The Vote Leave Framework for a New UK-EU Deal: Analysis

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Analysis

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The Vote Leave campaign has published a roadmap (the “roadmap”) setting out a framework for the UK to withdraw from the European Union by 2020. The aim of this analysis is to evaluate the credibility of the claims made in the roadmap document.

The analysis here focuses on three main areas covered in the roadmap:

• The legal mechanism for withdrawal from the European Union
• The ambition to conclude a withdrawal agreement within the lifetime of the current Westminster parliament
• Domestic legislative changes in the period between a referendum vote to leave the European Union and formal withdrawal from the EU.

The key conclusions are:
Article 50 TEU is the only credible legal mechanism by which the UK would withdraw from the EU and the alternative mechanisms proposed by Vote Leave are either legally implausible or politically less attractive than resort to Article 50.

In order for a withdrawal agreement to be concluded in the time-frame proposed by Vote Leave, and to avoid the risk of vetoes, the most plausible means of achieving this goal would be a withdrawal agreement that included a relatively minimal Swiss-style trade agreement that could over time be supplemented by future sectoral agreements. This is, however, unlikely to be consistent with the preferences of the EU institutions or indeed other Member States.

The proposal to present a Bill in the current parliamentary session to amend the European Communities Act 1972 in a manner that could give rise to incompatibilities between UK law and EU law (without the UK having withdrawn from the EU) is politically improbable having regards to (a) the simultaneous opening of withdrawal negotiations with EU institutions and Member States and (b) the composition of the Commons and potential resistance from the Lords. Any legislation that was enacted would also draw the devolved governments and UK courts into a constitutional conflict with the Westminster Parliament. Instead of the sovereignty of parliament being restored, such legislation could result in domestic constitutional challenges to such sovereignty.
**Article 50 TEU – the ‘Sole Lawful Means’ of Withdrawal?**

As widely reported, the Lisbon Treaty, for the first time, introduced into the EU treaties a mechanism for the withdrawal of a Member State from the European Union: Article 50 of the Treaty on European Union. The Vote Leave roadmap states that this ‘is not the sole lawful means of leaving the EU’ citing both the example of Greenland’s ‘withdrawal’ using the ordinary revision procedure and the application of the Vienna Convention on the Law of Treaties (the ‘Vienna Convention’).

Two issues arise in both examples. The first is the credibility of the claim as to the applicability of alternative procedures and the second is whether an alternative route offers any obvious procedural advantages.

*The Greenland Analogy*

As for the analogy with the ‘withdrawal’ of Greenland using the ordinary revision procedure under what is now Article 48 TEU, two important differences stand out. First, Greenland was not a Member State but a constituent territory of a Member State and so it was sufficient to merely amend the treaties to redefine the territorial scope of application of the EU treaties as regards Denmark. Second, with the inclusion of Article 50 TEU, EU law now has a specific legal basis for a withdrawal process. The Court of Justice requires that the rules and procedures which apply to a specific legal basis apply over the rules and procedures of a more general legal basis.

In any event, there is no obvious procedural advantage to using Article 48 TEU. Indeed, quite the opposite. Two veto opportunities are created. The unanimous agreement of every Member State is required for a treaty amendment meaning that each national government has a potential veto. By contrast the voting rule under Article 50 TEU is that a qualified majority of states is sufficient. The other veto opportunity arises because a treaty revision under Article 48 TEU requires to be ratified by each Member State in accordance with its own constitutional traditions. That could be simply parliamentary ratification – but even that can encounter delays – or it could demand a national referendum with all the uncertainty that creates. So it is simply not obvious why Vote Leave would consider this to be a viable or useful alternative to the Article 50 TEU process itself.

*The Vienna Convention on the Law of Treaties*

The Vienna Convention sets out a general public international law framework for the negotiation, conclusion and termination of treaties. Article 54 of the Convention specially covers withdrawal. Article 54(a) states that a party may withdraw ‘in conformity with the provisions of the treaty’ whereas Article 54(b) otherwise allows a party to withdraw at any time ‘by consent of all the parties’ following consultation with the other parties to the treaty. Clearly Article 54(b) applies only to the extent that Article 54(a) does not, but as the EU treaties do now establish a withdrawal mechanism, Article 54(b) has no application. Moreover, Article 5 of the Convention makes clear that the Convention only applies to the treaties of an international organisation like the EU, ‘without prejudice to any relevant rules
of the organization’. Article 50 TEU is such a relevant rule and so it, when read together with Articles 5 and 54(a) of the Convention, provides the correct legal framework.

In any event, the Article 54(b) Convention requirement of the consent of all the parties, like the unanimity agreement under Article 48 TEU, affords no procedural advantage over Article 50 TEU.

It has been suggested by some academics that Article 62 of the Convention affords an override, allowing a state to withdraw from a treaty because of a fundamental change in circumstances where such circumstances constitute an essential basis of that state’s consent to be bound by the treaty. In such a situation, following notification to the other parties, the state could, after a three-month period, withdraw from a treaty.

The clear and obvious problem with this alternative route is that it would be open to argue in every case in which Article 50 TEU could be applied that it was predicated on a Member State believing that there was a fundamental change in circumstances leading it to seek to withdraw from the EU. If Article 62 of the Convention could be invoked in such circumstances it would devoid Article 50 TEU of any purpose whatsoever and conflict with the clear intent of Article 5 of the Convention. Not only would this be objectionable from the perspective of doctrinal analysis, there is simply no way that the European Court of Justice would permit the autonomous legal order of the European Union and the specific procedural mechanism of Article 50 TEU to bend to international law in this manner.

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The clear conclusion is that Article 50 TEU is the correct legal basis for the conduct of a withdrawal process and neither the experience of Greenland nor the Vienna Convention casts any doubt on that conclusion.
A New Settlement by May 2020

At the heart of the roadmap is the deadline of May 2020 for the UK to have reached a ‘new settlement’ with, but withdrawal from, the EU. In other words, by the conclusion of this parliamentary session, the core aspects of the new settlement deal should be in place.

In order to assess the credibility of this claim it is important to identify two distinct, albeit interrelated elements of the ‘new settlement’: the formal process of leaving the EU and the terms and conditions of any future EU-UK trade and cooperation.

The Article 50 ‘Divorce’

The treaty establishes that once Article 50 TEU is triggered by a Member State notifying the European Council of its intention to withdraw, the parties have two years to negotiate the terms of an orderly withdrawal. It is this two-year time-frame rather than the four years envisaged by the roadmap that is legally significant. If negotiations are not concluded within two years, then the withdrawal becomes final without agreement.

The two-year negotiating period can be extended, but it requires the unanimous consent of the Member States. As it might be thought that the UK would prefer an orderly withdrawal over disordered exit without an agreement, the potential of any state to veto any extension of the negotiating period means that the UK is in a comparatively weaker bargaining position the closer it gets to the two-year deadline.

It is not clear from the roadmap whether the adoption of an agreement by May 2020 is predicated either on a delay in triggering Article 50 – the Prime Minister had previously suggested there would not be a delay in notifying the European Council – or in the expectation that the parties could agree to extend the deadline, or some combination of the two.

On the EU side, negotiations will likely be conducted by the Commission but will be concluded by the Council of Ministers (excluding the UK) acting on behalf of the EU. No individual state within the Council has a veto as qualified majority voting applies. Nonetheless, if a decision went to a vote, an outvoted state may seek to challenge the actions of the Council before the Court of Justice, with ensuing delay and uncertainty. The consent of the European Parliament is also required before an Article 50 agreement can be finalised and it remains to be seen what attitude it may take.

A Trade and Cooperation Agreement

The roadmap indicates that a new settlement will include a UK-EU free trade deal. However, it is simply unclear what the ambitions and model for any future trade and cooperation agreement might be and so it is difficult to evaluate the credibility of the roadmap timetable in this regard. However, we might imagine some possibilities.

Some have suggested that the UK could rejoin the European Free Trade Association (EFTA) and so take part in the European Economic Area (EEA) agreement. However, the other
members of EFTA would need to agree to the UK re-joining EFTA and the EEA Agreement would entail accepting free movement of workers which would be unlikely to be acceptable.

On a more bilateral basis, the EU has concluded ‘association agreements’ with non-EU states that include a free trade component but extend cooperation into a wider field of European activities and programmes. These are extensive in scope and may take time to negotiate. As witnessed by the recent negative referendum vote in the Netherlands, domestic ratification processes may delay or derail the adoption of such agreements.

What the roadmap seems to have in mind, however, is perhaps something much more minimal like the EU-Switzerland trade deal. Nonetheless, this deal is supplemented by a range of sectoral bilateral arrangements that have developed over the years. The EU has made clear that it would prefer a much more ambitious and comprehensive framework for EU-Swiss relations and it would seem unlikely that the EU would wish to repeat its experience with Switzerland.

One (Minimal) Agreement?

The credibility of the Vote Leave roadmap timetable for a new settlement depends upon the relationship between the two elements described. The Article 50 procedure has two key advantages over other types of treaty reform. It does not require unanimity among the Member States and it does not require ratification in accordance with domestic constitutional rules. To put it another way, neither national governments nor national parliaments can individually veto the adoption of an agreement that commands the support of the government of the withdrawing state, the EP and a qualified majority of EU national governments.

The problem might be if the content of such an agreement included matters that Member States believe do not fall within the exclusive competence of the EU. Thus, it has been said that were a comprehensive withdrawal agreement to have the character of a ‘mixed agreement’ – it involves matters of both exclusive EU and shared competences – the conclusion of that agreement ‘on behalf of the Union’ could be undertaken by the Council acting by a qualified majority, but that the consent of each of the Member States and ratification by them would be necessary for those aspects falling within the competence of the Member States. Or to put it another way, both national governments and national parliaments – and perhaps national electorates where referendums are held – could exercise veto powers.

The possibility that a withdrawal agreement could be mired in political and legal wranglings over the division of powers between the EU and Member States might argue in favour a minimalist approach to the withdrawal treaty especially if this mirrored the political ambitions of the UK negotiators to seek little more than a free trade deal.

The common commercial policy is an area of exclusive EU competence and so in principle an agreement based on a free trade deal would seem to avoid the pitfalls associated with a mixed agreement. Yet legal principles and political practice do not necessarily coincide and so it cannot be excluded that even a trade-oriented agreement might still be considered by
some Member States as involving issues within their own competence. Litigation may, again, delay a smooth withdrawal process.

The conclusion is that the credibility of the Vote Leave withdrawal timetable depends not just on finding common ground between the negotiating parties, but also on calibrating an agreement in such a way as to facilitate its conclusion within the terms of Article 50 while minimising risks of litigation before the Court of Justice, and delaying or derailing national ratification or referendum procedures.

The result may be something closer to the Swiss model with a withdrawal treaty acting as the basis for a free trade agreement with the arrangement supplemented where necessary by more sectoral agreements over time. But as already indicated, this may not correspond with the preferences of the other parties.
Domestic Legislative Change

The roadmap anticipates a programme of domestic legislative change predicated upon a withdrawal from the European Union by the end of the current session of the UK Parliament.

The majority of the proposals refer to legislation which would be adopted in subsequent parliamentary sessions and so – presuming the timetable is met – at a time when the UK would be outside the EU. Therefore, the focus here is on the one piece of legislation scheduled for the lifetime of this parliament, namely, a European Union Law (Emergency Provisions) Bill (“the Bill”).

There are three principal areas to be covered by the Bill which, it is stated, will amend the European Communities Act 1972. These relate to the powers of the UK to remove – and presumably also to prevent the entry of – EU citizens whose presence is regarded as not being conducive to the public good; the scope of application of the EU Charter of Fundamental Rights; and a rather unspecific aim of ‘ending payouts under EU law to big businesses’.

It is difficult to offer a robust analysis as the proposals lack specificity and indeed it is not entirely clear what the amendment to the 1972 Act would be expected to achieve except to seek to inhibit the application of EU law insofar as the anticipated domestic legal changes would necessarily conflict with EU law.

The first thing to note is that it is far from obvious that the Government would introduce legislation in breach of EU law at the very time that it was conducting delicate withdrawal negotiations with its EU partners. It is one thing to expect the Government to implement the outcome of the referendum by triggering the Article 50 withdrawal process but another for it to use the domestic legislative process to seek to avoid its continuing obligations under EU law.

It is also doubtful that such a Bill could command a majority in the House of Commons or necessarily find support in the House of Lords. The Government has a small majority in the Commons and a blocking coalition of MPs from all sides of the House – including MPs from within the Conservative Party – could defeat the Bill.

If the Bill was proposed and enacted into law it would generate two sets of potential constitutional conflicts. The first conflicts would be between the Westminster Parliament and the devolved governments. This is particularly relevant insofar as there might be an attempt to limit the scope of application of the EU Charter of Fundamental Rights when the UK implements EU law.

The devolved governments have capacities to implement EU law in matters falling within the scope of devolved competences and, as such, the exercise of such powers must be compatible with the Charter. In the case of Scotland, the recently enacted Scotland Act 2016 gives legal form to the Sewel Convention and provides that the UK Parliament will not
normally legislate with regards to devolved matters without the consent of the Scottish Parliament.

It is at least arguable – and one would expect the Scottish government to argue – that any attempt to limit the application of the Charter such that a devolved power could be exercised in a manner that was not consistent with the Charter and so give rise to possible legal action against Scottish ministers for acting in breach of EU law, was, at least indirectly, an example of Westminster legislating with regard to a devolved matter and hence required the consent of the Scottish Parliament.

The other constitutional conflict would be with the UK courts. While the UK remains a Member State of the European Union, the treaties and laws made under them are binding on all institutions of the Member States including their courts. As such, it is the obligation of national courts arising as a matter of EU law itself, to disapply any national rule of whatever status insofar as it is in conflict with obligations under EU law.

An amendment to the European Communities Act which purported to conflict with EU law and to do so expressly would bring the courts into a constitutional conflict, having to choose between their obligations under EU law and their obligations as a matter of domestic law. It is simply not obvious how any given judge, or any given court, would seek to resolve that conflict. Either way, it would antagonise and politicise the judiciary in a manner that many would find unacceptable and could, paradoxically, give rise to judicial challenges to parliamentary sovereignty.

The conclusion is that any proposal to introduce a Bill in the current parliamentary session that purported to deviate from the UK’s existing obligations under primary or secondary EU law would encounter significant political obstacles and, if enacted, would create constitutional conflicts between, on the one hand, the devolved governments and the UK courts, and, one the other hand, the Westminster Parliament. Far from restoring the sovereignty of parliament, its sovereignty could be brought into direct constitutional challenge.