

Brexit and Art. 50: the Key lies in Luxembourg

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The British people voted in their recent European referendum to leave the European Union. This has prompted the obvious question: what happens next? The answer has turned on the construction of Article 50 of the Treaty on the European Union (TEU), which provides the mechanism by which a Member State can leave the Union. The relevant text is as follows:

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.*

There have essentially been two crucial questions in relation to the operation of Article 50: first, what are the constitutional requirements of the United Kingdom in relation to such a decision? Is it a prerogative power, exercisable by the monarch on foot of advice of the Executive Government, or does it require an Act of Parliament? There have been measured academic opinions arguing that it is a [prerogative power](#) and that it must be [passed by Parliament](#). Second, and relatedly, how should notification issue to the European Council?

A law firm, Mishcon de Reya, have now indicated their [willingness to test these questions in court](#). There is currently a debate about whether the litigants in the case have standing to bring a case in the first instance, although as [Thomas Fairclough](#) has argued the courts have the power to determine whether a prerogative exists. Fairclough ultimately argues that although the courts have the power to hear the case, they may conclude that they do not have the power to challenge the exercise of the prerogative except in exceptional circumstances: 'within the furthest reaches of *Wednesbury*'. What has not been fully appreciated is that this challenge could end up being litigated in the European court system, and not merely in the UK.

To see how this could occur, a useful starting point is the legal analysis provided by [Andrew Duff](#). The crucial paragraph of Duff's analysis is as follows:

But it is not just UK law which empowers the prime minister to act but also EU law, which in this case has primacy. The CJEU would be able to insist that the British prime minister, as a member (for the moment) of the European Council, is duty bound to trigger Article 50 TEU which, by virtue of the European Communities Act 1972, has direct effect on him or her. A failure to fulfil his or her obligation would open up the UK to attack at the CJEU, as would a failure to act on Brexit on behalf of the European Council as a whole.

Of course, for Duff's argument to be correct, the matter would have to end up before the CJEU in the first instance. This appears to be likely to be the case.

The question of the meaning of Article 50 TEU is a matter which is enshrined in the Treaty on European Union and therefore axiomatically a matter of European Union treaty law. The most obvious means that the Article would end up before the European courts would be via Article 267 of the Treaty on the Functioning of the European Union (TFEU) which provides:

The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:

(a) the interpretation of the Treaties;

This would occur by means of a preliminary reference from the national courts. In the case of a court against whose decision no judicial remedy lies, the matter must be referred. Of course, it is unlikely that the national courts would be particularly keen to make such a reference in such a highly politicised issue. The *Mishcon de Reya* litigation will specifically concern the circumstances in which Article 50 can be triggered under the UK Constitution. This necessarily implicates the construction of Article 50. The question of the circumstances in which a national court should refer a question has already been addressed by the [CILFIT v Ministry of Health](#) case. The national court must refer the case unless the question is irrelevant, the provision has already been interpreted by the European courts, or the correct application of community law is so obvious as to leave no scope for reasonable doubt. In relation to the final limb, the following elements are important: there must be no discrepancies between the official languages of the treaties, EU law uses peculiar legal terminology, concepts are not the same in EU law and national law, and regard must be had to the objectives of the EU as a whole. Practice direction 11 of the [UK Supreme Court](#) makes it clear that they follow the CILFIT guidance on the issue.

Under the circumstances, it is clear that these requirements cannot be fulfilled and that the question of the construction of Article 50 must, as a matter of EU law, be referred to the CJEU. The question of the construction of Article 50 is obviously relevant to the determination of the case. Article 50 has not yet been invoked and therefore has not been interpreted by the European courts. The different legal texts are unlikely to have been considered by the UK courts. The correct application is not obvious, as may be seen from the academic disagreement surrounding the issue. What, for example, constitutes 'notification' under Article 50(2)? It is also not clear whether, for example, the term 'own constitutional requirements' is a term of art of European law, or whether there is an obligation to notify which the Member State is in breach of its Treaty obligations if it fails to do so indefinitely. This would implicate *inter alia* the EU's guarantee to respect the fundamental constitutional structure of the United Kingdom under Article 4(2) TEU, as well as the United Kingdom's obligation to cooperate under Article 4(3) TEU, which extends to 'any appropriate measure, general or particular, to ensure fulfilment' of Treaty obligations.

The determination of the issues would raise considerations of delicate political matters, perhaps matters which a court should not be cognisant of. It may be, therefore, that the Court of Justice of the European Union would defer to the national court's determination. There remains the possibility, however, that the CJEU might issue a ruling requiring the UK Government to issue notification to the European Council pursuant to the wishes of the British people, which the UK Government itself may not wish to give effect to until its bargaining hand is strengthened. Such are the vagaries of constitutional law.

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