

Brexit: Triggering Article 50 and the Role of Parliament – a Proposal

Triggering article 50 of the EU treaty will most probably lead to UK exit from the Union within a period of 2 years after notice of the decision to withdraw is given by the UK. (The period can be extended if all 27 remaining Members agree, but that seems unlikely). Exit will come about either in accordance with an agreement between the UK, the Council of Ministers of the 27 and the European Parliament concluded within that period, or by the failure of the negotiations to conclude in time.

Whether the Government has authority under the Royal Prerogative to give notice is a legal question decided in the negative by the Divisional Court on 4 November, but to be finally resolved by the Supreme Court before the year end. If the Supreme Court follows the reasoning of the High Court – that Notice changes UK law – then primary legislation is required to give authority to notify. Even if this is not required, Parliament should require full debate of the merits of any proposal to notify and a vote, under its conventional constitutional power to supervise and control the Executive.

In either case there is an important political question: How should this Parliamentary power be exercised in advance of such complex and sensitive negotiations? The Prime Minister and David Davies, the Brexit Secretary, make the very fair point that it is not in the national interest to show our hand in advance of the card game. Granting this, what can and should Parliament require?

The answer is that the Government must show that the outcome of a failure to agree is on balance in the UK national interest. Such failure is certainly possible, some say more likely than not. The effect will be withdrawal on a (very) "Hard Brexit" basis, with no rights (or duties) on internal market participation, or, indeed, anything else. Any other outcome will have UK agreement and can accordingly be presumed to be better, though Parliament and the Select Committees on Leaving, under suitable confidentiality, will have an important role ensuring this as negotiations progress.

Such a "Hard Brexit" may be advantageous for trade in goods (given the protective nature of some EU tariffs and the argument that UK WTO membership would revive automatically on leaving). The tougher challenge is to show that trade in services (the far larger and generally more dynamic part of the economy) would not suffer damage that would outweigh any such gain. There are arguments that services are no longer territorial (on line etc.) and incorporation in some Member States (Malta, Cyprus) is relatively easy for U.K. based businesses. There are many other factors in the balance, some, like security and sovereignty, not capable of quantitative assessment. But the Government should set out the merits of that Hard Brexit/failure scenario in a White Paper and Parliament should only approve an article 50 mandate if satisfied that such an outcome is acceptable. This is not only necessary in the national interest; it will also strengthen our negotiating hand. The Government anyway needs a clear assessment of this worst case scenario for its own purposes.

This issue is surely one of confidence in the government: if Parliament is not satisfied there should be a general election. The Prime Minister has said that pressing the case for a

Parliamentary mandate shows contempt of the will of the people expressed in the referendum. In fact the current litigation seeks to uphold our parliamentary democracy and the rule of law. Moreover the people did not know what they were voting for or against. If this scenario is assessed by Parliament not to be in the national interest the case for the people to confirm their original decision, or not, is clear. The argument that the time for Parliament to decide is on ratification after negotiations are concluded is unsustainable: agreement may never be reached and anyway time will continue to run.

This is a common sense approach: it is generally wise, before irrevocably abandoning the status quo to assess the worst possible outcome (in this case, a likely one) for balance of advantage.

Jonathan Rickford

6th November 2016

Jonathan Rickford is a former Legal Adviser to the Department of Trade and professor of European commercial law at Leiden University and the London School of Economics.