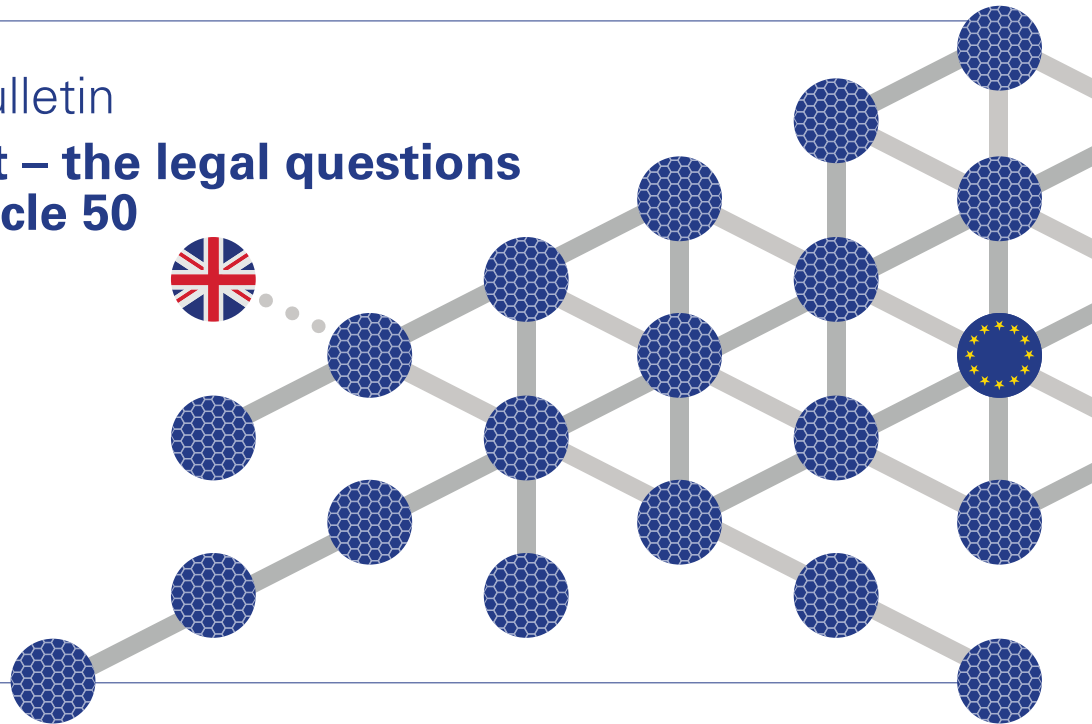




Brexit Analysis Bulletin

Triggering Brexit – the legal questions surrounding Article 50



As the UK continues to grapple with the political and economic implications of the UK's vote to leave the European Union (EU), it is important to note that Brexit is fundamentally a legal process. Numerous complex and unprecedented legal questions will need to be addressed in the coming months and years and some notable steps have already been taken in this regard.

Background: Article 50 of the Treaty on the Functioning of the EU (TFEU)

The most fundamental and immediate legal question posed by Brexit is how to trigger Article 50. This is the mechanism through which the UK gives notice of its intention to leave the EU and this prompts formal exit negotiations to be completed within two years. Many in the UK have swiftly become familiar with the terminology of this short provision, and the key part of the wording as follows:

“any Member State may decide to withdraw from the Union in accordance with its own constitutional arrangements”

Unlike most EU Member States, the UK does not have a codified constitution and, in that context, Article 50 presents more questions than answers. The legal opinion in the UK remains divided as to whether Article 50 can be invoked by the Prime Minister alone, using her prerogative powers, or whether parliamentary approval will be required. It is also unclear whether parliamentary approval would be sufficient or whether a formal Act of Parliament would be required in order to trigger Article 50.

The Court Case

On 3 November 2016 the High Court issued a judgment ruling that the government does not have the power to trigger Article 50 without Parliamentary approval. As a matter of constitutional law, the High Court held that the government needed to be conferred authority by Parliament in order to trigger Article 50; thus prohibiting the Prime Minister from triggering Article 50 on her own. It is worth noting that no question was raised before the High Court, either by the claimants or by the government, as to the Court's jurisdiction on this question.

The government has already declared its intention to appeal the High Court's decision, and the Supreme Court has set aside time for hearings on 7 and 8 December 2016, in anticipation of the decision being appealed. The legal question will therefore likely remain unresolved until the end of 2016, when the Supreme Court is likely to issue its decision. It is expected that all 11 Supreme Court Justices will sit on a panel, rather than the usual five Justices, an increase which is reserved to cases of high constitutional and great public importance.

Although the High Court stressed that its judgment had “no bearing on government policy, because government



policy is not law”, the decision will undoubtedly have wide-ranging ramifications. It will impact the timing of Brexit – the Prime Minister’s promise to invoke Article 50 by March 2017 may be questioned – but also may have an implication on the terms of Brexit. The majority of MPs were, and presumably remain, personally opposed to Brexit. Although political reality would dictate that many MPs will feel obliged to respect the mandate of the referendum, many will probably insist that Article 50 may only be triggered once they are satisfied with the government’s proposed terms for Brexit.

It will also keep the question of Brexit a live political debate for the months (and potentially years) to come. Uncertainty regarding the UK’s future in or out of the EU would remain and a final parliamentary vote to trigger Brexit would undoubtedly become a new focal point for those wishing to remain in the EU.

The Arguments

The principal legal arguments that were put forward before the High Court case can be roughly summarised as follows:

- The government argued that UK constitutional law provides for international treaties to be entered into through the use of the Royal Prerogative. The Royal Prerogative is formally exercised by the Queen on the advice of her Ministers, not by Parliament. The UK is a member of the EU by virtue of international treaties and withdrawal from such treaties can therefore be commenced through the Royal Prerogative.
- The other side argued that EU laws have been incorporated into the UK legal system through legislation passed by Parliament, and this has created a number of new rights under UK law. It would be unconstitutional if the government were permitted to exercise use of the Royal Prerogative to diminish or abrogate those rights.

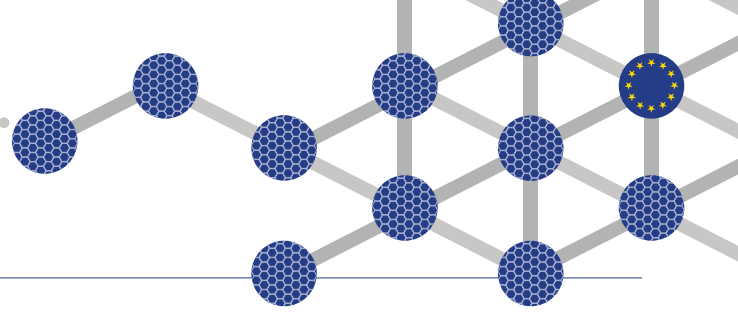
The other legal issues

While the uncertainty regarding Article 50 is perhaps the most pressing question, various other legal points have been thrown up by the result:

- The EU referendum was not legally binding. It is therefore agreed that the referendum result has had no immediate legal effect and further legal steps will need to be taken in order to trigger Article 50. This was also noted by the High Court in its judgment.
- What is also agreed is that the UK alone has the power to invoke Article 50. Despite the calls for the UK to trigger Article 50 as soon as possible, neither the EU institutions, nor other EU Member States, can commence this process on the UK’s behalf. As yet, there has been no legal argument put forward to refute this point.
- Once triggered, it is not clear whether it would be possible to stop the Article 50 process. One of the authors of the provision, Lord Kerr, gave a view that it would be possible to stop the process even after Article 50 is invoked. If that happened, however, the EU institutions may seek to alter arrangements and Article 50 will always be open to interpretation by the European Court of Justice.
- The question of the devolved administrations and their role in the Brexit process will continue to be a live issue for some time. On 28 October, a challenge to the government’s power to trigger Article 50 was dismissed by the Belfast High Court, though the claimants have indicated that they will appeal.

Conclusion

While many of the legal questions surrounding Brexit appear procedural and technical at first glance, their outcome will play a key role in how the UK moves towards Brexit in the coming months and years. For this reason, your Shepherd and Wedderburn Brexit Advisers will ensure that you remain updated on developments.



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JOINING THE DOTS OF THE EU REFERENDUM

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Shepherd and Wedderburn has been for many years offering balanced and impartial advice on how the different scenarios might play out in the event of constitutional change.

Now that the vote has been cast to leave the EU, members of our dedicated Brexit group continue to interrogate the regulatory and commercial issues and to advise clients on next steps and outcomes.

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