

# Global Britain Briefing Note

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## Britain & the EU: if “Out”, How ?

Legally, once the UK triggers the Lisbon Treaty’s Article 50, the EU treaties (after a short delay) cease to apply

*Forty years’ worth of EU regulation would however remain embedded in domestic British law until the British Parliament repealed the European Communities Act 1972, the main mechanism for transposing EU law into British law, and other Westminster legislation*

For the first time in the EU’s history, the Lisbon Treaty spells out member-states’ freedom to withdraw from the Union. The withdrawal clause is Article 50 TEU. It was inserted in the Lisbon Treaty’s predecessor, the draft EU Constitution, at the request of former French President Giscard d’Estaing, with the UK in mind (though this is not set out in the treaties). To date, Article 50 is untested, since no country has ever activated it.

The Treaty of Lisbon<sup>1</sup>, signed in Lisbon on 13<sup>th</sup> December 2007, is the EU’s (and therefore the UK’s) constitution. It comprises two sections, the “*Treaty on European Union*”: “TEU”, and the “*Treaty on the Functioning of the European Union*”: “TFEU”.

## A. Rights & obligations under the provisions of Article 50

- Any Member-State has the absolute, unqualified right to withdraw from the EU at any time.
- The notification to the EU by a Member-State of its intention to withdraw *obliges* the EU to negotiate a “*withdrawal agreement*” with the withdrawing state.
- Furthermore, the EU is obliged to envisage the “*framework for the departing Member-State’s future relationship with the Union*”.
- No specific time period is specified in Article 50 between the Member-State’s notification of its intention to withdraw, and the date on which the EU Treaties (i.e. TEU & TFEU) cease to apply to the withdrawing Member-State. In theory, provided the “withdrawal agreement” were in place, the withdrawing state could cease to be a member of the EU one day after having notified the EU of its intention to withdraw.
- In the absence of a withdrawal agreement, Article 50 states that the Treaties will *automatically* cease to apply to the withdrawing Member-State two years after the date of notification by that Member-State of its intention to withdraw.
- Once the Treaties “cease to apply to the withdrawing state”, that state has left the European Union – though much EU law will remain embedded in the departing state’s domestic legislation. In the case of the UK, the domestic legislation that provides the mechanism for embedding EU law in British law is the *European Communities Act 1972*, which would be amended or repealed following British withdrawal.
- Article 50 also provides for the possibility of the withdrawing Member-State and the European Council agreeing on a longer period than two years between notification of a Member-State’s intention to withdraw and the date on which the Treaties cease to apply to the withdrawing Member-State.
- Article 50 is not the only part of the Lisbon Treaty which deals with the withdrawal process. Article 50 refers to a separate article, Article 218, which covers part of the process (see below).

## B. With who or what would a withdrawing Member-State be negotiating the withdrawal agreement ?

- Initially, the answer seems to be the Commission, which, without necessarily consulting the withdrawing Member-State, would “*submit recommendations to the Council*”. The Council would then “*authorise the opening of negotiations and nominate the (European) Union negotiator or head of the Union negotiating team*”.
- A separate article of the Lisbon Treaty, Article 218(5) TFEU, to which Article 50 refers, says “*The Council, on a proposal by the negotiator, shall adopt a decision authorising the signing of the agreement, and, if necessary, its **provisional application before entry into force***”. The Lisbon Treaty does not explain what a “provisional application before entry into force” might involve in practice.
- Following the conclusion of negotiations between the EU and the withdrawing Member-State, [Article 218(6),] the Council would have to “*obtain the consent of the European Parliament*”.
- Article 218(7) specifies that “*The European Parliament and the Council may, in an urgent situation, agree on a time limit for consent.*”

## C. Arrangements for free trade with countries outside the EU

The Union's constitutional obligation to negotiate arrangements for "free & fair" trade with states that are not members of the Union is spelt out in two other Articles of the *Treaty on European Union*:-

In *The Treaty on European Union, Title I, Common Provisions, Article 3 [5]* says:- *In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity & mutual respect among peoples, **free and fair trade**, eradication of poverty & the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.*

In *The Treaty on European Union, Title I, Common Provisions, Article 8* says:-

1. *The Union shall develop a special relationship with neighbouring countries, aiming to establish an area of **prosperity and good neighbourliness**, founded on the values of the Union and characterised by **close and peaceful relations based on co-operation**.*
2. *For the purposes of paragraph 1, the Union may conclude specific agreements with the countries concerned. These agreements may contain reciprocal rights and obligations as well as the possibility of undertaking activities jointly. Their implementation shall be the subject of periodic consultation.*

In Article 8 [2] above, the word "may" appears to imply that free trade could exist between the EU and other countries in the absence of "*specific [EU] agreements*", the parties relying (for example) on the provisions of World Trade Organisation treaties.

[Note, in the text of Article 8, the word "**shall**". "Shall" *obliges* the Union to "*contribute to free and fair trade*" and to "*develop a special relationship etc*"; "may" would not.]

## *Appendix: the complete wording of Article 50 TEU & Article 218 TFEU*

**Article 50** is in ‘Title VI, Final Provisions’ of the *Treaty on European Union (“TEU”)*. It says:-

1. *“Any Member-State may decide to withdraw from the Union in accordance with its own constitutional requirements”.*
2. *A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218.3 of the Treaty on the Functioning of the European Union. (See below, in blue.) It shall be concluded by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.*
3. *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 paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.*
4. *For the purposes of paragraphs 2 and 3, the member of the European Council or of the Council representing the withdrawing Member State shall not participate in the discussions of the European Council or Council or in decisions concerning it.*
5. *If a State which has withdrawn from the Union asks to rejoin, its request shall be subject to the procedure referred to in Article 49.*

**Article 218(3)**, in ‘Title V, International Agreements’ of the *Treaty on The Functioning of the European Union (“TFEU”)*, says: *“The Commission, or the High Representative of the Union for Foreign Affairs and Security Policy where the agreement envisaged relates exclusively or principally to the common foreign and security policy, shall submit recommendations to the Council, which shall adopt a decision authorising the opening of negotiations and, depending on the subject of the agreement envisaged, nominating the Union negotiator or head of the Union’s negotiating team.”*

**Article 218** contains eleven sections, as follows. As well as Article 218(3), other sections may be invoked during the process of withdrawal – for example, Article 218(11):-

*Article 218(1):* *Without prejudice to the specific provisions laid down in Article 207 (see below) agreements between the Union and third countries or international organisations shall be negotiated and concluded in accordance with the following procedure.*

*Article 218(2):* *The Council shall authorise the opening of negotiations, adopt negotiating directives, authorise the signing of agreements and conclude them.*

*Article 218(3):* *see above, in blue*

*Article 218(4):* *The Council may address directives to the negotiator and designate a special committee in consultation with which the negotiations must be conducted.*

*Article 218(5):* *The Council, on a proposal by the negotiator, shall adopt a decision authorising the signing of the agreement, and, if necessary, its provisional application before entry into force.*

*Article 218(6):* *The Council, on a proposal by the negotiator, shall adopt a decision concluding the agreement.*

Except where agreements relate exclusively to the common foreign & security policy, the Council shall adopt the decision concluding the agreement:

- a) after obtaining the consent of the European Parliament in the following cases:
- i) association agreements;
  - ii) Union accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms;
  - iii) agreements establishing a specific institutional framework by organising co-operation procedures;
  - iv) agreements with important budgetary implications for the Union;
  - v) agreements covering other fields in which either the ordinary legislative procedure applies, or the special legislative procedure where consent by the European Parliament is required.

The European Parliament and the Council may, in an urgent situation, agree on a time limit for consent.

- b) after consulting the European Parliament in other cases. The European Parliament shall deliver its opinion within a time-limit which the Council may set depending on the urgency of the matter. In the absence of an opinion within that time-limit, the Council may act.

Article 218(7): When concluding an agreement, the Council may, by way of derogation from paragraphs 5, 6 and 9, authorise the negotiator to approve on the Union's behalf modifications to the agreement where it provided for them to be adopted by a simplified procedure or by a body set up by the agreement. The Council may attach specific conditions to such authorisation.

Article 218(8): The Council shall act by a qualified majority throughout the procedure.

However, it shall act unanimously when the agreement covers a field for which unanimity is required for the adoption of a Union act as well as for association agreements and the agreements referred to in Article 212 with the States which are candidates for accession. The Council shall also act unanimously for the agreement on accession of the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms; the decision concluding this agreement shall enter into force after it has been approved by the Member States in accordance with their respective constitutional requirements.

Article 218(9): The Council, on a proposal from the Commission or the High Representative of the Union for Foreign Affairs and Security Policy, shall adopt a decision suspending application of an agreement and establishing the positions to be adopted on the Union's behalf in a body set up by an agreement, when that body is called upon to adopt acts having legal effects, with the exception of acts supplementing or amending the institutional framework of the agreement.

Article 218(10): The European Parliament shall be immediately and fully informed at all stages of the procedure.

Article 218(11): A Member State, the European Parliament, the Council or the Commission may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the Treaties. Where the opinion of the Court of Justice is adverse, the agreement envisaged may not enter into force unless it is amended or the Treaties are revised.

## Notes

1. *The Treaty of Lisbon in Perspective*, ISBN 978-0-9558262-0-7, British Management Data Foundation, February 2008 [www.bmdf.co.uk](http://www.bmdf.co.uk), [www.eurotreaties.com](http://www.eurotreaties.com) The EU version is at [http://europa.eu/lisbon\\_treaty/full\\_text/index\\_en.htm](http://europa.eu/lisbon_treaty/full_text/index_en.htm) as pdf document [QC3209190ENC\\_002](http://europa.eu/lisbon_treaty/full_text/index_en.htm). *Bolding by Global Britain*

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Ian Milne, Director

*Web :<http://www.globalbritain.org>*

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