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Brexit: Pulling the (art.50) trigger

Julius Stobbs (Stobbs IP) · Monday, January 16th, 2017

Of all the political upheavals seen during 2016, we in Britain are quietly smug that ours has the best name. A notable mention going, of course, to the winners of best hair: the United States.

Stobbs is delighted to offer a series of updates over the coming months relating to the British exit from the European Union. We begin by considering below some of the political implications of recent developments.

Thus far we have heard painfully little by way of Brexit related policy coming out of the Government. Recently, however, the outline of a timeline was forged, when Theresa May (the “PM”) confirmed that she intends to trigger [Article 50](#) before March 2017. We may be looking, then, at the UK leaving the European Union by Easter 2019 (cue stockpiling of Lindt Easter treats).

Art. 50, then, will be triggered once Britain confirms its intention to leave the European Union. It is plausible that the implications of the two-year time limit have been exaggerated in the press of late. It seems likely that the negotiations initiated by the notification of withdrawal will be convoluted and prolonged, so it feels unnecessary to view the timeline as a start-stop scenario as it is so frequently portrayed. Several commentators have suggested that the full process of extrication will take nearer 10 years (see [Canada and the EU negotiations](#), for example).

There are considerable constitutional implications raised by Brexit. Thankfully, the UK does not take all political/legal decisions based (directly) on public vote; as a parliamentary democracy, all new domestic law must be agreed by both of the Houses of Parliament. As the PM has confirmed that Art. 50 will be triggered early this year, however, it is unlikely that there is to be a parliamentary vote. The act of initiating the exit from the EU and revoking much domestic law would need to be carried out under *prerogative powers*, then, if the PM is to proceed as claimed.

The use of prerogative powers (or *absolute authority bestowed by the Monarch*) has been a source of major judicial concern over the past 100 years. This conflict is likely to continue, especially given that Art. 50 states a withdrawal must be initiated “in accordance with [the Member State’s] own constitutional requirements”. The PM’s authority to take this step has been even brought before the judiciary in [England and Wales](#), as well as [Northern Ireland](#).

The case brought against the Secretary of State for Exiting the European Union (and others) is aimed at confirming whether the Executive branch of the government, headed by the PM, is constitutionally authorised to trigger Art. 50. Contrary to the mendacities printed in pro-Brexit tabloids, the question before the judiciary is *not* whether the UK is to leave the EU, but how it may

be done in a constitutionally appropriate manner. Not that we read the tabloids, obviously.

As expected, the court at first instance confirmed that the Executive arm of the Government cannot unilaterally trigger Brexit, even following the public vote. To allow the executive arm of the government to create law unilaterally would be to violate the separation of powers doctrine and therefore the constitution, stated the court.

This matter has been taken escalated to the Supreme Court, with a decision expected later this month. It is difficult to predict how the landscape may change if the decision is upheld, as we anticipate it will be. This decision could trigger a parliamentary vote, as would seem constitutionally required. The likely outcome of such a vote is also problematic, since well over half of MPs in the UK voted to remain in the EU (Bremain?). We remain confident that a Preliminary Reference to the CJEU is highly unlikely, though would certainly be entertaining.

We are left, then, in the position that it would seem unconstitutional for Britain not to leave the European Union following the public vote, however, the body which is constitutionally authorised to trigger the exit is not in favour of doing so.

Stobbs look forward to bringing future updates on Brexit, from the soon to be post-EU wasteland that we call home. To receive your updates in your inbox please subscribe to this [blog](#) and the free [Kluwer IP Law Newsletter](#).

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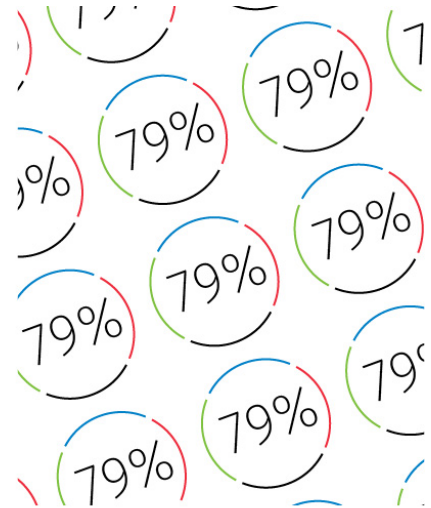
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