

Brexit or Britremain: Some Key Questions and Answers

What is Brexit?

Brexit is the voluntary withdrawal by the United Kingdom from the European Union ("EU").

Voters in the UK and Gibraltar will decide by way of a popular referendum on Thursday, 23 June 2016 whether or not to leave.

The withdrawal would be in accordance with Article 50 of the Treaty on the European Union ("TEU") (which has only existed since 1 December 2009).

Brexit would be a unique event – no Member State has ever left the EU. Algeria left in 1962 to become independent of France, Greenland left in 1985 to become "self-governing" of Denmark and Saint Barthélemy left in 2012. However, none of them was a Member State but merely a part of the relevant Member States. So this would be a unique event with profound consequences. It would be as significant as New York leaving the United States of America.

What will be the Question on the Ballot Paper?

The UK's European Union Referendum Act 2015 (17 December 2015) prescribed the question as: "Should the United Kingdom remain a member of the European Union or leave the European Union?"

The alternative answers are (a) "Remain a member of the European Union" or (b) "Leave the European Union". It is neither an "in"/"out" nor a "yes"/"no" referendum.

Will the UK Leave 2 Years after the Vote to Brexit?

There is a popular view that the UK would leave exactly two years after the referendum date if there is a vote for Brexit. This is not necessarily so.

Article 50(3) of the TEU provides that the "Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in [Article 50(2)], unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period."

It took several years to negotiate the UK's accession to a slimmer and lighter European Communities so two years is a very optimistic time frame to negotiate and legislate for the un-doing of 43+ years of law. It could happen in two years but it would be more likely to be a transition-type arrangement.

Is Withdrawal Inevitable if there is a Brexit Vote on 23 June 2016?

Not necessarily. If there is a tight majority in favour of Brexit, then the other Member States might offer an alternative enhanced package thereby triggering a possible second referendum (as in the case of Denmark and Ireland in some previous referenda).

Whatever the outcome on 23 June 2016, the "Withdrawal Treaty" might still be put to the UK electorate when it is agreed (either by way of a referendum or as part of the UK General Election which is scheduled for 7 May 2020 or, more likely, following a confidence vote or debate on the Withdrawal Treaty) so 23 June 2016 may not be the end of it...- there might be Brexit 2!

Could the UK Re-join the EU?

Yes but it would be a slow process.

Article 50(5) provides that if a Member State which has withdrawn from the EU asks to re-join then its request shall be subject to the procedure referred to in Article 49 of the TEU. This clever provision means that there cannot be a "revolving door" or any easy path to re-enter the EU. Indeed, one could see that many of the remaining Member States would be generally reluctant to let the UK back in too easily. So, it would mean that the UK would not find it so easy to re-join.

Remember that the other Member States are worried about the "floodgates". This is not just about what the departing Member State wants or does not want, as the remaining Member States could be quite reluctant to agree to new arrangements and could even exploit the opportunities which a withdrawal could present for their own interests.

Hasn't the UK Been Here Before?

Mass referenda are rare in the UK. There have really only been 12 ever and then only 2 of them covered the whole of the UK. The more relevant one for present purposes was the one on continued UK membership of the then European Communities on 5 June 1975. There was a 65% turnout. (In the Scottish Independence Referendum on 18 September 2014, there was a 84.59% turnout which was the highest turnout ever in a UK referendum.) 67% voted in favour of remaining in the European Communities. In Northern Ireland, there was a 47% turnout and 52% voted in favour. Curiously, the southern half of the UK was more in favour of membership with the northern half (particularly parts of the west of Scotland) less in favour of membership – on 23 June 2016, the voting patterns (North/South) could well be reversed.

So do we know what would Happen Post-Brexit?

No, and this is key to understand. Businesses are being advised to "prepare for Brexit" which is fine but the question is "prepare for what?". No one has a clear vision of what will happen post-a Brexit vote so one needs to speculate somewhat about the various possibilities. It is also worth remembering that some remaining Member States may, despite the Brexited UK's wishes, seek to capitalise on the UK's planned withdrawal and not concede some of the current privileges so as to further their own interests. The negotiation of the "withdrawal" and "retained connections" would probably be more fraught than the Brexit campaign which is largely centred in one Member State but the withdrawal debate cuts across the interests of all other Member States and will be coupled with a desire by some Member States to ensure that a post-Brexit UK does not obtain such a good deal that others would be tempted to follow.

What will happen Post-Brexit to EU Law in the UK?

It depends on the post-Brexit agreement between the EU and the UK. If there was a complete "Clean Break" then EU Law disappears completely. In reality, EU law is embodied in so much of UK law already (e.g., statutes and statutory instruments) that it is not so simple to untangle or unpick the EU law elements. The impact of EU law on UK law would depend on the post-Brexit agreement (e.g., "Norway" or "Switzerland").

Paradoxically, there is some precedent in terms of various countries having been part of the British Empire becoming independent. In the case of Ireland, when it became independent in 1922, English law was

the backbone of the Irish regime so adaptation of statutes legislation had to be enacted and a system evolved whereby post-independence English case law was seen as “persuasive” but not “binding” (and this may be a model for UK courts dealing with EU case law post-Brexit in regard to UK legislation based on EU legislation (e.g., in the employment arena)).

What will happen with Competition Law?

The UK's competition rules are virtually the same as the EU rules (with some exceptions, notably on State aid). So, on the face of it little would change. Except that there would be a doubling up of regulations, regimes and penalties. Currently, businesses are fined usually by either the EU or a Member State but if the UK were to leave then there would be one more fining jurisdiction. There could also be a divergence in terms of rules between the EU and a Brexited UK (e.g., like the EU and the US at present).

What about Merger Control?

Post-Brexit, EU merger control will be less relevant to UK and other companies, including Irish companies - if the UK element of turnover is removed from the EU test then more deals will have to be dealt with at national levels without the advantage of EU one-stop shop (unless post-Brexit UK opts into the EU regime in some way). Otherwise the “one-stop shop” of the EU's Merger Control Regulation disappears. Businesses generally prefer the EU one-stop shop approach and actually lobbied the EU to extend the regime. Equally, there would be no reference back from the EU to the UK of transactions which matter locally in the UK. Some Irish businesses whose deals have been filed under the one-stop-shop EU regime may find that absent the UK turnover then the deal would have to be notified in more jurisdictions because the EU test would not be satisfied without the UK turnover.

What about State Aid?

Unless there are special rules agreed, the UK would no longer be bound by the EU's State Aid rules. This could provide an advantage for UK business. However, the World Trade Organisation and the EU's “anti-dumping” regime would continue to exist but the EU's State Aid rules would no longer do so. This would lead to an “asymmetrical” situation to the advantage of UK business with UK businesses being able to complain to the European Commission about EU Member State aid to EU businesses, but EU businesses not being able to complain to the European Commission about UK State Aid to UK businesses.

What about Agriculture?

The changes here would be significant. The Common Agricultural Policy (“CAP”) is still at the centre of EU policy. EU grants and subsidies to farmers would disappear – the Brexit campaign say that they would be replaced by UK funds. Complex arrangements would have to be negotiated to allow for the entry of EU food into the UK and vice versa (e.g., one need only think about how long it takes to negotiate for the export of EU food products to the rest of the world). The value of agricultural land is likely to fall if there is a Brexit and there is no substitution of EU grants by UK grants. On the other hand, the UK will no longer have to deal with the CAP and its labyrinthine regulatory regime...and food might be cheaper.

What about Transport?

The EU operates an internal market for transport. EU operators fly, drive and sail freely around the EU as “EU operators”. For example, “EU” controlled and majority-owned airlines fly from one Member State to another seamlessly on the basis of the “EU” passport. If the UK is outside the EU and sufficient replacement arrangements have not been negotiated then question marks exist over continued services by companies using “EU passporting”.

What about Banking?

More foreign banks operate in the UK than in any other EU country. EU financial services legislation has been the backbone of so much UK financial services legislation. There are more questions than answers at this stage. Among the questions do you retain the EU legislation but how would it be construed? The UK approach or the EU approach to construction? What about Passporting? Leave or Passport but no Influence? Could there be obligations to set up subsidiaries in EU Member States and have costly capital requirements? Would businesses have to move from the UK to the EU? What would be the relevance of post-Brexit CJEU case law? Could the Markets in Financial Instruments Regulation (Reg.600/2014) and the Markets in Financial Instruments Directive II (Dir 2014/65) be implemented or adopted in modified form? Could CRD IV go to make London attractive to Banks?

What about Employment Law?

The EU has brought about enormous changes in employment law (e.g., pay equality, non-discrimination and TUPE). Theoretically, EU employment law rights and duties would disappear if Brexit occurred. But, in practice, many of these rights and duties are embodied in UK law and would the electorate agree to some or all of them being taken away? There is a risk that even if the UK leaves the EU and some of those rights remain on the “UK statute book”, that the way in which they are applied and construed would be “frozen in time” (e.g., future EU developments and jurisprudence might not be followed).

Again, there are at this stage, more questions than answers. Key questions include what about the Mutual Recognition of Qualifications? What about the Free Movement of Workers? To be competitive outside of the EU, the UK might well look at the area of employment law and make its employment regime more attractive to industry to establish or expand in the EU. This could cause an interesting debate between both sides of the employment relationship.

What about Corporate/Company/Commercial Law?

In recent years, the EU has become very important in the area of corporate law. One only needs to think about the prospectus and mutual recognition regime, the EU Merger Control Regulation, the rules on agency arrangements, the TUPE/Transfer of Undertakings legislation, the Rome I Contract Regulation (Reg.593/2008) and so on. In reality, it is useful to contemplate how much one relies on EU law and then ask what happens if it were taken away but moreover, it is useful to ask what would be needed to be negotiated back into the post-Brexit UK relationship with the EU.

What about Litigation?

The EU has streamlined and facilitated the litigation regime around the EU. It is now easier to have a judgment in one Member State recognised and enforced in another Member State. If the UK leaves the EU then it may be more difficult, unless new arrangements are put in place, for judgments in the UK or a remaining Member State to be recognised and enforced unless there are arrangements agreed to address the issue.

Does so Much Turn on the Post-Brexit Arrangements?

Yes. If the UK votes to leave the EU then so much turns on the post-referendum arrangements. The more sophisticated and extensive those arrangements then the less disruption there will be. However, it is worth bearing in mind that some remaining Member States may simply not be in a mood to do an overly-generous deal with the UK because it might encourage other Member States to leave and could have a negative reaction among their domestic voters and business interests who might object to having a post-Brexit UK getting rights without all the duties.

Would the Republic of Ireland also Leave the EU if the UK did?

It is highly improbable that the Republic of Ireland would leave even if there is Brexit. Ironically, the Republic could not have joined without the UK in 1973 but now the Republic can choose to stay.

The impact on the Republic is difficult to quantify at this stage because so much depends on the post-Brexit arrangements. One can see impacts on areas such as trade, migration, business uncertainty, exports/imports/currency, energy and general competitiveness. There is no doubt that there is a slowdown in economic activity generally in various markets. A part of this slowdown may be due to the Brexit uncertainty and there is no guarantee that this uncertainty will disappear post-23 June 2016.

Would there be a fixed traditional "border" between Northern Ireland and the Republic? The answer to this question depends on what is agreed between the Brexited UK and the remaining Member States. Sweden/Norway does not have fixed borders (as Norway is in the European Economic Area) but it is possible that there could be a fixed border if comparable arrangements are not concluded.

A key point for the Republic would be the loss of an ally in the EU process. The Member State to which Ireland is closest to across a variety of parameters is the UK and there is no doubt that the absence of the UK could be very significant in the future EU for Ireland.

Could Northern Ireland or Scotland join the EU on its Own even if there was a Brexit?

Under Article 49 of the TEU, an applicant must be a "State" so Northern Ireland or Scotland would have to become a State before it could apply to join. Even if, for example, Scotland were to become independent, the process of accession takes time.

What if there is a Vote to Remain?

Then the February 2016 deal concluded between the UK and the EU applies. It covers the areas of economic independence, competitiveness, sovereignty and immigration. However, a great deal of uncertainty could still remain in the UK and beyond – the debate may not be quite over on 23 June 2016 even if the Brexit proposal is defeated.

What about Compliance Costs for Business?

If the outcome is Britremain then compliance costs for business in, or dealing with, the UK would remain largely the same. The arrangements negotiated in February by the UK involve relatively minimal changes for business and, if anything, would lead to a reduction in charges. If it is Brexit then the creation of a new regime will cause compliance costs to rise for business. For example, multinationals will no longer have a one size-fits all compliance programme for the EU but will have a different regime for the UK. Moreover, if there is a hybrid arrangement (e.g., some UK rules, some old EU rules and the new UK-EU agreement rules) then the compliance costs will be higher. However, Brexit could get rid of "EU Red Tape" and help reduce compliance costs! In some ways, this question epitomises the debate.

What should Businesses Do Now?

- Expect the uncertainty that is there already to intensify in the run up to Thursday 23 June
- Expect the market instability to intensify on Friday, 24 June
- Expect some uncertainty to continue post- Referendum Day because there could be political fallout and debate about what happens next
- Some businesses may continue to be cautious about investments and deals

- The traditional Summer break could then kick in prolonging the stagnation or "Brexation"
- If there is a Brexit vote then expect the fall out to involve prolonged and intensive debate on what the post-Brexit relationship should look like. There would be intensive negotiations between the UK and the EU with some Member States being unwilling to compromise easily
- Trade agreements are notoriously long to negotiate, draft and implement so expect some uncertainty
- In the short term, look at markets which are not so reliant on the UK still being a member until the "fog of uncertainty" lifts
- In the meantime, businesses should review their businesses model and activities to see how they are dependent on the UK being a member of the EU (e.g., trade, free movement of personnel, EU grants and EU passport rights for businesses and people) and how they would cope if that "UK membership" element was removed.

What will be Outcome of the Vote on 23 June?

That is for the voters of the UK and Gibraltar to decide. Whatever way they vote, the vote will be significant for everyone in the EU.

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