972, which is the foundation of EU law in the UK, would in practice cease to have effect. The 1972 Act only gives effect to the treaties as they stand. If the treaties stop having effect in the UK by virtue of Article 50, then all EU rights and duties will also have expired. So there is some uncertainty arising out of this process. Agreed withdrawal under the explicit terms of Article 50 seems the preferred and most likely option. It is possible, however, to have either by accident or by design, withdrawal from the EU without agreement. This would

certainly have very different legal consequences. These are some of the issues that the new British government, led by Prime Minister Theresa May, will have to decide.

The contributions below address issues such as the question of sovereignty, the legal nature of the referendum, the process of Article 50 TEU, the comparison of the UK referendum with similar referenda in other legal systems, the question of a second referendum, as well as the question of what happens next. The authors do not wish to suggest that they hold any joint or collective views, although they may well do so. Each author is responsible only for his or her own contribution.

Some of the essays included here appeared first as blog posts in various sites. Where applicable, the place of first publication is noted at the end. Finally, we also thought that it would be useful to produce a short list of important sources and references. This appears as 'Further Reading' at the end of the paper.

*Oxford, 14 July 2016*

# Regaining Sovereignty?

ALISON YOUNG

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A lot of the referendum debate was phrased in terms of regaining sovereignty. Have we regained sovereignty or was David Cameron right to claim that all we would gain was the illusion of sovereignty? We need to think of this in terms of external sovereignty – the ability of the UK to act as a sovereign nation on the international stage and internal sovereignty – the ability of the Westminster Parliament to legislate on any subject matter it wishes, without this being overturned by the courts.

## **Nothing lost, nothing regained**

In terms of external sovereignty, the UK always had the ability to join and to leave an international Treaty. Article 50 merely sets out a way through which this can be exercised. The UK is using exercising its external sovereignty by deciding to leave. It will exercise it again when negotiating the withdrawal agreement and then by ratifying this agreement so it can have effect in UK law.

## **Something lost, little regained**

It is internal sovereignty – particularly parliamentary sovereignty – which appears to have been lost. Provisions of EU can have direct effect. This means that they can create rights and obligations which can be relied upon in UK courts, even when UK law has not enacted specific measures to implement these rights and obligations into UK law. Directly effective provisions of EU law override national law, even Acts of Parliament. If we leave the EU, then we no longer have to give primacy to directly effective EU law.

However, the picture is not that simple. First, it is hard to predict what the impact of anything will be until we see the withdrawal agreement. Second, there are arguments that, despite UK law having accepted the direct effect of EU law in *Factortame II* (such that the Merchant Shipping Act 1988, requiring a percentage of British nationality of owners or crew for ships to be registered as British and fish in British waters, was not applied to Spanish fishing companies), this did nothing to parliamentary sovereignty. Most see this as an argument of the preservation of a different veneer of sovereignty – preserved through clever words or theoretical reworking. Clever words do not take away from the reality that Parliament would find it hard, but not impossible, to legislate contrary to directly effective EU law, having to do so either by withdrawing from the EU, or by expressly stating that it wanted to legislate notwithstanding provisions of directly effective EU law. Moreover, there is no guarantee that a notwithstanding clause would have worked- it has never been tried.

More importantly, there is an argument that sovereignty have been lost, but although the need to take account of directly effective EU law was the catalyst, it was not the cause of this change. This is found in the dicta of Laws LJ in *Thoburn* (the metric martyrs case). Laws LJ argued that the European Communities Act 1972, which incorporates EU law into UK law, was a constitutional statute. As such it could not be impliedly repealed. It could still be repealed, but it would need express or, at least, very clear specific and precise language which made it clear that it was Parliament's intention to overturn a constitutional statute. The European Communities Act 1972 is not the only constitutional statute.

Others include the Human Rights Act 1998, the Bill of Rights 1689 and the series of devolution statutes. Leaving the EU will make no difference to Parliament's sovereignty in this sense. There will still be some statutes that can only be overturned expressly or specifically. Moreover, there is nothing to stop the courts classifying the legislation incorporating the withdrawal agreement as a constitutional statute, even if the provisions of EU law we sign up to post Brexit are not meant to have direct effect or primacy. Nor is there anything post Brexit that means that the courts will no longer regard parliamentary sovereignty as a principle of the common law, with all this entails, including the dicta from Lord Steyn in *Jackson* that it would not be inconceivable for the courts to refuse to apply legislation breaching the rule of law, his specific example being legislation removing the power of the courts to protect rights through judicial review.

Not only can we argue that nothing was lost, but also UK law appeared to be developing a means of pushing back against the primacy of directly effective EU law. The *HS2* decision (whether the process through which the legislation was enacted complied with EU requirements on environmental protection) makes it clear that constitutional statutes also include constitutional principles and constitutional measures (e.g. the Magna Carta). It is also clear that there is a hierarchy between these constitutional statutes, principles or measures. Therefore, as *HS2* illustrated, the possibility arose that the courts would not give primacy to directly effective EU law if this were to require a constitutional statute, measure or principle to be disapplied.

### **Taking Back Control?**

Regardless of how lawyers mangle the technicalities, the reality is that as a member of the EU, there would have been areas in which the UK Parliament would have found it difficult to legislate given the requirements of EU law. However, it is important to remember that the UK would have had a say in the making of these laws. First, the UK Parliament enjoyed pre-legislative scrutiny, as the Commission's common position (equivalent to an early draft of the Bill) would be sent to the UK and other national parliaments.

The UK Parliament could comment more generally and also raise concerns as to subsidiarity, including forcing the Commission to reconsider if enough national Parliaments also raised concerns of subsidiarity. Second, most legislation is enacted through the co-decision procedure. UK members of the European Parliament and UK Ministers, as members

of the Council, would have had the ability to deliberate and vote on this proposed legislation – albeit not exercise a veto power. It is extremely unlikely (probably impossible) that the UK will retain this role in the EU law-making process following withdrawal from the EU. Yet, the UK may still be bound to adhere to some aspects of EU law (e.g. those regulating the market, including free movement of persons). Even if we fully leave the EU, the policies of the EU will still continue to have an influence over us, in the same way that policies adopted in the US have an influence over the UK. Yet we will lose all chance to have a say in these policies. Yes, we may be able to reject them. But we cannot stop the consequences which flow from these policies given our connection to Europe and the rest of the world.

It is also hard to see Article 50 as anything other than placing the UK in a weak bargaining position. We are one Member State against 27 other Member States. If we are not able to obtain the deal we want within two years, then we are dependent on the other 27 Member States to agree to extend the bargaining period. Should this fail, then we leave the EU with no withdrawal agreement.

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# Constitutional Instability

PAVLOS ELEFThERIADIS

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Membership in the European Union has had a profound effect on the law of the United Kingdom. As is well known, European Union law operates under two basic principles, the principle of direct effect, which requires that EU rights and duties have an immediate effect on the law of the member states, and the principle of supremacy, which requires that EU rights and duties enjoy priority over all domestic rights and duties. In order to accommodate these doctrines, the constitutional law of the United Kingdom had to go beyond the traditional doctrines of A. V. Dicey, according to which all Acts of Parliament had the same validity and effect. Dicey's model assumed that all acts of parliament had equal value, namely the value given to them by the will of the sovereign parliament which created them. So it denied in effect the conventional distinction made by constitutional law almost everywhere else in the world between *higher* and *ordinary* law. Nevertheless, this distinction was a cornerstone of EU law, because it was intended to give it a more or less constitutional status in all continental jurisdictions, in order to protect its uniform application. This was easier to achieve where there is an explicit and easy to maintain distinction between higher and ordinary law.

In the absence of such a distinction, the UK could not give full effect to EU law. If the European Communities Act had the same effect as all subsequent Acts of Parliament, then it would be possible for a subsequent Act to 'impliedly repeal' the 1972 Act, by merely contradicting it. Supremacy of EU law would thus be impossible. As is well known, in order to accommodate the required effect of EU law the English courts recognised that membership in the EU had resulted in a modification to the doctrine of parliamentary sovereignty. The House of Lords decided in *R v Secretary of State for Transport, ex parte Factortame Ltd (No 2)* [1991] 1 AC 603 that later acts of Parliament, namely the Merchant Shipping Act 1988, could not set aside the European Communities Act 1972 by way of implied repeal. Parliament had to repeal the 1972 Act first, if EU law was to give way. So membership in the EU changed the UK constitution, if only by making explicit what some theorists had said was implicit in the law already, namely that some laws were more important than others.

This solution resulted in the explicit abandonment of Diceyan orthodoxy in other areas too. The British constitution is now explicitly taken to include higher law, which is to be distinguished from the ordinary law that is normally created by Parliament. The Supreme Court said in *R (HS2 Action Alliance Ltd.) v Secretary of State for Transport* [2014] UKSC 3 that the UK constitution includes 'constitutional instruments' that are distinct from ordinary Acts of Parliament:

*The United Kingdom has no written constitution, but we have a number of constitutional instruments. They include Magna Carta, the Petition of Right 1628, the Bill of Rights and (in Scotland) the Claim of Rights Act 1689, the Act of Settlement 1701 and the Act of Union 1707. The European Communities Act 1972, the Human Rights Act 1998 and the Constitutional Reform Act 2005 may now be added to this list. The common law itself also recognises certain principles as fundamental to the rule of law. It is, putting the point at its lowest, certainly arguable (and it is for United Kingdom law and courts to determine) that there may be fundamental principles, whether contained in other constitutional instruments or recognised at common law, of which Parliament when it enacted the European Communities Act 1972 did not either contemplate or authorise the abrogation.*

What will happen to these distinctions post Brexit? In principle, nothing. There is no reason to change any of these propositions. Constitutional instruments will continue to tower over the British constitution and bind all powers and offices of state. Even if the European Communities Act is repealed, all the remaining constitutional instruments will stay in place, including the Human Rights Act 1988 until itself is repealed, as the Conservative Party manifesto has already announced. Even after all these repeals, the protection of human rights will continue in Britain, either as an aspect of the common law, or as a matter of customary international law that is immediately binding (see e.g. *Trendtex Trading Corporation Ltd. V Central Bank of Nigeria* [1977] 2 W.L.R. 356.).

Nevertheless, this may not be the only or the most obvious result. Part of the Conservative Manifesto of the 2015 elections was the promise to abolish the Human Rights Act 1998 and replace it with a 'British Bill of Human rights' which puts 'Britain first'.<sup>1</sup> The change is not cosmetic but intends to bring back a conventional understanding of parliamentary sovereignty, one that gives the last word to parliamentary majorities and seemingly rejects the distinctions drawn by the Supreme Court. One of the proposals offered by the Conservative Party is to stop giving human rights a higher interpretive role at all. This aim is presented clearly as follows:

*'In future, the UK courts will interpret legislation based upon its normal meaning and the clear intention of Parliament, rather than having to stretch its meaning to comply with Strasbourg case law'.*

It appears that the proposal is to restore parliamentary sovereignty to its traditional sense, as it had been outlined by Dicey at the beginning of the twentieth century. Any recent Acts of Parliament would thus have priority, whatever their content. Any European obligations,

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<sup>1</sup> [https://www.conservatives.com/~media/files/downloadable%20Files/human\\_rights.pdf](https://www.conservatives.com/~media/files/downloadable%20Files/human_rights.pdf)

including obligations to respect human rights, would be secondary to the will of the majority.

This proposal creates a serious problem of constitutional *instability*. Can a Conservative government bring about the desired constitutional change at all? Can it really take the constitution back to its pre-1972 or pre-1988 roots? If we read the *HS2* judgment, this must be impossible. The distinction between ‘constitutional instruments’ and ordinary acts of parliament seems now firmly embedded in the British constitution. On the other hand, the desire of the parliamentary majority may be put in a new Act of Parliament returning us to the orthodox Diceyan view. Could this new Act of parliament (perhaps to be called the ‘Restoration of Parliamentary Sovereignty Act’) change the deeper constitutional principle unanimously endorsed by the Supreme Court? The answer is that we do not know.

The organic growth of British public law while the UK was a member of the EU and a party to the European Convention of Human Rights made these questions academic. The withdrawal from the EU and the possible abolition of the Human Rights Act (which may or may not be accompanied by withdrawal from the Council of Europe, as Theresa May suggested in a pre-referendum speech), bring forward the question of constitutional change. And the surprising fact is that we do not have any theory of constitutional change in the UK.

Dicey’s account of the constitution denied another central premise of constitutional law, namely the distinction between the constituent power of a self-governing people (i.e. the power to establish a new or amend an existing constitutional regime) and the ordinary power of offices to conduct day to day law and politics. Dicey went against the tradition. Locke, for example, had presupposed a higher legal power when he said that ‘the first and fundamental positive Law of all Commonwealths is the establishing of the Legislative Power’.<sup>2</sup> Locke believed thus that the legislative power was itself *legally created* and guided by a ‘fundamental law’, or in modern terms a law of the constitution. Locke also said that the ordinary legislator cannot ‘*transfer the Power of Making Laws* to any other hands’ because ‘being but a delegated Power from the People, they who have it, cannot pass it over to others’.<sup>3</sup>

Dicey took a slightly different view. The existence of legislative power was not itself a matter of law, albeit fundamental law, but a matter of immutable *fact*, a logical axiom that reason could not doubt. For Dicey the fact of sovereignty could not change in any way.

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<sup>2</sup> Locke, *Second Treatise on Government* §134, ed. Laslett, p. 355.

<sup>3</sup> And in §141 Locke adds: ‘The power of the *Legislative* being derived from the People by a positive voluntary Grant and Institution, can be no other, that what the positive Grant conveyed, which being only to make *Laws*, and not to make *Legislators*, the *Legislative* can have no power to transfer their Authority of making Laws, and place in other hands.’. *Second Treatise*, ed. Laslett, 363.

This is why we do not have in the UK a theory of constitutional change. Following Dicey, the dominant constitutional theories of the UK those offered by Wade, Hart and Goldsworthy consider that changes of this scope must be taken to be *extra-legal*, or ‘non-legal’ *revolutions*, even though they happened through ordinary channels of statute and case law. This is Wade’s explicit analysis of the acceptance of EU law, for example.<sup>4</sup>

The withdrawal from the UK makes these previously academic issues, questions of practice. Can we amend the constitution? Can the distinction between ‘constitutional instruments’ which include human rights be abolished by a new Act of Parliament as the Conservatives seem to promise? What will be the constitutional effect of the eventual repeal of both the European Communities Act and the Human Rights Act? Because we lack a theory of constitutional change, these imminent changes are bound to open up a period of constitutional uncertainty. Even if the Conservative Government brings about a Bill of Rights for Britain that restores the power of parliament to decide anything it wants without checks and balances, we shall not know if it had succeeded reversing the doctrine of ‘constitutional instruments’. When a case reaches the Supreme Court, it will have to come up with a theory of constitutional change explaining whatever result it chooses to endorse.

If these observations are correct, Brexit will not just bring legal uncertainty. It will also bring about constitutional *instability*, especially if the new government carries out its promise to abolish the Human Rights Act 1998. By opening up the debate for the wholesale restructuring of the UK’s constitutional architecture in a short period of time, these changes will invite us to think about the appropriate process of fundamental constitutional change in the UK. There is little precedent or theory to guide us.

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<sup>4</sup> H W R Wade, ‘Sovereignty: Revolution or Evolution?’ 121 *LQR* (1996) 568.

# **A Comparison of the UK's EU Referendum with Referendum Laws in France, Germany, Ireland and Denmark.**

REBECCA MOONEY

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Following the UK referendum on the EU, calls have been made for similar referenda across Europe, often by far right groups. Referenda can make an important contribution democratic debate, but may existentially threaten representative democracy and the rule of law, unless subject to constitutional controls against their use as blunt instruments of single party rule. A democratic constitution that allows referenda should balance direct and representative democracy, and the rule of law, so governments cannot obtain an unrestrained mandate for executive rule predicated on simple referenda majority. This paper compares the legal implications of the UK's referendum on the EU, with referenda in France, Germany, Ireland and Denmark.

## **United Kingdom**

UK legal authority for referenda is an Act of Parliament. The EU Referendum Act 2015 is an ordinary law. Referenda cannot legally bind parliament, and are subject to the courts' judicial review jurisdiction. However, since governments can effectively control the majority in the House of Commons, and courts cannot overrule Parliament, these are not necessarily sufficient safeguards of the UK's representative democracy. In comparison the other states discussed here have written constitutions, with safeguards against abuse. Referenda are constitutionally regulated, subject to legislative and constitutional court oversight. Constitutional laws should ensure legal clarity on the effect of referenda.

## **France**

France has a long history of referenda under the constitution, article 11. Sovereignty rests with the people—'government of the people, by the people for the people'—exercised through elected representatives and referenda (article 3). De Gaulle made controversial use of referenda. Subsequent reforms curtailed the scope for referenda to prevent abuse of power.

National and local referenda are allowed, at the President's instigation, or on the vote of 20 percent of elected representatives together supported by 10 percent of all enfranchised citizens. Senate and national assembly oversight is necessary. National referenda are limited to seeking approval of bills (proposed laws) affecting organization of public authorities, reforms to economic, social or environmental policy and related public services, and

ratification of international treaties affecting state institutions. 'Ratification' is the formal process for states to commit to new international treaties. A negative result in a French referendum means the question cannot be put to a second referendum within two years. On a favourable result, the President must enact the relevant law within 15 days.

A referendum similar to the UK's, on whether to 'leave' or 'remain', would be legally impossible, although ratification of *new* EU treaties could be put to a referendum. The 1992 referendum on Maastricht Treaty ratification attained a 51% mandate. In 2005, a referendum on the parliamentary bill to ratify the proposed treaty to establish a EU constitution rejected ratification by 55%. Subsequent negotiations lead to the Lisbon Treaty 2009, which was ratified without a referendum, prompting claims that the 2005 referendum had been ignored. That analysis is flawed. Once the 2005 draft Constitutional Treaty had been shelved, its single-issue referendum, on a specific draft law (relating only to the 2005 ratification bill), could have no binding or advisory effect on the subsequent Lisbon Treaty.

A French referendum could potentially seek approval of a parliamentary bill proposing law for withdrawal from existing EU treaties, *after* the bill has passed through the representative Parliament. The French Constitution therefore balances representative democracy with direct democracy through popular referenda, each intended to provide mutual checks on the mandate of the other.

Finally, the Constitutional Council, the guardian of the constitution with advisory powers, is cautious about reviewing referenda, because of the constitutional place of referenda in contributing to expression of popular sovereignty. It refused to scrutinize the Maastricht Treaty referendum. However it does examine the legality of documents preparing referenda ('preparatory texts'), and is consulted by the government on referenda rules and processes. Since 2008 it has overseen referenda instigated by popular mandate.

## Germany

In Germany, a referendum similar to the UK referendum would be prohibited. Since Germany's post-war reconstruction, manifested in the 1949 Basic Law (Germany's constitutional document), insulation of representative democracy against direct majoritarian rule is exceptionally strong, with checks and balances at least on a par with the US constitution. The Basic Law's bill of rights places human dignity and individual civil and political rights at the apex of the constitution.

State authority is strictly derived through representative democratic parliamentary processes (article 20). Those rights and principles cannot be amended or repealed (article 79). The constitutional court has ultimate power to strike down unconstitutional laws and executive action.

German state authority cannot be drawn solely from direct majority votes in referenda. Federal referenda, of limited advisory effect, are only permitted to confirm laws

changing *Länder* (regional) territorial boundaries, and only after passing through the full parliamentary process (article 29, Basic Law). In 2004, an attempt to expand the Basic Law to allow a referendum on EU membership failed.

## Republic of Ireland

In contrast, referenda in Denmark and the Republic of Ireland are *required* before laws can be adopted which change the constitution. Referenda are thus essential to the mechanics of Danish and Irish EU membership. In Ireland national referenda are mandatory to effect constitutional changes (constitution article 46), but the constitution also has safeguards to balance representative democracy, direct democracy and the rule of law.

Irish referenda can occur *after* a bill has passed through parliament (article 46). On a referendum majority, the President must enact that law. Ratification of all European Community and Union Treaties have been subjected to referenda, including European Communities accession (1972), the 1987 Single European Act, the 1992 Maastricht Treaty, and the Amsterdam Treaty 1998. The Nice (2002) and Lisbon Treaties (2009) were subjected to two referenda, first returning a negative result but subsequently approving ratification.

The Irish High Court and Supreme Court can strike down unconstitutional legislation (articles 15 and 34). The Supreme Court can review the constitutionality of parliamentary bills (article 26). Ordinary citizens can apply for judicial review of the constitutionality of the relevant government bills, laws and referenda. The Referendum Commission disseminates information to the electorate, and reports on the conduct and outcome of referenda.

## Denmark

In Denmark, seeking referenda on parliamentary bills needs one third of the parliamentary vote (Article 42 of the Constitution). Treaty accession by simple parliamentary majority does not require a referendum (Article 19) unless the treaty delegates law-making to international organisations like the EU (Article 20). That can *only* be done if 5/6ths of parliament approves the bill and a subsequent referendum returns a simple majority (Article 20). Nine referenda have been held on EU matters. The 1992 Maastricht Treaty referendum rejected ratification by 50.7%.

Denmark, like Ireland, has strong rule of law controls over referenda. The courts may strike down unconstitutional laws. The Supreme Court reviewed whether the Maastricht and Lisbon treaties triggered the special procedure for referendums on ratification.

In summary, compared to the UK, stronger political and legal controls exist over referenda in France, Germany, Ireland and Denmark. None allow any legal mandate from a simple majority referendum without parliamentary scrutiny. The scope of referenda is constitutionally restricted in all cases. In none of these states do governments have

unfettered rights to call referenda. Judicial control against abuse of power is particularly strong in Germany, Ireland and Denmark.

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# Do We Have to Follow the Result of the EU Referendum?

REBECCA WILLIAMS

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Do We Have to Follow the Result of the EU Referendum? Legally the answer is clear: no. The [European Union Referendum Act 2015](#) states that a referendum should be held. It does not state what should happen thereafter. Indeed, it is argued that we cannot follow it by issuing a notification under Article 50 of the Lisbon Treaty without a further Act of Parliament (see CLA posts by [Barber, Hickman, King](#) (compare [Young](#)), and the [judicial review action](#) being brought by Mishcon de Reya, instructing Tom Hickman and David Pannick, among others).

Politically the answer is more difficult: though Jeremy Hunt has [called for a second referendum](#), David Cameron has ruled out that possibility and stated in [his resignation speech](#) that the will of the people ‘must be respected’. And that is the key point: a proper understanding of the legal machinery necessary to effect withdrawal from the EU is vital, but we can’t see the full picture without reference to the politics that will fuel the movement of that machinery. If the referendum was, as Cameron put it, ‘a giant democratic exercise, perhaps the biggest in history’, how could its effects ever be undone? That question would be difficult enough to answer in most circumstances, but in a context where many people voted Leave precisely because they felt disenfranchised, actually to disenfranchise them by failing to follow the results of the referendum has the potential to be particularly illegitimate and incredibly damaging.

And yet two substantive arguments are being put forward to suggest that we may not have to trigger Article 50. The first argument is that the referendum was not as democratic as it was made out to be. True democratic debate requires access to accurate information (ironically, this is often cited as a reason why the freedom of the press is an instrumental good as well as a right in itself) and in the light of complaints that this was completely lacking in the context of the 23<sup>rd</sup> June referendum, it is tempting to argue that the result was therefore invalid. If duping a party into signing a contract is enough to invalidate that contract, should concerns over the veracity of referendum campaign claims not be sufficient to invalidate its result? If voters felt that they were provided with insufficient facts and evidence to make an informed choice, can the result be said to be truly valid?

Is it even in keeping with the spirit of [s 7 of the 2015 Referendum Act](#), which required the Secretary of State to publish a report containing information about rights and obligations under EU law as well as information about countries that have arrangements with the EU other than full membership?

Certainly there are those on record in social media who regret their choice to vote Leave on either or both of these two grounds of duplicity or lack of information. And only six years ago the election of Phil Woolas as the Labour MP for Oldham was [declared void](#) under [s. 106 of the Representation of the People Act 1983](#) on the basis that he had made several 'false statement[s] of fact in relation to [his opponent's] personal character or conduct'. The 'primary purpose' of s 106, said the Parliamentary election court, was 'to protect the electorate from false information and ensure true freedom of election'. And yet of course s 106 itself cannot apply, either to the referendum in general (which did not concern the representation of the people by election) nor to statements about matters other than the character of a candidate for election. Nor is it clear in any case that this is the solution: the Woolas case was itself criticised in [some parts of the press](#) for having the potential to 'chill' free, political speech.

More generally, even if duplicity or a lack of information meant there were defects of process in the June 23<sup>rd</sup> referendum, it is difficult to argue that these went so far as to invalidate the result. We have no evidence that the number of people who now regret their choice is enough to have tipped the balance on June 23<sup>rd</sup>. Far from it – many people on social media are still celebrating the result of their vote. If the Remain campaign has already been criticised for telling people they would be idiots to vote Leave ([Mervyn King](#)), such insults cannot not now be compounded by the injury and lack of respect entailed in telling them that their choice will not now be respected because they did not know what they were doing.

The arguments about duplicity and lack of information do relate to the general question of when, if ever, it is appropriate to hold a referendum and what conditions are necessary to make it the fully democratic process it is supposed to be, but that is a different question for a future time. For now, we should focus instead on the other reason why Article 50 might not have to be triggered.

The Liberal Democrats have [announced](#) their intention to fight the next election, especially an early election on a pledge to stop Brexit. It would be open to a reconstituted Labour party to do the same, or indeed for there to be some kind of anti-Brexit coalition campaign, which might be necessary in order to achieve a large overall majority. Of course Theresa May [ruled out](#) the possibility of such an early election. Nevertheless, if such an election were to come about and such a majority were to be achieved, this would meet the democratic legitimacy of the 23<sup>rd</sup> June referendum with another expression of democratic legitimacy; one more recent than the referendum and more in keeping with the country's democratic traditions.

The benefit of this approach is that it would not be a means retrospectively to undo the 23<sup>rd</sup> June referendum, but a chance to ask the question prospectively. Those who do feel that they would have voted differently on June 23<sup>rd</sup> had they known the truth can have the chance to do so, not because that vote was invalid, but because they are being consulted again. And they are not the only ones being consulted – so is the rest of the electorate, including those who are content with their vote on 23<sup>rd</sup> June but now wish to change their

minds and those who wish to affirm their decision notwithstanding the events since. It would also allow for broader domestic debate about the deeper, more fundamental concerns about inequality that motivated many Leave voters.

Democracy requires that the will of the people should be respected, not that it should be entrenched indefinitely; this is a key element of the Parliamentary sovereignty we all wish to protect. UK Parliamentary sovereignty means that Parliament can make *and unmake* any law whatever. If we were to regard Parliament as being shackled to the result of a referendum even when a general election returned a party with a mandate to disregard it, that would be to *disrespect* the sovereignty so prized by those on both sides, but particularly those who voted Leave. If an anti-Brexit party were to secure a large majority in a general election its government would then have a democratic mandate to stop Brexit, and if no such majority were secured, the existence of that second, and more traditional chance to vote would make the process of Brexit easier to bear for those who do wish to remain. It is democratically illegitimate to ignore the will of the people, but it is democratically legitimate to listen to them twice.

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# Brexit, Article 50 and the 'Joys' of a Flexible, Evolving, Uncodified Constitution

ALISON YOUNG

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There has been a lot of speculation as to the meaning of the 'constitutional requirements' to trigger Article 50. Nature abhors a vacuum and sometimes, it seems, so do constitutions. This vacuum arises because, unlike other legislation providing for a referendum, the European Union Referendum Act 2015 makes no mention of any legal obligation triggered by the referendum result.

Most, if not all, British constitutional lawyers would accept the proposition that referenda do not generate legally binding obligations upon government to implement their results, and the lack of provisions in the 2015 Act contrasts starkly with the [Northern Ireland Act 1998](#) and the [Parliamentary Voting and Constituencies Act 2011](#). Given the relative silence of the European Union Referendum Act 2015, one can only infer that the result of the referendum is advisory only, and does not trigger Article 50 in and of itself. If any legal obligations follow from the Referendum they are to be found elsewhere, or are to be considered to be purely political.

Given this, what are the 'constitutional requirements' governing a decision of the UK to withdraw from the European Union? There would appear to be a number of possibilities:

- The Prime Minister need only inform the European Council through an exercise of prerogative powers
- Constitutional convention requires that there is some form of parliamentary deliberation before an exercise of prerogative powers
- There is a legal requirement of parliamentary deliberation before an exercise of prerogative powers

There is a legal requirement for legislation before an exercise of prerogative powers. The argument in favour of a legal requirement for legislation before an exercise of prerogative powers has been made by [Nick Barber, Tom Hickman and Jeff King](#). Their argument turns on an interpretation of legal requirements governing the existence and the exercise of prerogative powers. It is clear that, to the extent to which the two directly conflict, statutory provisions override prerogative powers. It is also clear that, where there are clear statutory provisions governing the way in which prerogative powers is exercised, it is unlawful to exercise these powers in a manner which contradicts these statutory provisions.

Barber, Hickman and King argue for a different interpretation of the nature of the relationship between statutory provisions and prerogative powers, essentially arguing that as statute always overrides the prerogative, prerogative powers cannot be exercised in a

manner which would 'turn a statute into what is in substance a dead letter' or to 'cut across the object and purpose of an existing statute'. They argue in addition that the European Communities Act 1972 is the means by which all EU rights and obligations are incorporated into European Union law. As such, to use the prerogative power to initiate Article 50, which will then inevitably remove these rights, would be to cut across the purpose of the European Communities Act 1972.

This is a difficult argument to accept. First, it is clear that their interpretation, though clever, is not widely accepted. Second, it is by no means clear that the triggering of Article 50 automatically means that all of the EU rights currently enjoyed by EU citizens will be removed. Unless and until a withdrawal agreement is reached between the UK and the European Union, it is impossible to predict which EU rights will and will not continue to be enjoyed by UK citizens. Even though we can point to some that definitely will be removed – the right of UK citizens to vote in EU elections, for example – it is hard to argue that the removal of one right found in existing UK legislation means that prerogative powers cannot be exercised so as to restrict that right without legislation. Third, it is hard to read Article 50 as requiring that, once commenced, the only possible outcome is a withdrawal agreement or the removal of the United Kingdom from the EU.

Article 50 makes it clear that 'the Treaties cease to apply' to the UK 'from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification' unless there is an extension of the negotiation period. It is silent on whether a Member State may withdraw its decision to leave the EU before the end of that period. Admittedly, to read a power to withdraw the notification may be abused – a Member State being held in a constant state of limbo by notifying the EU of its intention to withdraw, failing to reach an agreement within 2 years and failing to obtain permission to extend the negotiation period, then withdrawing its notification only to trigger this again to obtain at least a further two years for negotiations.

However, this potential for abuse can be countered by potential legal action before the European Court of Justice, not to mention the political difficulties of adopting this course of action. Fourth, a prerogative power to enter into Treaties does not in and of itself create rights and obligations in UK law, these rights and obligations need to be ratified – normally through legislation – into UK law.

It is easier to argue for a requirement of parliamentary deliberation prior to the exercise of a prerogative power. The easier argument would be to argue in favour of a convention requiring parliamentary deliberation prior to the exercise of Article 50. It is difficult to point to a specific convention to this effect. However, that is not in and of itself conclusive – new conventions have to start somewhere. If we adopt Jennings's definition of a constitutional convention, they arise from a series of past actions, coupled with the belief of the actors that they were bound to act in this manner, and a reason for acting in this way. There is no past practice of the use of the prerogative power to initiate Article 50. Nor is there

any past practice of a requirement of parliamentary deliberation prior to the use of the prerogative to leave an international Treaty.

However, it may be possible to argue that a new convention has arisen by analogy with the convention, recognised in the [Cabinet Manual](#), although subject to different interpretations, of providing the House of Commons with the 'opportunity to debate' before the commitment of troops to military action. Arguably, this convention has since evolved into a requirement for a parliamentary vote in favour of military action, following the failure to obtain a vote in favour of [military action in Syria in 2013](#), the prerogative power then being exercised following a later vote in favour of military action in 2015.

The analogy is appropriate for a number of reasons. Both would provide a democratic mandate before a prerogative power is exercised which may have large constitutional repercussions; be they the deployment of troops or a potential fundamental change in the rights and freedoms of UK nations and the potential threat to the unity of the United Kingdom. Both concern the external sovereignty of the UK. Both concern issues in which the emotions of the public run high, demonstrated through public protests against military action and the signing of the petition questioning the result of the referendum and public protests. Both concern issues on which emotions run high and there may be the risk of a snap judgment that may, or may not, be regretted upon later reflection. Both may also have originated from a perceived divergence between popular and parliamentary sovereignty, with Parliament having earlier appeared to have engaged in military action when this was not approved by the public, or where the public has voted to leave the EU when major political parties were campaigning for the UK to remain.

It is hard not to see the justification of a convention that provides greater democratic scrutiny over the exercise of prerogative powers. Moreover, even if the case for a convention of parliamentary deliberation cannot be sustained, there may nevertheless be ample support for the Government to initiate this convention, a requirement of deliberation as opposed to parliamentary approval being easier to justify in the face of the referendum decision.

If we can make a case for a constitutional convention for parliamentary approval, can we argue that this convention could be legally enforced? Whether we would regard it as the crystallisation of convention into law, or the adoption of a new principle of the common law mirroring the convention, it is hard to argue that a convention requiring parliamentary consultation before the exercise of a prerogative power should be enforced by the courts.

First, this may cause issues for parliamentary privilege, found in Article 9 of the Bill of Rights 1689, particularly if this required the court to evaluate the sufficiency of parliamentary deliberation, although admittedly there is some suggestion by Lord Reed in *HS2* that this may be possible. It may also be non-justiciable as concerning a matter of high foreign policy. Second, it is no exaggeration to classify the result of the referendum as creating a constitutional crisis.

In these circumstances, the UK may be wise to learn from the [experience of Canada](#), where the Canadian Supreme Court concluded that, whilst not illegal, it was unconstitutional to seek a constitutional amendment without consent from the Provinces of Canada. This position allowed courts to provide an informed view as to the principled reasons for the existence of the convention, whilst stopping short of requiring the Government to abide by a legal obligation. This compromise has at least the advantage of aiming to provide for further negotiation and deliberation, which may be more needed in such situations. The same may be achieved by the court recognising, though not legally enforcing, a constitutional convention. The stronger argument is that, if a convention does exist, it should not be enforced by the courts.

If there is no ability to find a legal or a conventional constitutional obligation for legislation or parliamentary consultation, there is at least a good argument, in terms of political expediency, for wider consultation by the Prime Minister before an exercise of the prerogative power to trigger Article 50. The people may have voted to leave the European Union, but there is no popular consensus as to what this entails, or the relative desirability of any particular withdrawal agreement. Parliamentary debate may help to further inform us about the benefits and burdens of EU membership – something which many commentators feel the referendum debate lacked.

This may lead to further reflection on the possible aims of a withdrawal agreement, providing more democratic legitimacy for the Government charged with taking the negotiations forward. Parliamentary discussion may be particularly important given the lack of an electoral mandate to withdraw from the EU, the manifesto promise being only to hold a referendum. Moreover, the political expediency argument should extend to the need for parliamentary debate in the devolved legislatures, particularly given the even split with two of the component nations of the United Kingdom voting to leave and two voting to remain in the European Union.

Whilst the political expediency argument is the easiest to satisfy, it poses a potential danger to the constitutional stability of the United Kingdom and the European Union. ‘Political expediency’ is not a constitutional requirement. As such, if there is a long delay between the outcome of the referendum and the triggering of Article 50, the delay may prompt the Commission or another Member State to initiate an enforcement action against the UK under [Article 258 TFEU](#), or Article [259 TFEU](#). By failing to notify the Council of an intention to withdraw, despite fulfilling the constitutional requirements to withdraw from the EU, the UK has arguably failed to fulfil its obligation under Article 250 TFEU – especially as ‘shall’ may well be interpreted to include a requirement of ‘within a reasonable timeframe’.

The constitutional implications for the EU and the UK of such actions would be gargantuan, not to mention the impact of a further erosion of goodwill between the UK and the other 27 Member States when entering into negotiations. It would be wise, if delay is

sought, to find a constitutional requirement – the easiest being a constitutional convention of parliamentary deliberation.

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# A New Referendum is a Constitutional Requirement

PAVLOS ELEFThERiADiS

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The most recent primary legislation on the relations between the European Union and the United Kingdom is the [European Union Act 2011](#). This Act, who some scholars called at the time an '[unprecedented constitutional experiment](#)' is known for the fact that it establishes a very unusual 'referendum lock' before an amendment of the EU Treaties can be ratified by the UK. It introduces a rule that all serious amendments of the EU treaties will have to be approved both by an Act of Parliament and by the electorate in a referendum. The intention behind that Act was to make sure that the UK had thought long and hard before participating in further EU integration. The Act was seen as controversial among lawyers, because it changed the 'manner and form' in which the sovereignty of parliament is exercised.

In my view, the Act adds an important dimension to the debate about the effects of the EU referendum of June 23. The 2011 Act has been written in such an expansive way as to encompass, in my view, not only treaties that amend the EU treaties, but also treaties that the UK is due to enter as a result of withdrawing from it. This may be a surprising suggestion, because the drafters of the 2011 Act probably had not thought about this prospect. Nevertheless, the Act is to be applied on the basis of what it says, not on the basis of what its drafters were thinking at the time. On the basis of the words on the page, a new referendum is most likely legally necessary before the UK withdraws from the EU.

The argument is simple. The 2011 Act provides at section 2(1) that it applies to a 'treaty which amends or replaces' the EU treaties. Treaties that 'amend' the EU treaties affect, of course, only members of the EU. The treaty between the EU and the withdrawing UK will not amend the main treaties, namely the TEU and the TFEU (a separate treaty among the remaining 27 will have to do that). But, as we saw, the Act, in its attempt to include perhaps everything about the EU, covers also those treaties that 'replace' the EU treaties. What does 'replace' mean? 'Replacing' is something different from 'amending'. Because it is different, it must be something different from the ordinary amendment of the current EU treaties. It is therefore obvious that a new treaty between the withdrawing UK and the remaining EU could be one 'replacing' the European treaties, at least as far as the UK is concerned. It is a treaty that replaces the UK's rights and obligations towards the EU.

This conclusion is strengthened by the fact that the Act defines (in section 1(4)) part of what it means by 'amends'. There is no definition at all, however, of what is meant by 'replaces', which is left entirely open. It is therefore clearly plausible that both a withdrawal agreement that the UK will agree with the EU under Article 50 (the 'withdrawal agreement') and an in principle separate (and hopefully contemporaneous) future trade relations agreement ('the trade agreement') will be treaties that 'replace' the EU treaties as far as the

UK is concerned. This is because all the rights and duties of the UK towards the EU would be replaced by the rights and duties created by the withdrawal agreement and the trade agreement. If this is the case, then both these agreements will fall under the scope of the 2011 Act.

Not all agreements require a referendum according to the 2011 Act. Section 4 of the Act outlines a list of cases where a new treaty that in principle falls under the scope of the Act 'attracts a referendum'. If any one of the conditions mentioned there is met, a referendum is required. These conditions are very broad, perhaps excessively so. It is likely that those who drafted them did not have in mind a treaty that is part of a process of withdrawal from the EU. Most likely, they had in mind its opposite, a treaty bringing further integration. But the words mean what they say. Any court will have to give effect to them as they are in the statute book.

This was clearly the intention of the government at the time. Introducing the Second Reading of the Bill for this Act in the House of Lords Lord Howell of Guildford (who was then Minister of State, Foreign and Commonwealth Office) said about section 4: 'The Government make no apology for the complexity of the provisions. We want to make it clear for Parliament, the British people and, indeed, our EU partners and the EU as a whole where a referendum would be required under the Bill. We feel that a short, vague statement would leave any future decisions more open to challenge in Parliament and the courts'. So every one of these detailed provisions was carefully thought out.

The most obviously relevant cases seem to me to be in paragraphs 4(1)(i) and 4(1)(j), although others may also prove relevant:

- (i) the conferring on an EU institution or body of power to impose a requirement or obligation on the United Kingdom, or the removal of any limitation on any such power of an institution or body;
- (j) the conferring on an EU institution or body of new or extended power to impose sanctions on the United Kingdom.

The conditions do not refer to the balance of power or any arrangement of reciprocity. They are triggered if an EU institution or body is given the power to impose a single 'requirement' or 'obligation' on the UK, or if any limitation on existing powers is removed. They are also met if an EU institution or body is given the power to impose 'sanctions' on the UK.

Whether these tests of section 4 will be met by a future UK/EU treaty on withdrawal and future access to the single market depends on what those treaties will say. But it is in my view highly likely that at least one of these very broad tests will be met by any treaty creating reciprocal obligations in the process of withdrawing from the EU and establishing a future trading deal. For example, a withdrawal agreement will certainly impose obligations on the UK regarding EU citizens currently in the UK. This is especially so if the UK decides to replace its membership in the EU with membership of the EEA. As is well understood by now, being a

member of the EEA involves accepting the rules of the single market without voting for them at the Council. So the test of section 4(i) will be met in both its limbs, because by virtue of the EEA agreement EU institutions will have been conferred a new power to impose requirements on the UK, while the UK will have lost both its power to vote in the Council and its right to bring an action to the Court of Justice against an institution of the EU regarding these obligations.

For different reasons, the tests of section 4 (i) and (j) may also be met by a bilateral treaty or set of bilateral treaties between the UK and the EU (the 'Swiss' model). First, among other things, any such agreements will most likely remove the protection that the UK currently enjoys not to be discriminated against by virtue of 18 TFEU. The agreement will thus remove a 'limitation' on the powers of EU institutions. Second, any new treaties will almost certainly create powers in bodies or institutions of the EU to impose a requirement or obligation on the UK (paragraph i) or even create some form of sanctions (paragraph j) as in the WTO model of judicial panels, or by way of arbitration.

They will do so, most likely, in international and not in EU law, but the Act does not draw such a distinction. It says, for example, that what matters is the conferring of 'power' not 'power in EU law'. And if this applies to the set of bilateral treaties, it is also likely to apply to the WTO option as well.

Of course I am only summarising here issues that will require full and detailed consideration, if and when these treaties take shape. But the literal reading of the 2011 Act suggests that the tests are wide-ranging and therefore the threshold for meeting them is low. And, if any one of the tests of s.4 is met, a new referendum will be required by law. In short, because the scope of the 2011 Act is so wide and because it requires a referendum practically whenever there is any change in the allocation of powers in the relation between the EU and the UK, by changing these powers in the process of withdrawal, a new treaty or treaties between the withdrawing UK and the remaining EU will almost certainly meet some of the tests of the 2011 Act. This was not perhaps the intention of the drafters, but this will not matter (under the well-established *Pepper v Hart* criteria) where the meaning of a provision is clear.

If this argument – or a version of it - is correct, then it follows that practically any new agreement with the EU as a result of the EU referendum will have to be approved by a new referendum. Of course, the current government – if it could secure a majority in Parliament – could seek to enact new legislation to abolish the 2011 Act (or perhaps try to ignore it, relying on a rival account of parliamentary sovereignty). This is a feature of the omnipotence of our Parliament. But the retrospective change of the law will be seen as obviously self-serving, and as something offensive to the rule of law. The current government had a chance to address these issues when it secured the enactment of the European Union Referendum Act 2015. The terms of the referendum were set then by the current parliamentary majority. To retrospectively change these terms after the referendum has taken place in order to circumvent the legal obligation of a second referendum, will be rightly seen as constitutionally

inappropriate. When the referendum was called, the obligation to hold a second referendum was already in the statute book.

I conclude that a proposed new treaty between the UK and the EU that seeks to replace EU membership with a set of new trade agreements will most likely have to be approved by way of a new referendum according to the framework created by the 2011 Act. The only secure way to avoid such a referendum is not to enter into any new treaty with the EU at all. This would entail that the UK would leave unilaterally, without regard for future trade and in very bad terms. This, however, is an unthinkable scenario, one to bring certain economic disaster for the UK and one that has not been contemplated by the leave campaign or the government.

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So what would a new referendum decide? The question would be about the proposed new treaty or set of treaties with the EU, which would have been agreed after a lengthy and probably laborious process as the best possible deal available to the UK. If the answer to this referendum is affirmative to the new treaty, then the new agreement replacing membership of the EU with another type of relationship will have been approved and will take effect. But if the answer is 'no' to the new agreement, then the status quo, namely continuing membership of the EU, will have received a renewed mandate by the electorate as a preferable state of affairs to the best available alternative. The electorate would have chosen to remain. At that point the government would have to revoke the Article 50 notification and the UK would continue being a member of the EU.

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## Why the UK has Little Chance to Become a Successful Tax or Regulatory Haven

LUCA ENRIQUES

Across the channel, [commentators](#) are predicting that a likely outcome of Brexit is that, after withdrawing, the UK will lower corporate taxes and deregulate its economy to attract relocations from the Continent and elsewhere. After all, even out of the EU, the UK would still have the advantages of proximity to the largest economic free trade area on the planet and perhaps, depending on the outcome of the negotiations, of still being associated with it one way or the other. George Osborne appears to have plans consistent with those predictions, [having declared his intention](#) to lower the corporate tax rate to 15 percent, which would be the lowest among large economies.

The mere possibility that the UK engages in fiscal and regulatory competition is a powerful argument for the remaining EU member states to insist on either of two uncompromising outcomes following any triggering of Article 50: (a) the “Norwegian” one, ie membership of the EEA, which requires acceptance of the four EU freedoms and all EU rules without a say on their contents, or (b) no agreement at all. Outcome (a) would rule out regulatory competition on all matters that are or will be harmonized. And, with the UK out, the EU can be predicted to move in the direction of more harmonization than has been the case so far. Outcome (b) will mean no free access to the EU market for UK firms, which will greatly discourage relocations.

Yet, the fears that the UK will successfully engage in a regulatory or tax race-to-the-bottom are largely misplaced: in the present conditions, it is highly unlikely that the UK can attract any significant number of foreign businesses. [\[1\]](#) Relocating is costly. If a UK location is no longer cost-effective down the road, for instance because the relevant policies have changed, a second relocation will be needed, adding to the cost of the prior one. Hence, businesses will bear the costs of moving to the UK only if they can be persuaded that the new attractive tax and legal environment is there to stay. The problem is that the UK is not currently in a position to credibly commit to a stable environment. Here is why.

Jurisdictions attracting foreign business with favourable tax or legal treatment (think of Luxembourg or Delaware) tend to have relatively small economies, where the revenues for the state from the economic activity generated by the favourable tax or regulatory regime are a significant portion of the total. That makes the state’s commitment credible, because the harm to public finances from reneging on the promise to maintain the favourable status

quo will be huge and, as a consequence, the political system can be expected not to meddle with the existing arrangements.

A large economy like the UK's is thus at a disadvantage from this point of view. Yet, countervailing factors may still allow a large country to attract a disproportionate amount of economic or financial activity within its borders. After all, the City of London has attracted financial activities from all over the world for decades despite the large size of UK's economy. That is not to say that the UK won the competition in financial services via regulatory or tax dumping. It means, rather, that the UK was eventually able to credibly commit to preserving the quality of its regulatory and tax environment over the long run.

How did it do it? There are, of course, many explanations. But arguably, in the past decades the appeal of the City as a financial centre owed much to the high quality, stability, and trustworthiness of UK's institutions. A long tradition of parliamentary democracy, free and inquisitive media, the rule of law, independent courts, stable governments, a strong legal profession and, relatively speaking, a predictable electorate that could be expected not to be willing to renounce the advantages of hosting a highly profitable financial centre all played an essential part in the City's success.

The context is now different. First came the diffused, and no matter how justified, anger against bankers following the financial crisis. While UK policymakers were arguably no harsher than others in reshaping financial regulation, there can be currently no presumption that a pro-business and/or pro-financial institutions agenda will go down well with the electorate. Then, and relatedly, the EU referendum has given a severe blow to the UK's political institutions' credibility. To an external observer, the very decision to ask such a complicated (and open-ended) question to the electorate via a simple majority vote looks reckless. The quality of the campaign debate and coverage was surprisingly dismal, while the low instincts and fleeting emotions of the [enraged majority](#) in favour of Leave entail a degree of unpredictability in British politics that was hitherto unacknowledged.<sup>[2]</sup> Finally, the cluelessness of politicians about what to do after the unexpected outcome, and more generally [the messy state of post-referendum national politics](#), have added a final touch of amateurism to an already grim picture.

In short, the post-referendum uncertainty relates not only to the future of UK/EU relationships, but also to the stability and trustworthiness of British political institutions. That uncertainty may not be enough to erode the competitive advantages for firms that are already established in the UK (for them, relocating elsewhere will be a certain cost to be compared to the uncertain ones of remaining here), but it makes any attempt to attract new businesses or to rebrand the UK as a tax or regulatory haven at the border of the EU highly unlikely to succeed.

It is far too early, of course, to write off the UK as a stable democracy with trustworthy political institutions (a point [the Economist](#) has already made). Yet, it will take a lot of political goodwill, a committed leadership and a less temperamental electorate, not to mention a

streamlined constitutional framework, before foreign businesses will find a UK commitment to a friendly tax and regulatory environment credible in the long run and decide to move here.

To conclude, the other 27 countries will find it convenient to parade the prospect of a UK tax or regulatory haven as a bugbear during the Article 50 negotiations. But the truth is that, even if the UK wanted to go down that road, it would hardly have any chance to succeed after the self-inflicted wound of the EU referendum. Page | 31

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## Brexit to the EEA: What Would it Mean?

JOHN ARMOUR

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As the dust clears from the result of the UK's referendum on EU membership, new Prime Minister Theresa May and her team must begin serious consideration of the options open to the UK. Two issues are likely to sit at the heart of the UK's negotiation.

First, there is an economic imperative to preserve the operation of the financial services sector. UK-authorised financial firms currently enjoy a 'passport' to operate throughout the EU without additional authorisation. Loss of the EU 'passport' would damage not only intra-EU financial services exports, but also reduce the willingness of third country (especially US) firms to base European operations in the UK. According to [TheCityUK](#), financial and related professional services account for 7% of [domestic employment](#) (two-thirds of whom work outside London), 12% of UK GDP and 12% of UK [tax revenues](#). The EU is the largest export market for UK financial services. Its loss could be an economic disaster for the UK.

Second, in light of the significance attached to concerns about immigration in the referendum campaigning, there is a political imperative to secure a change to the terms on which immigrants are able to enter the UK. These two desiderata are widely thought to be incompatible: EU officials and senior politicians in other Member States have [publicly opined](#) that the EU's framework is not available *a la carte*: we must take free movement or leave financial services. What, then, are the options for the UK?

To date, consideration of alternatives to the EU has revolved around three possibilities popularly known as the 'Norway', 'Swiss' and 'Canada' models. The so-called 'Norway model' would involve re-joining the [European Free Trade Association](#) (EFTA) and becoming a party to the [European Economic Area](#) (EEA). Ironically, EFTA membership would be a round-trip for the UK, which was the [prime mover behind the establishment of EFTA in 1960](#) as an economically-oriented framework for trade liberalisation between European countries, in contrast to the EEC's more politically-oriented approach. Yet over the years, EFTA increasingly became seen as a 'waiting room' for EU membership, from which most of its original member states subsequently graduated. Today there are just four EFTA members: Iceland, Liechtenstein, Norway, and Switzerland.

A key difference from the EU is that EFTA is not a customs union. This means that, while EFTA members agree to waive tariffs on goods and services amongst themselves, they do not agree a common policy in relation to trade with third countries. This would open the possibility, for example, to more favourable trade terms with Commonwealth countries, as was the case prior to the UK's accession to the EEC in 1973. Nevertheless, EFTA does negotiate



shared free trade agreements with third countries on behalf of its members, which the UK would be free to join or not as it wished.

The most important such agreement is the 1994 [European Economic Area \('EEA'\) Agreement](#), which governs relations between three EFTA members (Switzerland opted out) and the EU. The EEA entails acceptance of the EU's four freedoms: goods, persons, services and capital. Moreover, the EEA requires contracting parties to implement as part of their 'internal legal order' the vast majority of the EU's acquis (as set out in the 22 [Annexes](#) to the EEA Agreement), save for the Common Agricultural Policy, the Customs Union, the Common Trade Policy, the Common Foreign and Security Policy, Justice and Home Affairs, and the European Monetary Union.

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As regards financial services, the EEA-relevant EU measures include those pertaining to [company law](#) and [financial services](#). As a result, were the UK to become a party to the EEA, UK-authorised financial services firms would keep their 'passport' to market products and services throughout the EU. Moreover, UK-registered companies founded by entrepreneurs in other EU member states (of which there may be upwards of 100,000) would continue to have their [existence recognised](#) by other EU jurisdictions.

However, there are two significant drawbacks to an EEA version of the 'passport', as opposed to the EU version. First, the [UK would no longer get any say](#) over the content of the rules. As a member of the EU, the UK has been a highly influential participant in the legislative process. In particular, the EU's early 21<sup>st</sup> century reforms on securities markets owed much to UK thinking, and the UK has been a vocal opponent of some post-crisis measures it views as overkill.

Second, the 'transplantation' of EU legislation into the laws of EEA members is not automatic; rather, members must each consent to enact it into their domestic laws. This can lead to a lag between the enactment of EU laws and their EEA adoption. There have been particular problems with post-crisis EU financial regulation. The new [European System of Financial Supervision](#) ('ESFS'), introduced in 2010, established EU-level agencies with delegated authority to write binding rules. Implementing this creates constitutional difficulties for some EEA members, and although the matter is a [priority](#) for the EFTA Standing Committee, it has not yet been resolved. Because the ESFS is embedded in all subsequent financial services regulations produced by the EU, virtually none of the EU's post-crisis financial regulation is yet applicable in the EEA. Indeed, the majority of the EU legislation in the 'holding pattern' status of ['identified as EEA-relevant but not yet adopted'](#) consists of financial services measures.

Financial services regulation in the EU has moved quickly since the financial crisis. If UK firms have no say in the direction of that process, and cannot be guaranteed the application of the latest measures, then the current EEA model will not be suitable for the [fast-changing regulatory challenges of the financial sector](#). This means that if the UK seeks to sign up to the EEA, it would need to ensure at least some mechanism to improve implementation speed for financial services measures and ideally some process for securing

UK input to the rules. This would be in both sides' interests, because regardless of EU membership, their financial sectors will continue to be interwoven as a practical matter, posing a mutual source of potential systemic risk.

The EEA therefore does not look a promising avenue for the UK. Straightforwardly applied, it would involve no additional immigration control and a greatly enfeebled version of the financial services passport. Of course, the UK might try to negotiate exceptions to the EEA's free movement parameters: [Liechtenstein](#), for example, obtained a five-year transitional period. However, the UK's prospects for such an 'EEA minus' deal seem [distinctly unpromising](#), given the risk to the EU of setting a precedent that other member states might follow. More concerning for the UK is the risk that other EU member states, jealous of London's success in financial services, might offer an 'EEA minus' version that permitted the UK to opt out of free movement but tore up the passport for financial services.

What, then, of the other options? The 'Swiss' and 'Canadian' models each refer to bilateral agreements between these countries and the EU, which could provide templates for a bilateral UK-EU deal. The [bundle of bilateral measures between Switzerland and the EU](#) cover free trade in goods, but not services, and also require Switzerland to accept the free movement of EU citizens. This configuration would clearly be unappealing to UK voters, [as indeed it now appears to be to the Swiss](#). In contrast, the recently-negotiated [Comprehensive Economic and Trade Agreement](#) ('CETA') between Canada and the EU, encompasses not only goods but a wide range of services, and does not entail any commitment on Canada's part to free movement of persons.

However, its provisions on financial services ([Chapter 13](#)) do not extend anywhere near the 'passport' recognition enjoyed by firms authorised within the EU. Brexit optimists might argue that the UK might be in a stronger negotiating position even than Canada and so able to achieve an even better result. Yet it should be remembered that CETA has taken [seven years](#) to negotiate, that any bespoke agreement with the UK would be at least as complex, and that EU member states would have concerns about precedent-setting which would not have applied to Canada. [Uncertainty blights investment](#), and uncertainty of the extent and duration entailed by such a negotiation could easily be fatal for much of the UK's financial services sector.

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## Further Reading

*A selection of publications on the legal issues surrounding the UK's withdrawal from the EU.*

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