
ILPA has commissioned a series of position papers on legal issues relevant to the EU referendum. Each paper is accurate at the date of the position paper.

The purpose of the papers is to help inform the debate about the EU referendum, and they are available to be used as a resource by both ILPA members and the general public.

The position papers have been written by legal experts in the relevant fields and ILPA is very grateful to all those who have contributed to this work.

Copies of the other position papers can be found on the ILPA website at www.ilpa.org.uk

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The Impact of Brexit

Steve Peers, University of Essex, 17 May 2016

Introduction

What would happen if the UK left the EU? In each case, that would depend on what the UK and EU negotiated afterward. But it is possible to give some general indication of the consequences.

The UK's main options

As regards the free movement of EU citizens, it is possible that the UK might still wish to accept free movement, as a condition of participation in the European Economic Area (EEA) treaty, which extends the bulk of the rules on access to the EU internal market to non-EU countries (Norway, Iceland and Liechtenstein).

The UK is currently a party to the [EEA Treaty](#), but according to Articles 2 and 128 of that Treaty, the parties to it are the EU and its Member States as well as those members of the European Free Trade Association (EFTA) that wish to join (Switzerland, an EFTA member, voted against joining). There is no express provision on what happens if a Member State leaves the EU. So it is arguable that in order for the UK to (re)join the EEA if it left the EU and ceased to be a Member State, it would have to join EFTA and then apply to (re)join the EEA. In that case, the same Article 128 makes clear that the terms of new states joining have to be agreed by all the existing members. Within the EU, the EEA Treaty is an association agreement, which means that all Member States have a veto and (in practice) the UK's participation would have to be ratified by national parliaments. The European Parliament would also have a veto.

However, it is not clear if the UK would seek to join (remain in) the EEA, or if the EU would agree to this. The most prominent members of the 'Leave' side have ruled out EEA membership, on the grounds that the free movement of people, along with contributions to EU programmes or to EU Member States (which are legally required by the EEA treaty and its protocols) as well as the acceptance of many EU laws with less say make EEA participation undesirable. On the other hand, some 'rank and file' supporters of the Leave side support EEA membership in some form, or assume that it would be the inevitable result if there is a Leave

vote.

It would be possible for the UK to seek to (re)join the EEA while requesting special terms, such as an exemption from or a limitation of the rules on free movement of people or other exemptions (financial contributions or the acceptance of EU laws, for example). Of course, the EU and other EEA parties would have to agree to any such requests. There is an extra safeguard in the EEA treaty if there is a large impact of migration (or any other EEA rule) in a Member State. It is up to each EEA member to decide whether to invoke this safeguard, but the EEA provides for retaliation (ie suspension of some aspect of preferential trade) if an EEA member seeks to invoke it.

Alternatively, the UK could seek to negotiate a 'stand-alone' treaty on free movement of people with the EU, as Switzerland has done, or a more limited agreement on migration between the UK and EU. This might form part of a broader trade agreement, or be linked politically with other agreements (ie the Swiss case), so it could not be denounced without triggering the possible retaliatory denunciation of other treaties.

The UK could alternatively seek to negotiate bilateral treaties on migration with individual Member States, although it is not clear as a matter of EU law exactly what external competence the EU (as distinct from its Member States) may have as regards treaties with non-EU citizens. In any event, any treaty which impacts upon the number of UK citizens coming to work in the EU will likely be a 'mixed' agreement that requires ratification by all Member States and a national veto, since EU law reserves competence on the volumes of admission of non-EU economic migrants to Member States.

Process of withdrawal

In principle EU law will fully apply until the UK ceased to be a Member State. The withdrawal process is set out in Article 50 [Treaty on European Union](#) ('TEU'), although some have argued that the EU and UK might ignore Article 50 and reach some *ad hoc* arrangements instead. As a matter of law, it seems clear that Article 50 is the only legal route to withdrawal under the current Treaties, although it would be legally possible alternatively either to amend Article 50 by way of Treaty amendment or to arrange for the UK's withdrawal by means of Treaty amendment (as in the case of Greenland). However, making the UK's withdrawal conditional on either of those forms of Treaty amendment would not appear to offer any advantages for the UK, since in that case the arrangements would be subject to national vetoes and ratification in each national parliament.

If the UK votes to leave the EU, the withdrawal process would be triggered once the UK officially notified its intention to withdraw. The Treaty does not require the UK to notify this intention if there is a Leave vote, or specify when the notification would have to be made. Although David Cameron has said that he would immediately notify a Leave vote, some on the Leave side have suggested that they might delay a notification, or not make a notification at all, hoping that the EU would be willing to renegotiate the UK's membership again. Then the results of that further renegotiation would be put to the British public in another referendum. However, this plan would depend on the EU's willingness to renegotiate again; and the sort of fundamental changes to the UK/EU relationship that Leave supporters would like to see (such as the abolition or significant restriction of the free movement of people) would very likely entail Treaty amendments, with the difficulties described above. Furthermore, some Leave supporters are unequivocally in favour of notifying withdrawal from the EU as soon as possible in the event of a Leave vote.

If a withdrawal is notified, then negotiations on a withdrawal treaty will formally begin, although it may be possible to have informal negotiations beforehand if both sides agree. In principle the UK would leave the EU two years after notification, unless the withdrawal treaty sets a different date or the UK and the EU agree unanimously to extend that date. It is not clear if a notification can be withdrawn after it is made, or if the withdrawal date could be extended indefinitely as a means to the same end. It is also not clear if the withdrawal treaty will deal with the post-Brexit relationship between the UK and the EU; Article 50 talks only about taking account of the future framework for relations. Presumably it would be possible to negotiate the post-Brexit treaty informally if necessary, alongside the withdrawal treaty.

Article 50 says that the UK will not be part of the negotiations on the withdrawal treaty or the future UK/EU relationship on the EU side, although of course it will be negotiating on its own behalf. To this end, the UK will not be able to participate in voting or meeting in the Council or European Council concerning these negotiations, although it will still be able to participate in those bodies otherwise. While some on the Leave side have threatened to veto EU measures during the withdrawal period as a pressure tactic to obtain better terms of withdrawal, this will only work to the extent that the measures are subject to unanimous voting, or cannot be adopted by means of 'enhanced cooperation' or (in the case of foreign policy) 'constructive abstention' instead. The UK will retain its participation in all other bodies (European Parliament, Commission, CJEU) during the withdrawal period.

Impact on UK citizens in the remaining EU and EU citizens in the UK

The withdrawal agreement ought to detail the position of UK citizens in the remaining EU and EU citizens in the UK at the time of Brexit. The key issues are retaining residence rights and the status that goes along with it (status of family members, access to employment and benefits, equal treatment, grounds for expulsion). There will also be a question of how to regulate the future position of those already resident, for instance if they marry a non-EU citizen in future, they retire from work or otherwise change their status, they enter university in future or they are not yet a permanent resident under EU law.

While Article 70 of the [Vienna Convention on the law of treaties](#) refers to guaranteeing 'acquired rights' of individuals in the event of termination of a treaty, it has never been applied in the context of a withdrawal from the EU pursuant to Article 50 of the TEU, since that TEU clause has never been used before. It is therefore open to question what 'acquired rights' means. Some literature argues that it applies only to property rights, not to public law issues like immigration status. There may be a better argument that it protects people who have *already* acquired permanent residence status as of the Brexit date, but it is not clear if it can logically apply to rights in the *process* of acquisition or which the person concerned would wish to invoke in future, such as those described above. Moreover, Article 70 does not apply if the treaty concerned sets out special rules for withdrawal, and it could be argued that the process referred to in Article 50 TEU does just that. It is also not clear whether Article 70 (or the rule of customary international law which it embodies) would in any event constitute a rule which could be invoked by individuals before a national court, in order to set aside a national or EU law rule which conflicted with it.

To the extent that they did not have acquired rights or were not covered by a treaty between the UK and the EU or its Member States, national law or (in the remaining EU) to some extent EU law would apply. It would be up to the UK what rules it wished to adopt as regards EU citizens in the UK. On the EU side, national immigration law on the immigration of non-EU citizens would apply. Moreover, this area of law has been partly harmonised by EU law (except in Ireland and Denmark, which like the UK have an opt out from these laws), which would set at least minimum or parallel standards applying to UK citizens as regards family

reunion, long-term residence, the admission of students, researchers and trainees, equal treatment for workers in general, and admission of highly-skilled workers, seasonal workers and intra-corporate transferees.

The EU waives short-term visa requirements for wealthy countries, except in principle it will retaliate if a wealthy country imposes visa requirements for one of its Member States. One of the senior figures on the Leave side has contemplated imposing tourist visas on EU citizens, with UK citizens equally being subject to visas for visits to the EU. In any event, in the absence of a deal on free movement of people, UK citizens will no longer be fast-tracked when they cross the EU's external borders—and EU citizens will not be fast-tracked when they visit the UK in return.