To every end there will always be a new beginning...

Emmanuelle Inacio takes a close look at Brexit and the triggering of Article 50

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> **BREXIT IS INDEED THE MOST IMPORTANT DECISION THAT HAS FACED THE UNITED KINGDOM IN A GENERATION AND IT HAS SERIOUS CONSEQUENCES FOR THE UK ECONOMY**

The result of the United Kingdom's Brexit Referendum of 23 June 2016 has been declared and 51.9% of Britons have voted to leave the EU.

The morning after the referendum, David Cameron announced his resignation as Prime Minister of the UK and that he would step down in the autumn. He declared that a negotiation with the European Union will need to begin under a new Prime Minister who will take the decision about when to trigger Article 50 of the Treaty on European Union (TEU) which is the procedure applicable for any Member State's withdrawal.

Even if the EU Member States are pressing the UK to trigger the formal and legal process for its withdrawing, it could take many years or even never happen… Brexit is indeed the most important decision that has faced the United Kingdom in a generation and it has serious consequences for the UK economy that must be carefully considered.

As a reminder[1], Article 50(1) of the Treaty on European Union (TEU) provides that "*any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements*". Article 50(2) states that "*A Member State which decides to withdraw shall notify the European Council of its intention*."

In other words, on the one hand, as long as the notification of the UK's withdrawal from the EU is not sent to the European Council, the UK remains a Member State of the EU. The notification could even never be sent at all…

On the other hand, the UK's withdrawal from the EU may be in accordance with its own constitutional requirements. Members of the UK Constitutional Law Association pointed out that the Prime Minister is unable to issue a declaration triggering the UK's withdrawal from the European Union without having been first authorised to do so by an Act of the UK Parliament[2]. Otherwise, the declaration would be legally ineffective as a matter of constitutional law and it would also fail to comply with the requirements of Article 50 TEU. Indeed, the UK's democracy is a parliamentary democracy, and it is Parliament, not the Government, that has the final say about the implications of the referendum, the timing of an Article 50 TEU, UK's membership of the Union, and the rights of British citizens that flow from that membership. Most members of Parliament are in favour of remaining in the EU: they could ignore the referendum's result or decide to dissolve the Parliament and call for a new general election.

Another constitutional issue is whether the consent of the Scottish Parliament – whose constituents voted in favour of remaining in the EU – is required for the UK to withdraw from the EU.

But even if the UK Parliament decided to authorise the UK Prime Minister to issue a declaration triggering UK's withdrawal from the European Union in order to comply with Article 50 TEU and UK constitutional law, Article 50(2) TEU states that "*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.*"

Article 50(3) 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 paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period".

Article 50(4) adds that "*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. A qualified majority shall be defined in accordance with Article 238(3)(b) of the Treaty on the Functioning of the European Union.*"

Finally, Article 50(5) states that "*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.*"

Once Article 50 is triggered, only the terms of the withdrawal arrangements are negotiated: the UK cannot revoke the notice to withdraw. The future relationship with the European Union will be taken into account in order to negotiate and conclude the withdrawal agreement.

Article 50(3) establishes an optional procedure as it allows for a negotiated agreement where the Member State in question and the EU agree on terms but it also recognises a unilateral right of withdrawal. If the negotiation succeeds, the date of the withdrawal should be the date of the entry into force of the withdrawal. If an agreement is not reached, the withdrawal should be automatically effective two years after the notification, unless the European Council, in agreement with the concerned Member State, unanimously decides to extend this period.

If Article 50 is triggered, during withdrawal negotiations, the UK will not be in a bargaining position of strength and risks having to leave the EU with no agreement at all.

Even if the Member States of the EU are pressing the UK to trigger Article 50, they cannot oblige the UK to do so as Article 50 can only be invoked by the UK. There is nothing else for the European Union to consider until the UK notifies the European Council of its intention to withdraw.

The UK is still a member of the EU and will probably remain so or at least for several years. Therefore, the UK will *inter alia* participate in the challenging task of modernising and harmonising insolvency law in the EU.

On the way to European insolvency law harmonisation: inception impact assessment and public consultation

The European Commission has undertaken two recent initiatives in order to harmonise the European Insolvency Law by means of a common EU legislative framework[3].

On the one hand, The European Commission has published an inception impact assessment on its initiative to set common standards for restructuring and insolvency laws across the EU on 3 March 2016. The European Commission will present a legislative proposal by autumn 2016 which will cover the following topics:

1) Preventive restructuring procedures and a discharge of debt (second chance) for entrepreneurs as provided for by the Insolvency Recommendation; and
2) Key areas of insolvency beyond the scope of the Insolvency Recommendation as concerns corporate insolvency:

- Common minimum rules for directors' duties and liabilities in anticipation of insolvency, as well as their disqualification due to breach of those duties;
- Common minimum rules for the ranking of claims in insolvency and avoidance actions, with a view to bringing more legal certainty in the cross-border flow of capital;
- A simplified approach to SMEs insolvency, for example by providing standard forms for filing claims and putting in place electronic means to reduce costs;
- Common minimum rules for insolvency practitioners with the aim of allowing both easier exercise of this profession in different Member States and set standards ensuring proper conduct of these professionals;
- Protection of investors' rights by ring-fencing securities from the insolvency regimes of intermediaries with whom investors deposited their securities.

3) Key areas of insolvency beyond the scope of the Insolvency Recommendation as concerns insolvency of natural persons:

- Provisions on the availability of insolvency procedures, both debt restructuring and liquidation procedures;
- Provisions on the discharge of debt of natural persons other than entrepreneurs after a reasonable period of time (no more than 3 years, as for entrepreneurs).

On the other hand, the public consultation on the insolvency initiative – consultation on an effective insolvency framework – was launched for 12 weeks from 23 March 2016 to 14 June 2016 to seek views with regard to common principles and standards which could ensure the efficiency of the national insolvency frameworks, in particular in a cross-border context. The responses to the public consultation will be used to identify the aspects to be possibly dealt with in the Commission's future insolvency initiative and will be taken into account in the Commission's impact assessment report in parallel with the results of an external study carried out for the Commission by the University of Leeds and other available information[4].

To be continued...

Footnotes:

1 In "To Brexit, or not to Brexit, that has always been the question…" (2016 Spring) Eurofenix.
2 https://ukconstitutionallaw.org/2016/06/27/nick-barber-tom-hickman-and-jeff-king-pulling-the-article-50-trigger-parliaments-indispensable-role/
3 http://ec.europa.eu/justice/civil/commercial/insolvency/index_en.htm
4 http://bobwessels.nl/2016/03/2016-03-doc13-consulation-on-harmonisation-insolvency-laws/

> **THE UK WILL, INTER ALIA, PARTICIPATE IN THE CHALLENGING TASK OF MODERNISING AND HARMONISING INSOLVENCY LAW IN THE EU**

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