

The civil service after Article 50



About this paper

Together, the Institute for Government and The UK in a Changing Europe have produced this paper to look at the challenges facing the civil service and the capacity requirements that must be managed over the course of Brexit.

With the triggering of Article 50, the formal process of leaving the European Union (EU) begins. This notification of withdrawal marks the beginning of a two-year window for negotiations – during which time the UK will need to address a number of political, economic and constitutional challenges. In one way or another, Brexit has implications for all regions and industries in the UK.

Charged with making Brexit happen, overcoming challenges and exploiting opportunities, is the civil service.

Our Brexit work

Following the UK's vote to leave the EU, the Institute for Government has launched a major programme of work looking at the negotiations, the UK's future relationship with the EU and the impact of Brexit on the UK union. Keep up to date with our work at www.instituteforgovernment.org.uk/brexit

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Introduction

With the triggering of Article 50, the formal process of leaving the European Union (EU) begins.

The notification of withdrawal, within the Prime Minister’s March deadline and less than nine months after the referendum result, marks the beginning of a two-year window for negotiations – during which time the UK will need to address a number of political, economic and constitutional challenges. In one way or another, Brexit will have implications for all regions and industries in the UK.

At the centre of this, and charged with making Brexit happen, overcoming challenges and exploiting opportunities, is the civil service.

Since the referendum there has been much speculation about whether the civil service – which is at its smallest since the Second World War and is already focused on implementing manifesto commitments with a reduced headcount and smaller budgets – has the capacity to carry out its task.

Recent Institute for Government research found signs of real progress in preparing for the approaching negotiations.¹ Whitehall was reorganised, with the Department for Exiting the EU (DExEU) established. DExEU quickly put new teams in place and has developed cross-government working groups to draw on the policy expertise of different departments when weighing up the Government’s negotiating options.

But the civil service will need to change to meet the needs of the two-year period of negotiations, and will also need to adapt to meet the new challenges of governing post-Brexit. As shown in Table 1, the triggering of Article 50 represents the end of the first of three key phases of Brexit, with each phase presenting different demands.

Table 1: The three phases of Brexit

1. Preparing for negotiations	2. Managing the negotiations	3. Implementing Brexit
<ul style="list-style-type: none">• co-ordinating analysis across Whitehall• capturing the views of businesses, the devolved administrations and other interests	<ul style="list-style-type: none">• with the EU institutions and 27 member states• on the terms of the UK’s departure from the EU• on the new framework for relationships	<ul style="list-style-type: none">• transferring the existing <i>acquis</i> into UK law• designing and implementing new domestic policies or regulatory regimes to replace EU functions• preparing and pursuing a new international trade policy

¹ Owen, J. and Munro, R., *Whitehall’s Preparation for the UK’s Exit From the EU*, Institute for Government, London, 2016.

Layered on top of business as usual (including 'routine' EU business) and taking forward other manifesto and Prime Ministerial priorities (of which there are many), Brexit poses some core organisational challenges for government. Throughout the process there will be pressure on some of the core cross-cutting functions such as finance, project management and human resources; there will need to be a clear picture of where resource and specialists are deployed, an effective approach to allocating resource or prioritising projects, and careful management of cross-department interdependencies.

Brexit will make four fundamental demands on civil service capacity:

- **Analysis and policymaking:** Developing and appraising different options for both the negotiations and new policy regimes. Advising ministers and reacting to options tabled by the EU negotiators.
- **Co-ordination:** Using the whole government machine to draw on expertise and insight, not just from across Whitehall but also in the devolved administrations, public bodies and wider civil society. A wide range of actors will be required to balance views, identify trade-offs and manage interdependencies.
- **Legislative capacity:** The civil service will need the skills and capacity to prepare, draft and manage the passage into law of a large body of legislation, some of which will be highly contentious, against tight external timelines.
- **Delivery and implementation:** This includes developing the capacity to administer new regulatory regimes, setting up a new immigration system and implementing a new system of customs checks at UK borders.

Using this framework, this paper will look at the capacity required over the course of Brexit and the challenges facing the civil service.

1. Preparing for negotiations

From an almost standing start after the referendum, government has had a little less than a year to fully prepare for talks – and that is even if substantive talks are left until after the French election in May, as some expect. By giving notice of the invocation of Article 50, which means it has opened the two-year (or in practice, 18-month) window to hammer out agreements, the Government has effectively announced that it is ready to negotiate – that means top-level negotiating positions are clear, the relevant trade-offs are understood and the processes are in place to co-ordinate the negotiations and draw on departmental expertise as necessary.

Analysis and policymaking

A large amount of analytical work has been carried out to understand the implications of different kinds of relationship with the EU for the British economy, recognising the complex interdependencies between the highly dispersed Whitehall departments. This analysis, shepherded by DExEU but reliant on departmental horsepower and specialist knowledge, has been presented to the Cabinet Committee for Exiting the EU, and underpins the Government's thinking and emerging position. The Brexit White Paper revealed some of this, but it seems reasonable to assume that ministers had access to a more extensive set of analyses.

Co-ordination

Whitehall moved quickly following the referendum to set up new mechanisms to co-ordinate information and analysis from various departments. DExEU was established to commission work from individual departments and agencies, and feed this into the Government's decision-making processes. This co-ordination role has worked well in terms of information being received by DExEU from departments. However, in research done at the end of last year, the Institute for Government found that some departments were unclear at that point what would be expected of them during later stages of the Brexit process, and what they should be doing to prepare.² Three months on, and after the publication of the white paper, there should now be greater clarity on what the next two years might have in store.

Legislative capacity

While the pre-negotiation stage requires minimal legislation – the only bill required has been the European Union (Notification of Withdrawal) Bill – significant legislative capacity is required to prepare for and draft the Great Repeal Bill. Departments have been asked to identify which pieces of EU legislation impact their policy areas, and whether that regulation should be carried over into UK law, amended or scrapped. While transfer is straightforward in many instances, there are examples where significant policy decisions are required in order for the legislation to remain relevant – for example, if it requires an EU body to perform an essential function, such as regulation, a decision must be made about who can and will perform that function in the UK after exit.

² Owen, J. and Munro, R., *Whitehall's Preparation for the UK's Exit From the EU*, Institute for Government, London, 2016.

Delivery and implementation

Few policy changes can be implemented before the UK leaves the EU. Until Brexit, the UK will be bound by EU policies and laws. However, the delivery of other policies and commitments may be delayed by the need to divert resource to Brexit preparations.

Institute for Government research has found that departments have been asked to prepare for Brexit on top of pre-referendum manifesto commitments, as well as continuing to implement spending and headcount reductions.³ In order to free up capacity for future stages of Brexit, departments need a steer from the Government as to what policies can be delayed or dropped. In other areas, the amount of work is such that reprioritisation alone will not work – it appears inevitable that the Government will have to revise the spending plans of departments such as the Department for Environment, Food and Rural Affairs (Defra) and the Home Office. The fact that key affected departments are already recruiting shows that they must have been given indications that they will not be held to the administrative savings agreed in the pre-Brexit spending review.

Delivery and implementation should also frame any negotiating position the UK takes. As well as the underpinning analysis and policymaking input, the Government's plan for Brexit should have been made in the context of how it will be delivered – acknowledging where the UK will need an 'implementation period', as stated in the Government's white paper, and what transitional arrangements will be required.

2. Managing the negotiations

The talks alone have been described as 'unprecedented' in scale by Sir Ivan Rogers, the former UK Permanent Representative to Brussels, possibly resulting in the 'most comprehensive free trade agreement' in history. But supporting the talks is just one element of what will be required during this phase – the UK will need to be laying the administrative and legislative ground for life outside of the EU.

Analysis and policymaking

It is not yet known how the Prime Minister will structure the negotiating team. It's likely that it will comprise a number of 'chapter leads' (or equivalent) who can take responsibility for specific aspects of the negotiations. These will report to Olly Robbins, Permanent Secretary at DExEU, Sir Tim Barrow, the new UK Permanent Representative, DExEU Secretary of State, David Davis, and, ultimately, the Prime Minister. Those leads could come predominantly from DExEU in London and UK Permanent Representation (UKRep) in Brussels.

But the negotiations are likely to require direct input from relevant departments on more technical issues during negotiations. The Home Office will input into the debate around the future of EU nationals in the UK and the status of UK nationals living in EU countries; while the Treasury will expect a major role in negotiations on the UK's 'divorce bill'. Any discussion on a future trade deal will need to include policy experts

³ Owen, J. and Munro, R., *Whitehall's Preparation for the UK's Exit From the EU*, Institute for Government, London, 2016.

from relevant departments; countries such as the US, Canada and New Zealand usually include key officials for complex or sensitive trade talks. Defra, for example, may be required to assess a suggested deal on UK–EU agricultural tariffs. After decades in the EU, negotiations of this scale will require rapid and dramatic upskilling of government capability and capacity, particularly to match the very substantial expertise the EU negotiators will have at their disposal.

Much of the detailed expertise no longer lies in core Whitehall departments, but in arm’s length bodies, such as the Environment Agency, that have been implementing and enforcing EU regulations. So Whitehall will need to be ready and have the mechanisms in place for engaging these bodies, which have differing degrees of independence from departments, have their own governance arrangements and have seen their policy input role scaled back in recent years.

Co-ordination

Co-ordinating mechanisms need to be put in place to ensure that the expertise of policy departments is available to the negotiating teams. Depending on the make-up of the negotiating team, it is possible that DExEU could continue to act as a conduit for policy analysis and information from departments to the negotiating team. Government will need fast reaction times, responding quickly to positions emerging from talks, and supplying ministers and negotiators with the information required to reliably counter or accept proposals.

Running successful negotiations also requires co-ordination of information from beyond Whitehall. The UK is negotiating with 27 member states, not a unified bloc. To agree a deal, it needs to meet their individual concerns. The Foreign Office and UKRep will have to engage member states directly to understand their position. Co-ordination will also be necessary with those parts of government dealing with non-Brexit-related issues, such as preliminary trade negotiations with other countries around the world, and British policies within and towards NATO.

Legislative capacity

Once negotiations have begun, the countdown begins on a two-year negotiating period, after which the UK will leave the EU. Extending the period is technically possible, but unlikely, since it would require the unanimous agreement of all 27 member states. The UK Government must therefore assume that – if they fail to secure a deal – then after two years the EU treaties will cease to apply. This means that EU laws and regulations will cease to apply in the UK, and that policy competences previously reserved to the EU – such as trade negotiations and the setting of customs and tariffs – become the responsibility of the UK Government.

In order to prevent a period of legal and regulatory uncertainty, the Government will produce a ‘Great Repeal Bill’, transposing EU laws into the UK statute book. It must ensure that there is sufficient capacity in the Government Legal Service and parliamentary counsel, and in Parliament itself, to allow necessary legislation to be prepared, scrutinised and approved before the UK leaves the EU. As the end of the two-year negotiating window approaches, government will need to retain enough capacity to manage last-minute changes and adapt to any deal that is made.

Delivery and implementation

As with legislative preparations for Brexit, the Government must use the negotiating period for more than just talks with the EU: it must also prepare for Day One outside of the EU. While the Government has indicated that it will pursue an 'implementation phase' to allow the UK to adjust to life outside of the EU with minimal disruption, there is no guarantee that the EU will agree to this.

The Government should prepare to leave the EU as soon as negotiations begin. This involves not just replacing (or transposing) EU laws and regulations, but also the services and policies which were previously provided by the EU – such as a new computer system capable of registering EU citizens in the UK, or enforcing trade tariffs. The Government must ensure that it has enough time to design, procure and implement any new administrative systems needed to deliver services and policies before negotiations conclude and the UK leaves the EU.

Not only is this contingency planning necessary to avoid facing a 'cliff edge' (and significant disruption to systems such as immigration or customs), without it the Government cannot reasonably threaten to walk away at a bad deal as it will be dependent on the EU for transitional arrangements.

What to watch out for:

- Will the Government look to make any legislative changes upon exit, or will it be maximum continuity?
- When will we see government spending on contingency plans and additional resources in areas where the risk of a 'cliff edge' or no deal with the EU is too great?

3. Implementing Brexit

The changes that will need to be implemented as a result of Brexit will largely be determined by the outcome of the talks. There are a few areas, however, where the Brexit White Paper and the Prime Minister's recent Lancaster House speech suggest significant change is inevitable – particularly immigration and customs. To ensure a 'smooth and orderly Brexit', the civil service will need to ensure risks are managed and all the essentials are in place, while also preparing to exploit opportunities from Brexit in the months and years that follow.

Analysis and policymaking

Once the UK leaves the EU and EU law ceases to apply, the Government will be free to develop new policies and regulations in areas previously covered by the EU (subject to any deal reached with the remaining member states). While some new policies will need to be in place as soon as the UK leaves the EU, others – such as new environmental regulation and agricultural policy – can be developed over time. Although most Whitehall departments are affected by EU policy, it is unevenly spread, with some minimally impacted, and others finding most of their operating frameworks are determined by Brussels. This will require a redistribution of capacity to evaluate existing policy and regulation, and prioritise potential reform.

Co-ordination

Some of the policies that the UK will take back from the EU are devolved matters under the devolution settlements. These include fisheries, agriculture and environmental regulation. If and where repatriated policy powers are devolved to Scotland, Wales and Northern Ireland, the UK Government and the devolved administrations will need to develop enhanced mechanisms to co-ordinate policies across these nations so that, after the loss of the unifying EU framework, divergent policy and regulatory regimes don't create barriers to trade within the UK.

Co-ordination and communication with the EU will not cease after Brexit, and the Government will need to boost its diplomatic capacity to access and influence the views of EU member states and institutions. Bilateral relations with European partners might increasingly replace institutionalised contacts within the EU. At the same time, continued monitoring of EU developments will require a continued lobbying presence in Brussels to ensure that UK interests are taken into account from outside EU negotiating rooms.

The Government will also need to create capacity to negotiate with non-EU member states on trade deals. This is a new capacity – and the Department for International Trade (DIT) is already seeking a senior trade adviser and building up its analytic and communications capacities. Given the nature of trade deals, it will also need a strong legal team. Those people will need to be complemented by trade teams in the key sector-facing departments and regulatory bodies. DIT will need to co-ordinate with these teams for detailed input on the highly technical issues that are the essence of trade deals.

Legislative capacity

There are some pieces of new legislation that the UK will need to be ready for Day One post-Brexit, such as new migration and customs regimes. While the Great Repeal Bill will ensure legal continuity at the point of leaving the EU, it is also very likely that the Government will want to change inherited EU legislation. It is estimated that thousands of EU laws and regulations currently apply in the UK. If the Government were to amend these using primary or secondary legislation, it will be a major drain on legislative resources. It will need careful prioritisation if it is not to crowd out other policy priorities stemming from the 2020 general election. Any major policy changes will be done through specific pieces of primary legislation. Starting in the two-year negotiating period and continuing once details of the deal are understood, the Government will need to pass a series of bills in areas such as immigration and agriculture to ensure new regimes have a legislative foundation.

Delivery and implementation

Some post-Brexit policies will need to be implemented before the UK exits the EU, to prevent a 'cliff edge' scenario where, for example, there are no arrangements for EU goods or citizens to enter the UK. The implementation of other policies is less urgent and will be the focus on the months and years following Brexit.

We know phased implementation is the preferred option of the Government, but how long will it be? Changes in systems such as immigration and customs may require new

legislation, new technology to be developed and new infrastructure to be built. Programmes of that scale in government traditionally take years not months.

What to watch out for:

- How long will DExEU last?
- Will we see teams of civil servants, in the centre or departments, assessing the medium-to-long-term opportunities from Brexit?
- How will Whitehall adjust for its new relationship with the EU and other countries around the world?
- How long will any implementation phase be?

The following table summarises these capacity demands across the three Brexit stages.

Table 2: Brexit capacity demands

	Preparing for negotiations	Managing negotiations	Implementing Brexit
Analysis and policymaking	Understand the strategic interests of the UK across sectors and feasibility of different options.	Capacity within departments and key public bodies to analyse and make recommendations to the negotiating team on emerging deals.	Develop new policy options in areas such as fisheries, agriculture, immigration and trade.
Co-ordination	Understand the views and preferences of different departments and public bodies, as well as local and devolved government and business.	Bring together insight from departmental policy experts on negotiating options, and using UKRep and Foreign Office intelligence on the views of EU member states.	Co-ordinate post-Brexit policy changes with devolved administrations. Diplomatic capacity to maintain links with EU institutions and new trade partners.
Legislative capacity	Departments must identify which EU rules and regulations should be transposed into UK law.	Ensure the 'Great Repeal Bill' is prepared, drafted, scrutinised and approved to avoid a legal 'cliff edge' after Brexit.	Prepare and scrutinise potentially hundreds of pieces of primary and secondary legislation to enact post-Brexit policies.
Delivery and implementation	Major policy and reform commitments may need to be delayed to free up capacity for Brexit work.	Prepare new policies and administrative systems for Day One after leaving the EU.	Delivery and implementation of post-Brexit policies including negotiating trade deals and procuring new IT services.

Contributors

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