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One week on after the EU referendum



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International Public Policy Institute (IPPI),
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1. Introduction

Much has been written about the surprise outcome of the EU Referendum on 23 June. While it clearly represents a turning point in UK history, it is difficult to be certain about the immediate next steps or to see clearly where we go now. And in trying to process this bigger picture, it's difficult to be objective on such an emotive and political issue. Yet with the caveat about the lack of "known knowns" – these are my reflections.

2. Short term implications

We are clearly facing significant short term challenges. The vote was a shock, and it will take time for an economic and political adjustment. The economic impact will inevitably be in the mid-range between what Sir Mervyn King has described as the exaggerated claims of the Remain side and the "it won't be so bad and it will be worth it" line of Vote Leave. Nonetheless, the immediate economic shock is real.

- The impact of the currency and stock markets has been in line with expectations. The pound-dollar exchange rate is about 11% down. The cost of government borrowing may not be affected that much, and the balance of payments outlook could improve. Inflation may pick-up – but that appears manageable;
- The impact will be felt where the economy is already deeply vulnerable - through further lowering investment. This will lead to short term impact in lowering demand and long term problems for productivity growth;
- [Brian Ashcroft suggests¹](#) that *"the short term negative effects will strengthen in 2017 and possibly 2018, with the result that we should expect to see a sizeable slowing in growth compared to the pre-Brexit forecasts over the next two years. A recession running for longer than two quarters is a distinct possibility"*
- And business and people are already making choices, with early comments from the likes of Goldman Sachs, Vodafone and Siemens. We should expect more uncertainty blighting investment.

¹ <http://www.scottisheconomywatch.com/brian-ashcrofts-scottish/2016/06/brexit-and-the-scottish-economy-dont-panic-but-do-worry.html>

- And in an inter-connected world, the damage to others may be worse in the Eurozone than at home. This is a very important point – in EU, the UK's actions are seen as damaging them as much as us. The bailout of the Italian banks is a case in point.

The political adjustment will take time to find its level – and will require a new narrative for both UK political parties. The causes of the vote have been long in the making, and go much wider than the EU. There are excellent articles by [Chris Deerin](#)², [Torsten Bell](#)³, [Tony Travers](#)⁴ and [Nick Pearce](#)⁵. And the academic work done by [Will Jennings](#)⁶ on the bifurcation of politics helps digest the challenge now facing the UK.

The vote has led to a resignation of a Prime Minister, and has undermined the Cameron legacy. The position of the Leader of the Opposition is in doubt. There have been renewed and vocal calls from EU far right parties, putting pressure on EU governments. The critical player going forward will of course be Angela Merkel. [Alan Beattie](#)⁷, writing in the Financial Times, argued that Angela Merkel's cautious style of leadership could be a very positive influence – but that she would have to “*insert herself between the hotheads in Brussels and the fatheads in London*”. Noticeably, there are some “cool heads” in Scotland – across the political spectrum.

3. Article 50

Is the Referendum decisive and are Remainers in denial? The Referendum was advisory and non-binding in law. It does not in itself trigger a process to leave the EU. But the vote appears binding in politics.

The central issue facing a new Prime Minister is how and when to trigger Article 50 of the Treaty of Lisbon – the legal process for a Member State to leave the European Union. Article 50 provides a step by step process and the framework within which the negotiating process and political debate can progress (see attachment). While ultimately the outcome of any negotiations will depend on politics, the legal framework set out in Article 50 will create a negotiating playing field. And the EU machine is very skilled at developing processes which deliver negotiating agreements (even if the parties to them dislike the outcome).

It is important to recognise that Article 50 is not a re-run of Prime Minister Cameron's negotiation process, nor does it require a ratification process at the end. It starts the clock ticking toward a departure from the EU. In fact, the design of Article 50 appears to tilt the playing field to the EU

² <https://medium.com/@chrisdeerin/that-sinking-feeling-4559d45e8c0b#.t4u2aoh4l>

³ <http://www.resolutionfoundation.org/media/blog/the-referendum-living-standards-and-inequality/>

⁴ <http://blogs.lse.ac.uk/brexitvote/2016/06/28/the-shock-is-visceral-the-future-uncertain-deep-seated-grievances-lie-behind-this-vote/>

⁵ <http://blogs.bath.ac.uk/iprblog/2016/06/27/the-political-economy-of-brexit/>

⁶ <http://onlinelibrary.wiley.com/doi/10.1111/1467-923X.12228/pdf>

⁷ <https://next.ft.com/content/80418d42-3d1c-11e6-8716-a4a71e8140b0>

side. It arguably hands control to the EU to work out how to exit the UK, rather than give control to the UK on how it leaves. It is worth working through the steps in Article 50:

- **Only the UK can decide whether to initiate Article 50** – but it must have reasons for doing so. In law, the Prime Minister could simply deploy the “Royal Prerogative” and notify the EU Council of the United Kingdom’s intention to leave. A minority view in legal circles is that an Act of Parliament will be required (and people will remember the extensive arguments about the need for a vote to go to war). There are excellent discussions by [David Allen Green](#)⁸, [Nick Barber](#)⁹ and [David Pannick](#)¹⁰. In politics, there will be arguments over whether an Election is required, or even a 2nd Referendum. There will be considerable debate over the next few months on what to do next in order to trigger Article 50. But, in law, if the new Prime Minister is minded to, s/he could simply proceed under the Royal Prerogative to notify in September. *Article 50 (1) states “Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements”.*
- **The UK must deliberately and formally start the process** – it can’t inadvertently do it and nor can the EU do it. *The law says the following: Article 50 (2) “A Member State which decides to withdraw shall notify the European Council of its intention”.*
- **The UK will negotiate with the EU Council, which votes by majority.** It would have been a conscious decision by the drafters of the Lisbon Treaty to enable a Member State to leave under a qualified majority. In contrast, it takes a unanimous agreement under Article 49 for a new Member State to join. *The law says the following Article 50 (2) That agreement shall be negotiated ...and... concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.*
- **There needs to be a deal within 2 years, unless there is a unanimous agreement to extend the process.** If no agreement, then the UK is ejected – which is the worst of all options, probably for everyone but certainly for the UK. Importantly, there is no legal provision for a second Referendum or a ratification process. One could be negotiated, but only with the agreement of the EU – see [Phil Syrpis](#)¹¹. *Article 50 (3) states “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 notificationunless the European Council....unanimously decides to extend this period”.*

⁸https://www.facebook.com/permalink.php?story_fbid=1200279093330132&id=137432829614769

⁹ <https://ukconstitutionallaw.org/2016/06/27/nick-barber-tom-hickman-and-jeff-king-pulling-the-article-50-trigger-parliaments-indispensable-role/>

¹⁰ <http://www.thetimes.co.uk/article/why-giving-notice-of-withdrawal-from-the-eu-requires-act-of-parliament-dz7s85dmw?shareToken=bf869ec671c090addc04b13bac1b328>

¹¹ <https://theconversation.com/once-the-uk-triggers-article-50-to-start-brexit-can-it-turn-back-61727>

- **It is a negotiation between the UK and the 27. It is not a collaboration of the 28 on how 1 leaves.** *Article 50 (4) states “... the withdrawing Member State shall not participate in the discussions of the European Council or Council or in decisions concerning it.*

The key point is that Article 50 is designed in such a way as to never be used and to tilt the negotiating table to favour the EU. Triggering Article 50 potentially gives away any control the UK has left and is a major step. Prime Minister Cameron’s resignation at least recognised that fact and passed that decision to others. Because it is such a big step, it may of course never happen. See the [Guardian user comment](#)¹² and [Martin Wolf](#)¹³

4. The United Kingdom’s future relationship with Europe

Whatever the legal issues, the UK has decided what it doesn’t want. But it has not yet decided what it does want. What is the preferred model for the future relationship with the EU? Norway, Switzerland, Turkey, Ukraine, or a new bespoke Association Treaty? (see slide) All are challenging. Each has pros and cons. None are easy. See summary in the [Financial Times](#)¹⁴

Expect to hear much talk about the 4 freedoms – free movement of capital, labour, trade and services. Any solution to restrict freedom of movement of labour is likely to be at a cost (to everyone) in terms of freedom of movement of something else – probably trade. While any likely solution will be bespoke for the UK - no country has really left before – it is essential that the UK has a set of positions before it starts the process. And of course the EU will have its own negotiating strategy – see [Martin Sandbu](#)¹⁵ and reports of [Schauble’s Plan](#)¹⁶.

There will be challenges and opportunities. The University sector has raised concerns on EU funding and students. The Financial sector are seeking reassurances on passporting and regulations. The energy sector faces uncertainty over the energy single market and the environmental approach to climate change. The agriculture and fisheries sector are facing profound changes – even the Norway option, which is closest to the status quo, would mean significant repatriation of powers to the UK/Scotland. The list could go on.

The UK Government’s dilemma is balancing the overwhelming negotiating need to play it long against the short term economic consequences that are being created for everyone.

¹² https://www.washingtonpost.com/news/worldviews/wp/2016/06/26/an-astute-online-comment-has-many-wondering-whether-brex-it-may-ever-happen/?tid=pm_pop_b

¹³ <https://next.ft.com/content/eb481064-3c88-11e6-8716-a4a71e8140b0>

¹⁴ <https://next.ft.com/content/78413118-3959-11e6-a780-b48ed7b6126f>

¹⁵ <https://next.ft.com/content/c7ad42a6-3c46-11e6-8716-a4a71e8140b0>

¹⁶ <https://global.handelsblatt.com/edition/457/ressort/politics/article/schaubles-secret-brex-it-plan>

5. The Scottish question

On a Scottish level, there is much that the Scottish Government can do to influence (and frustrate) the process. Scotland voted substantially differently – all local authority areas and by a clear majority. Yet there was over 1m votes for Leave. The headline is that within the UK constitutional issues are really prior issues before triggering Article 50, not issues to be dealt with later – see [Sionaidh Douglas-Scott¹⁷](#). For example:

Does a majority in the Referendum in favour of Remain in Scotland actually mean anything legally?

- No – the Referendum was a UK franchise. In as far as it was an advisory Referendum, it advised on the basis of the UK.
- Yes – it is hard to ignore such a clear outcome, and UK Government has already established a precedent on who speaks for Scotland by agreeing to the Independence Referendum. While the UK Government rejected the “4 Nations Lock” approach put forward by the devolved governments, the legal and constitutional issues underlying the proposal have not been resolved. The UK Parliament still has to come to terms with the fact that it has given away control not just to Brussels, but also de facto to devolved Parliaments.
- On balance, yes the vote to Remain in Scotland matters very much

Does Scottish Parliament have a say over Article 50?

- No: EU matters are reserved under the Scotland Act. Any role is at discretion of the UK government.
- Yes: The Scottish Parliament is bound up in EU legislation, and is responsible for delivering it. It is responsible and accountable under EU law. There is the Sewel Convention, and a Legislative Consent Motion will be essential to change Scottish Parliament laws. Moreover, leaving EU will lead to significant changes in Scottish law.
- On balance, imposing Brexit on the Scottish Parliament represents a major override of a democratic body. Like the UK Parliament it would spend years redesigning legislation – see [Francis FitzGibbon¹⁸](#). But in UK law of course it could be done.

Could Scottish Parliament stop Article 50 being triggered?

- The First Minister was right to say that the Scottish Parliament would refuse to endorse any Legislative Consent Motion to trigger Article 50. But she clearly recognises that there may be no such legislation, and in any case, the UK Government could simply

¹⁷ <https://ukconstitutionallaw.org/2016/06/28/sionaidh-douglas-scott-brexit-the-referendum-and-the-uk-parliament-some-questions-about-sovereignty/>

¹⁸ <http://www.lrb.co.uk/v38/n12/francis-fitzgibbon/if-we-leave>

override what is a (Sewel) Convention anyway (they have done it before). This is explained by [Lindsay Stirton and Richard Kirkham](#)¹⁹ and [Mark Elliot](#)²⁰.

- More exotically, there is a case that under Article 50 the term “its own constitutional requirements” may not be met. Someone could make a case to frustrate the process. The UK and Northern Ireland Governments will need to consider the implications for the Good Friday Agreement. Potentially even if UK government triggered it, that someone could seek judicial review action against the EU to stop them considering it. This may not get past a first legal hurdle, but it would create hurdles and potentially frustrate and delay the process.

Choices facing Scotland

But Scotland also needs to know what it wants. Scotland now has an unenviable dilemma of choosing either UK or EU. The most important points often go unsaid. The UK has just decided narrowly to leave the EU. In contrast, Scotland has decisively voted in 2 Referendums in under 2 years to maintain its place in both the United Kingdom and the European Union. Yet, that option – the settled will of the Scottish people in both Referendums – is no longer an option.

The opinion polls, for what they are worth, point to a hardening of pro-Independence sentiment. But the choice potentially facing people in Scotland has not previously been tested, and it will take time to process such a major choice:

- Many people living in Scotland - particularly in disadvantaged areas - protested against the establishment and the challenges of globalisation by voting Yes (against Westminster) and Leave (against the EU). How will they decide if they choose between them – there is a strong undercurrent of opposition to both in Scotland, which perhaps has not yet found its voice.
- How will the prosperous liberal minded unionists who voted No, and then Remain, choose between them?

6. Are the England question and the Scottish questions resolvable?

Is there a workable compromise which respects Scotland's apparent wish to remain and England's to leave? To be clear, the longest option would involve a sequential 3-step process;

- The UK leaving the EU after a 2-3 year Article 50 process, followed by
- Scotland leaving the UK, after an Indyref2, followed by
- Scotland gaining accession to the EU under Article 49.

¹⁹ <http://vinculumjuris.net/2016/06/27/a-constitutional-solution-to-this-constitutional-crisis/>

²⁰ <https://publiclawforeveryone.com/2016/06/26/brexit-can-scotland-block-brexit/>

All of the current attention is on whether there are alternative models. And there are some excellent summaries of the possible options, including by [Merijn Chamon and Guillaume Van der Loo](#)²¹, [Brendan O’Leary](#)²², [Jo Murkens](#)²³, [Adam Ramsey](#)²⁴ and [Tobias Lock](#)²⁵;

- **The so called “Reverse Greenland” option, where parts of the UK could maintain membership and other parts of the UK were to leave the EU.** This would create a “variable geometry” of EU membership within the UK. This model already exists in Denmark. In that case, Denmark is a full Member State, but Greenland, which is part of Denmark, is not in the EU. Clearly this model applies to a small part of a Member States, and not (as would be the case in the UK) the large part of one of the largest Member States including a world city of the status of London.
- **The “Scotland stays, rUK leaves” option.** Assuming political support, is there a model involving a simultaneous departure of England and Wales from the EU, independence for Scotland, and Scotland remaining in the EU. There is no precedent for this, nor a legal process. But it would appear that while Article 50 requires a majority of the EU Council to agree the terms, any form of “Scotland stays” model may require unanimous agreement (as is the case in Article 49 for new members).

The Norway EEA model for all of the UK. This is the approach suggested by Gordon Brown. It would involve the UK leaving the EU, with a future relationship built around the Norwegian model, albeit with some further bespoke restrictions on in-migration. There is an excellent analysis of the existing Norwegian model by [Benjamin Leruth](#)²⁶ – see table attachment. Mr Brown’s argument was that such a model would go some way to preserving trade between the UK and Europe – and that any model that has Scotland outwith the UK (even staying in Europe) would impact negatively on trade, reopen issues around the currency etc.

These issues will dominate the debate, at least in Scotland. And will no doubt be subject to the discussions which are underway between the Scottish Government and the EU Institutions. But two things can be said with certainty:

- **A Scottish solution should be one of the UK’s negotiating objectives.** This will be very challenging. The economic, political and constitutional challenges facing the UK Government in managing its relations with the EU in the run-up to an Article 50 process are extraordinary. There may well be a very strong view that the UK’s territorial issues

²¹ <http://blogs.lse.ac.uk/politicsandpolicy/a-brexite-could-make-it-easier-for-scotland-to-join-the-eu-as-an-independent-state/>

²² <http://blogs.lse.ac.uk/brexitvote/2016/06/27/de-toxifying-the-uks-eu-exit-process-a-multi-national-compromise-is-possible/>

²³ <http://blogs.lse.ac.uk/europpblog/2016/06/27/scotland-or-northern-ireland-could-reject-brexite/>

²⁴ <https://www.opendemocracy.net/uk/adam-ramsay/reverse-greenland-letting-scotland-stay>

²⁵ <http://verfassungsblog.de/a-european-future-for-scotland/>

²⁶ <http://www.tandfonline.com/doi/abs/10.1080/13501763.2015.1020840?journalCode=rjpp20>

are both a distraction and outside the scope of the Brexit project. However, it is clear that, from a Scottish perspective, the only route to a successful outcome will require the UK Government to help negotiate a solution which meets Scottish needs. While Scotland can create the circumstances to find a compromise solution, it cannot negotiate that without the active and engaged collaboration with the UK Government.

- **To achieve a constitutional change for Scotland, an independence referendum may be required soon, and potentially before triggering Article 50.** If Brexit has a political legitimacy, then to maintain a Scottish membership of the EU (especially if it involves independence) requires a similar degree of legitimacy. That means a successful referendum sooner rather than later. – a point astutely made by [Kirsty Hughes²⁷](#).

7. In summary

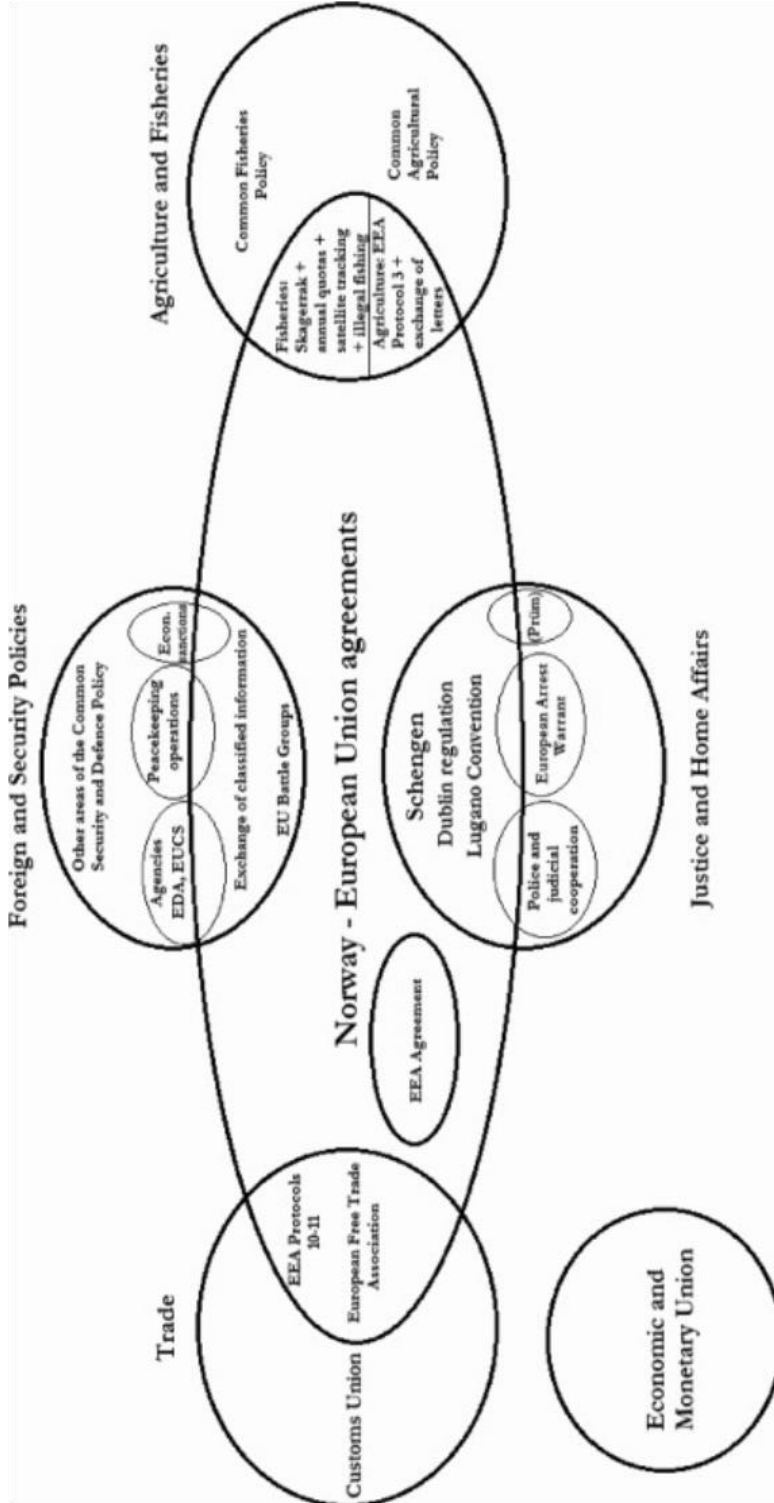
- We face extraordinary challenging times.
- The new UK Prime Minister will have to manage the expectations on him/her to “take back control”. But s/he will have to consider whether they are really in control of the levers and of events to take back control of law making powers.
- The UK territorial issues, in Scotland and Northern Ireland, are prior issues, not issues for later
- The Prime Minister’s leadership challenge is to manage a long delay before Article 50 is triggered, if it is triggered at all, in order to create a coherent strategy going forward. This may require an Election or a second Referendum before Article 50, and/or a ratification process of some sort.
- Meantime, the First Minister’s leadership challenge is to mobilise support for options to maintain a Scottish membership of the EU, within or outwith the UK. This may well require a Referendum soon.
- Any bespoke Scottish solution would have to be negotiated by the Scottish Government and the UK Government.
- The politics may well be to play it long, with a period of economic uncertainty.

²⁷ <https://www.opendemocracy.net/uk/kirsty-hughes/scotland-and-eu-post-brexit-independent-scotland-in-eu-or-outside-with-uk>

Article 50 of the Treaty of Lisbon

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. It shall be concluded on behalf of the Union 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.

The United Kingdom's future relationship with the EU
The Norway Option



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