

MOFO BREXIT BRIEFING

29 March 2017

FACT SHEET: WHAT YOU NEED TO KNOW ABOUT TRIGGERING ARTICLE 50

What has happened?

On 29 March 2017, the UK government served formal notice to the European Council of Ministers under Article 50 of the EU Treaty of its intention to leave the European Union. This action is a crucial step in giving effect to the result of the UK's referendum on EU membership in June 2016.

What is the effect of the Article 50 Notice?

The EU Treaty provides that the UK should now negotiate its withdrawal from the EU. The terms of withdrawal must be agreed within two years of the service of the Article 50 notice (so by the end of March 2019). These terms must be approved by a qualified majority of the European Council of Ministers (72% of the remaining 27 member states, representing 65% of the aggregate population of such states) and must also be approved by the European Parliament. The UK government has also indicated that the UK Parliament will be asked to approve the terms.

If no agreement is reached within the two year period, the UK will automatically leave the EU with no special arrangements in place. In trading terms, the UK would therefore effectively default to dealing with EU member states under the rules of the World Trade Organization (WTO). This two year period can only be extended with the consent of all EU member states.

In the meantime, the UK remains a member of the EU and all existing EU-derived laws and regulations continue to apply to the UK.

What will happen now?

There is no prescribed procedure for the negotiations and the EU has refused to undertake any formal preliminary talks with the UK prior to the service of the Article 50 notice. The precise nature and timeframe of the negotiations is therefore uncertain.

It is currently anticipated that there will be a European Council of Ministers summit on 29 April 2017 comprising the 27 member states remaining in the EU. It is expected that, shortly after the conclusion of this summit, the European Commission will publish an outline of the negotiating

mandate that it has been given by the member states. Michel Barnier, the former European Commissioner for Internal Market and Services, has already been appointed as the EU Commission's chief Brexit negotiator.

Formal negotiations between the UK and the rest of the EU are expected to start shortly thereafter but much of the early discussions are likely to focus on the procedure and content of the negotiations and it is unlikely that any substantive discussions will get underway until later in the year. Progress on key issues is also likely to be hampered by the French presidential elections in April and May and the German parliamentary elections in September. The outcome of these elections could have a major impact on the dynamics of the negotiations.

What do we know about the UK's negotiating position?

The UK Government published a [White Paper](#) in February 2017 setting out an outline of its plans to leaving the EU and identifying twelve principles to guide it in giving effect to Brexit. A key element of these principles is that the UK will not seek to retain membership of the European Economic Area (EEA) and will therefore not continue to be a member of the EU single market. As a consequence, when Brexit happens, the European Court of Justice will cease to have jurisdiction in the UK and the EU Free Movement Directive will cease to apply to the UK – so the migration of nationals from the EU and elsewhere will be governed by UK laws.

The White Paper states that although the UK government will not seek membership of the EU single market, it will seek access to the single market through a “new, comprehensive, bold and ambitious free trade agreement”. It also highlights the importance of financial services to the UK and states that the UK will be aiming for open and barrier-free trade in financial services between the UK and EU. The White Paper also states that it is in no-one's interest for there to be a “cliff-edge” to business or a threat to stability as the UK leaves the EU. It indicates that there should be a phased process of implementation, and that interim measures will be sought in negotiations.

In the letter from UK Prime Minister Theresa May triggering the Article 50 notice, the Prime Minister sets out a summary of the UK's objectives and approach to negotiations with the EU. These are consistent with the position set out in the White Paper.

All the above matters will form part of the UK's negotiation with the EU Commission which will be led by David Davis, the UK Secretary of State for Exiting the European Union.

What exactly will the negotiations cover?

As indicated above, the format of the negotiations is not yet known but should become clearer in the next couple of months after the summit of the remaining EU member states. In the Article 50 letter, the UK Prime Minister sets out proposed principles for the negotiations. These include seeking an early agreement as to the rights of citizens of the other EU member states residing in the UK and vice versa. The principles also state that disruption to investors, businesses and citizens in both the UK and the rest of the EU, as well the rest of the world, should be minimised and implementation periods should be agreed to avoid cliff-edges. It is also made clear that the UK would like discussions on its future trading relationship with the EU to form part of the negotiating framework.

Some in the EU have indicated that the discussions should instead focus on the terms of withdrawal including the amount of the UK's current and future financial obligations to the EU (referred to in

the UK press as an “EU exit bill” which has the potential to be a difficult and politically sensitive issue). Cecilia Malmström, the EU Trade Commissioner, has previously stated that negotiations of a new trade agreement should only occur once the UK has already left the EU. That would, however, give rise to the potential for the cliff-edge risk highlighted in the UK White Paper, and the UK relationship with the EU being governed by WTO rules while trade arrangements are negotiated.

The UK will hope that the remaining EU member states will agree with the UK government’s position that there should be parallel discussions on a wide range of issues, including trade and services, from an early stage so that matters don’t get bogged down early on. However, early indications are that this is far from certain. The German Chancellor, Angela Merkel, has stated that negotiations must first clarify how the UK and the EU will disentangle their interlinked relationship, and only then can the future relationship be discussed.

Can this really be done in two years?

The negotiations will be complex and wide-ranging and it seems highly unlikely that all aspects of the terms of the UK’s withdrawal and future trading relationship with the EU could be agreed within this time frame, particularly because the arrangements will need to be approved by both the UK and EU parliaments – which means that terms would effectively need to be agreed by the end of 2018 at the latest. The Article 50 letter highlights these challenges but expresses optimism that agreement can be reached within the two year timeframe. However, some commentators, including former UK cabinet secretary Gus O’Donnell, have said that a minimum of five years will be needed.

Although all EU member states would need to agree to an extension of the two year timetable, what seems more likely is that the UK and EU will seek to agree interim and transitional arrangements as part of the agreement, during which time further details can be agreed. Even then, the two year time-frame is likely to be extremely challenging.

Could the UK withdraw the Article 50 notice?

Article 50 is silent on this issue and commenters have disagreed on whether the Article 50 notice is revocable. Ultimately, it’s possible that this issue could come before the European Court of Justice although this eventuality seems unlikely. The UK government has stressed that, in its view, there is no turning back once the notice has been served and that if the deal is not approved by either the EU or UK parliament, the UK will still leave the EU with no agreement in place.

How will the UK give effect to Brexit

The UK government has indicated that it will introduce a Great Repeal Bill to the UK Parliament during 2017. The aim of this legislation will be to repeal the European Communities Act (which currently gives direct effect and primacy to EU law) at the time when Brexit becomes effective. It will, however, then preserve EU law as it exists at the moment of Brexit, allowing the UK government the ability to subsequently amend or repeal any legacy EU laws as it determines appropriate. Although this is straightforward in concept, the volume and complexity of EU law means that, in reality, this is likely to be a complicated piece of legislation because significant amendments are likely to be needed to existing EU laws to enable them to work effectively in the UK following Brexit.

What do clients need to do?

Although the service of the Article 50 notice is a major legal and political event for both the UK and the EU, it is one that has largely been regarded by governments and financial markets as inevitable since the UK referendum, and the likely timing has been known for several months. Most organizations have therefore already been identifying the impact of Brexit on their business and steps that may need to be taken to deal with its consequences. This planning may step up now that the notice has been served but, until there is more certainty and transparency as to the future relationship between the UK and the EU, it is hard for many organizations to make concrete plans. It is hoped that this will occur once negotiations start in earnest but greater certainty is not likely to begin to crystallize for a few months at least.

MoFo and Brexit

The process of Brexit will take many years, and the implications for our clients' businesses will unfold over time. Our MoFo Brexit Task Force is coordinating Brexit-related legal analysis across all of our offices, and working with clients on key concerns and issues, now and in the coming weeks and months. We will also continue to provide MoFo Brexit Briefings on a range of key issues. Please do not hesitate to call with any question or concern that you may have. We're here to help.

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