Triggering Article 50 does not require fresh legislation

Introduction

Considerable public interest has recently been focused on the 'trigger' mechanism for exit from the EU which is set out in Article 50 of the Lisbon Treaty. Expert opinion has divided between those who believe that the power to trigger Article 50 rests with the Executive using the legal authority of the royal prerogative from the Crown with no further parliamentary involvement necessary and those who argue that fresh legislation is required to confer statutory authorisation on the Executive to do something which could render nugatory rights under the European Communities Act 1972 ('ECA'). An ingenious third way involving the Henry VIII clause in section 2(2) of the ECA has also been suggested.

This note suggests that no fresh legislation is required and that the power to trigger Article 50 rests with the Executive but for very different reasons to those suggested by what might be termed the 'prerogative' camp. The live question is whether, if legislation were deemed necessary, a Parliament which is overwhelmingly in favour of remaining in the EU might refuse to pass such legislation thus preventing, at least in the short term, activation of the trigger mechanism.

Crown prerogative can sometimes be the source of legal authority for executive action

In the UK constitution, the executive power to conduct foreign affairs including the signing of treaties has historically been grounded in prerogative with the Crown as the ultimate legal source of authority. The view of many constitutional lawyers, including Mark Elliott, of the legal basis of the trigger power in international law is that it must therefore be solely a matter of prerogative. For them, this view is bolstered by the apparent absence of a specific Act of Parliament which authorises the withdrawal from the EU using Article 50.

Nick Barber, Tom Hickman and Jeff King agree with Elliott that the source of legal authority for Article 50 is the Crown. Their insightful piece argues that since the effect of a notice under the authority of Article 50 could be to render the ECA 'nugatory', it would be contrary to the principle set out in *De Keyser's Hotel* for that notice to be triggered without authorisation from primary legislation which they argue would necessarily require fresh legislation to be passed. Their argument presupposes, like Elliott, that the source of legal authority for Article 50 is Crown prerogative.

Secondary legislation under s 2(2) ECA

Adam Tucker takes a different view. He argues that since s 2(2) of the ECA transfers the power to embed rights acquired from the EU from a prerogative to a statutory basis, *De Keyser* prevents the Government from triggering exit from the EU without passing a secondary instrument authorising that trigger mechanism. This, he argues, would also have the welcome benefit of ensuring that there is scrutiny by Parliament of the decision to trigger Article 50.

Elliott disagrees with this argument. He points out that s 2(2) ECA is only appropriate where there is no existing law in place in the UK and, of course, there is already an existing legal basis for the power which he says is the prerogative. Elliott's argument is persuasive. Secondary legislation via the Henry VIII clause in s 2(2) ECA is not the solution.

Consensus about De Keyser

There is, however, a seeming consensus among the leading experts as to the relationship between prerogative and statute which is that in the event they intersect, legislation passed by parliament must supersede prerogative as the source of the executive's legal authority to act. This is obvious in a parliamentary democracy. The differences of opinion between the two main camps appear to rest on a question of fact as to whether the decision to trigger exit from the EU, which is a power whose legal authority both sides agree derives from the Crown, in fact undermines or renders nugatory a statute.

Elliott argues that the uncertainty surrounding the potential for a new deal or other outcome means that the trigger mechanism in and of itself cannot be said to undermine the ECA. Barber et al claim that the circumstances are such that for the executive to trigger exit from the EU would breach the agreed principle in *De Keyser* (or indeed *Laker* and *FBU* as it happens) because that would be to act using Crown authority in a way inconsistent with the intention of parliament as expressed in legislation.

A fourth option

This note argues, by contrast, that the prerogative and s 2(2) ECA are not relevant to the exercise of the executive power to trigger exit from the EU. Nor is there any need for fresh legislation. This is because there is already legislation which has been passed by parliament which provides statutory authority for executive action in this area. It therefore suspends, or places into abeyance, any prerogative source of authority to act and instead this legislation, not the prerogative, forms the legal basis for the power of the Prime Minister to trigger exit from the EU.

The legislation is the European Union (Amendment) Act 2008 ('the 2008 Act') which incorporates the Lisbon Treaty into UK law and, incidentally, gives it overriding legislative force with respect to past and future ordinary legislation by inserting it, in terms, directly into s 1(2) of the ECA. Any action under Article 50, as one section within the Treaty incorporated into UK law by the 2008 Act and the ECA, therefore must be taken under the relevant statutory authorisation and operate within the four corners of the relevant legislation.

In addition, s 6 of the 2008 Act (later replaced by the EU Act 2011) specifically lists actions under the Treaty which require further parliamentary approval before a Minister can undertake them. Article 50 is not among those actions listed in the 2008 or 2011 Acts.

Article 50 is therefore already incorporated in UK law by primary legislation.

The next issue is the legal criteria for triggering exit from the EU under the terms of Article 50 in UK law.

Article 50

> 1. Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.
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> 2. A Member State which decides to withdraw shall notify the European Council of its intention.

Constitutional requirements in the UK – the Separation of Powers

A little work is required to tease out what exactly are the constitutional requirements which mean that the Prime Minister can trigger the mechanism. This requires briefly considering the doctrine of Separation of Powers. In the UK, the functions of the legislature include scrutinising the executive, controlling supply, legislating, debating issues etc. The functions

of the executive include implementing the law, controlling foreign affairs, proposing legislation etc.

It is trite law to observe that parliament has the constitutional power to alter the legal source of particular executive powers so that they become statutory powers rather than being legally sourced in the Crown. Historic examples include the transfer of judicial power from prerogative to statute, and the transfer of the power to manage the civil service. It is important to note that said transfer does not mean that Parliament itself *exercises* that power, simply that the legal *source* of the power to act in whatever way is permitted under the prerogative or statute has been transferred. This means that executive discretionary powers relating to foreign affairs could be legally sourced either in the prerogative or in statute.

In *Chandler v DPP*, there was some discussion of the fact that the executive sometimes acted in that case using powers sourced in prerogative and at times under statutory powers that were previously legally sourced in prerogative. The switching of legal authority to act from prerogative to statute simply meant that the court could intervene more readily (pre-*GCHQ*) in statutorily rooted executive action through judicial review. It did not mean that parliament was itself exercising the relevant powers or needed to pass fresh legislation each time those statutory powers were exercised in order to re-authorise their use. At all times it was the executive who exercised those powers, whether the power was statutorily-sourced or prerogative-sourced.

Applying De Keyser

In *Rees-Mogg,* Lloyd LJ, perhaps somewhat controversially given *De Keyser*, held that when 'Parliament wishes to fetter the Crown's treaty-making powers in relation to Community law, it does so in express terms'. He further held that on the facts, the ECA did not actually fetter the prerogative. However, it is suggested that Article 50 clearly, expressly and unequivocally does condition the use of that part of the Crown's treaty-making powers that relates to withdrawal.

The incorporation into statute of that aspect of the prerogative of conducting foreign affairs which pertains to the potential withdrawal from the EU arguably took place with the passing of the 2008 Act. The relevant prerogative source of authority to exercise the power to withdraw from the EU therefore went into 'abeyance' or was 'suspended' (*De Keyser*). The power to withdraw from the EU became a statutory power for which the executive is directly, politically accountable to parliament.

Prime Ministerial exercise of a statutory power to withdraw

As our constitution allocates the function of conducting foreign affairs to the executive, whether the legal source of the power is prerogative or statute, the prime minister remains in control of the right to trigger the Article 50 procedure or otherwise deal with foreign affairs. That trigger power remains with the executive and ultimately with the Prime Minister and is now a statutory power under the 2008 Act and the ECA. No new legislation is required. Indeed legislative re-authorisation for the executive to trigger Article 50 would appear to be an exercise in duplication.

It is therefore suggested that triggering exit from the EU by the executive has already been approved by parliament and can be carried out at the discretion of the new Prime Minister.

Political aspects

The absence of any legal requirement for the Prime Minister to seek parliamentary approval for triggering Article 50 does not affect the political question. The new Prime Minister may well wish to secure the mandate of Parliament to exercise Article 50. The outcome of a debate and vote on triggering Article 50 would be politically important. However, there is no need to undertake any legislative actions of any kind in Parliament to authorise the trigger. That ship has sailed.

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