

How to withdraw from the European Union? Confronting hard reality

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When a spouse says “we need to talk”, this is usually a sign of approaching trouble. David Cameron is about to do this on January 18th in his eagerly awaited and notoriously postponed “Europe” speech. He is widely expected to express a desire to re-negotiate the terms of the UK’s membership in the European Union. This, however, may be just the beginning but not the end. Renegotiated terms of membership are likely to be short of what some of the Tory backbenchers, members of the eurosceptic UK Independence Party (UKIP) as well as some members of the public want. No doubt David Cameron has pushed himself into a political cul de sac and faces a real quandary: sell the skin of the country or risk being dumped by his own party. This dilemma, together with the anti-EU propaganda, so widespread in the British media, makes a referendum in the UK a *fait accompli*. If Cameron’s quest for a new membership deal is successful, the voters may be asked what they think about it. However, if the anti-EU sentiment in the UK grows and the UKIP does well in the polls, David Cameron may still be pushed by his own party to organise a simple “in or out” vote. Since such a referendum may lead to a ‘Brexit’, it is worth considering what such a withdrawal might look like.¹ Those who think that it will be an easy exercise are profoundly mistaken.

Unilateral withdrawal

One myth to dispel at the outset of this discussion is the possibility of unilateral exit. The EU is not a golf club but rather a marriage with various strings attached. It is, first and foremost, a legal order agreed between the 27 member states. Although some lawyers and policy-makers may perceive a possibility for unilateral departure in Art. 50 TEU, this is largely an academic exercise. A member state may decide to

¹ See also A. Łazowski, “Withdrawal from the European Union and Alternatives to Membership”, *European Law Review*, Vol. 37, 2012, pp.523-540.

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leave the EU as per domestic constitutional requirements, but this is merely a decision on exit. Withdrawal itself requires a proper treaty framework, regulating the time frame and details of the divorce. There is, however, a notice period laid down in Art. 50(3) TEU. This provision says that the EU Treaties cease to apply to the departing country on the day of entry into force of the withdrawal treaty or, if that does not materialise, two years from the date of notification of the intention to leave. This may mean that two years after "darling, I want a divorce" is spelled out, the divorcee can simply say goodbye. However, the legal reality is very different. While it is true that the two-year period is rather short to complete negotiations on a withdrawal agreement and can be extended, the deadline is there to keep both sides disciplined during the negotiations. Taking into account the existing levels of legal and economic integration between the member states, it would be in the interest of all sides to provide an adequate legal basis for withdrawal and future relations. At stake would be the rights of citizens and companies benefiting from the internal market, including UK nationals and undertakings. Bearing this in mind, it is hard to imagine a country proceeding to walk out without at least a fleeting glance backwards.

Withdrawal agreement

In accordance with Art. 50(2) TEU, a withdrawal agreement is an international agreement between the EU and a departing country. Taking into account the potential comprehensiveness of such an agreement, it may fall within different categories of competence, which are either shared between the EU and its member states or exclusively of the European Union. Unless it is decided otherwise, a withdrawal treaty may have to be concluded as a mixed agreement, making the ratification procedure much longer and more complex as it will involve the member states. It has to be emphasised that a departing country will be treated as a third country during such negotiations. Moreover, unlike accession treaties, withdrawal agreements do not form part of EU primary law. Thus, unless a special formula is developed, they cannot amend the treaties on which the EU is based. This implies that alongside an international treaty regulating withdrawal, the remaining member states would have to negotiate between themselves a treaty amending the founding treaties in order to repeal all provisions touching upon the departing country. Further complexities may be added if a departing country chooses to make a rapid move from the EU to the European Economic Area (EEA) instead. That would necessitate a third treaty regulating the terms of accession to EFTA and a fourth to deal with the accession to the EEA. The latter would require the approval of the EU and its member states, the EEA-EFTA countries and the departing/joining country.

The next issue that merits attention concerns the potential contents of a withdrawal agreement. Art. 50(2) TEU merely provides guidance in that it requires arrangements for "withdrawal, taking account of the framework for its future relationship with the Union". Certainly a comprehensive set of institutional and substantive provisions would be required to turn the political desire to leave the EU into a legal reality. To start with, it would be necessary to delete all provisions and protocols annexed to the founding treaties touching upon the departing country. A decision would also have to be made as to the cut-off date for the participation of a leaving country in the work

of all EU institutions, the newly created European External Action Service and the plethora of agencies, organs and advisory bodies. This would have to take place in two stages. Phase one should cover the period of withdrawal negotiations; phase two the ratification of a withdrawal agreement. It seems logical that nationals of the departing country should be allowed to take part in all the meetings until the formal date of exit; however, the key question is to what extent a divorcee should be allowed to shape the legislation it ultimately wishes to withdraw from. Another related issue is the status of EU staff members who hold the nationality of the departing member state. A number of employment law issues will need to be attended to. Moreover, the status of various EU bodies which have their seat in the departing country will have to be regulated.

The consequences of a withdrawal from the EU are not limited only to institutional matters. A departure would also have profound legal and economic consequences. The EU constitutes a legal order that covers a vast number of areas, from internal market to criminal law. It is reasonable to expect that EU law would cease to apply to a departing country on the date of exit and would have to be replaced by a new legal regime provided for by the withdrawal treaty or in a separate agreement. The latter would be the case if such a country decides to join the EEA instead.

The list of dossiers to be regulated in a withdrawal agreement is long. As of the date of exit, the freedoms of the internal market will cease to apply, thus the ex-member state and its citizens will no longer benefit from free movement of goods, persons, establishment, services and capital. It is hard to envisage the effects of the reinstatement of customs duties in trade or other types of barriers, which are strictly prohibited by free movement of goods *acquis*. Depending on the result of withdrawal negotiations, parties may decide to opt for a fully fledged free trade area instead. One can expect a great deal of bargaining when it comes to free movement of persons, establishment and services and it is not only the question of securing acquired rights of EU citizens and EU companies in a departing country (and the other way around) but also the regulation of the future participation of the leaving state in these chunks of the internal market. If it still wants to benefit from the four freedoms, it will have to turn to a model of integration without membership, which might require a very sophisticated institutional and legal arrangement. The examples of the EEA as well as Swiss Confederation may serve as alternatives to membership or at least blueprints for future arrangements, but one should not expect much appetite on the part of the member states to negotiate another such complex legal regime.

One should also remember that the substantive law of the EU is not limited merely to the internal market. Indeed, the *acquis* has evolved tremendously over the years and the impact of withdrawal on a number of areas will have to be thoroughly considered in withdrawal negotiations. This includes, inter alia, the Area of Freedom, Security and Justice covering judicial cooperation in civil and criminal matters; transport policy, including the open skies regime; and environmental policy with the contentious issue of allocation of CO₂ emissions. A withdrawal agreement would also have to provide for phasing out of the Common Agriculture Policy as well as Common Fisheries Policy. At the same time, pulling out of the EU customs union

would be a complex and costly affair. A departing country would no longer be part of the Common Commercial Policy. Hundreds of international agreements (including free trade agreements) would cease to apply in relation to the divorcee. It would also have to revamp its trade policy vis-à-vis the outside world, develop its own customs tariff regime, trade protection mechanisms and negotiate new agreements with other countries. It is quite naive to claim that all those agreements could be automatically reinstated on a bilateral basis between the divorcee and the third countries upon the EU exit.

Conclusions

Leaving the EU is no easy job. The levels of integration have gone so far that a departure of a member state will have profound legal, economic and political implications for the divorcee and for the EU. One may hope that Whitehall is fully cognizant of this reality and does not push renegotiated membership terms too far or even head for the exit. At the same time it is hard to imagine what else David Cameron may wish to opt-out from after he has implemented the big JHA opt-out which was negotiated by the previous government. Two things are certain: the UK cannot opt out of the weather,² and a divorce from the European Union should not be the triumph of imagination over common sense or hope over experience, but a decision based on a very thorough political, economic and legal analysis, as the consequences in all possible respects will be profound.

² <http://www.telegraph.co.uk/news/matt/?cartoon=9801313&cc=9776658>