

Briefing

November 2016

Brexit Update

On 23 June 2016, the United Kingdom voted to leave the European Union by 51.9% to 48.1%. In [our post-referendum Brexit briefing](#), we summarised the required next steps, the five possible models that had been the subject of discussion leading up to the referendum and the potential legal implications of Brexit.

Following Theresa May's speech to the Conservative Party Conference in early October 2016, the UK Government's preferred timing and shape for Brexit became clearer.

In her speech, she signalled the UK Government's intention to serve notice under Article 50 of the Treaty on European Union before the end of March 2017. However, in a decision handed down on 3 November 2016, the High Court of England and Wales held that the UK Government does not have the power, under what is known as the 'Crown's prerogative', to give notice under Article 50. This introduces new uncertainty to the timetable, albeit that David Davis, the Secretary of State for Exiting the EU, confirmed to the House of Commons on 7 November that Theresa May remains committed to serving notice under Article 50 before the end of March 2017, with parliamentary consent if required.

The Central Bank of Ireland has also

provided some clarity on its approach to institutions considering relocating their operations from the UK to Ireland.

TRIGGERING ARTICLE 50

As discussed in our [post-referendum Brexit briefing](#), notice of the UK's intention to exit the EU must be served on the European Council under Article 50 of the Treaty on European Union before Brexit negotiations can begin. While Theresa May had recently agreed to a parliamentary debate on Brexit before serving the Article 50 notice, she had not agreed to a parliamentary vote on the service of the notice or on the Government's Brexit strategy, emphasising that "...[it] is up to the Government to trigger Article Fifty and the Government alone."

However, the UK Government's ability to serve notice under Article 50 without the involvement of Parliament was the subject of a challenge in the High Court of England and Wales. The High Court delivered its decision on 3 November 2016, holding that the UK Government could not serve notice under Article 50. Among the reasons given by the High Court for its decision were the following:

- » the Government cannot use prerogative powers to override legislation enacted by the UK

Parliament (in this case, the European Communities Act 1972 and the other laws which give EU law effect at a domestic level in the UK); and

- » the Government cannot use prerogative powers to alter the rights of individuals and companies that have been conferred upon them by common law or statute – in this case, the High Court took account of:
 - » rights under EU Directives that were transposed into UK domestic legislation;
 - » rights enjoyed by UK citizens and companies in other EU Member States (such as freedom of establishment) by virtue of the UK's membership of the EU; and
 - » rights which UK citizens and companies would lose on a Brexit, such as the right to seek a reference to the Court of Justice of the European Union, and the right to ask the European Commission to investigate a breach of EU competition law.

The UK Government has been granted leave to appeal this decision. The appeal is expected to be heard in early December, but it is possible that the Supreme Court's decision will not be available until later in December, or early in January. Unless it succeeds

on appeal, the timing for the service of the notice under Article 50 could change if a Parliamentary debate and vote is required - it is difficult to see how a debate and vote on serving the Article 50 notice would not turn into a broader debate on the Government's preferred Brexit negotiation strategy, albeit that David Davis has indicated that the UK Government does not want to disclose too much about that strategy to avoid prejudicing its negotiations with the EU. The UK Government has emphasised that it remains committed to serving notice under Article 50 by the end of March 2017, with parliamentary consent if required.

THE 'GREAT REPEAL BILL'

A significant open question since the June 2016 vote in favour of Brexit was how the UK would deal with the significant body of EU law that currently applies in the UK. In her speech to the Conservative Party Conference, Theresa May confirmed that:

- » a 'Great Repeal Bill' will be presented shortly to Parliament pursuant to which, with effect from the date that Brexit formally takes place, the European Communities Act 1972 (which gives effect to EU law in the UK) will cease to apply and the existing body of EU law will be converted into UK law – this is with a view to providing “*maximum certainty*” at the time of Brexit as to what laws will apply immediately thereafter; and
- » Parliament can subsequently amend or repeal any of those laws, but this will have to take place in accordance with the normal procedures for amending or repealing UK law.

It remains to be seen whether the result of the UK Government's appeal of the High Court's decision of 3 November 2016 will affect the scope or timing of the 'Great Repeal Bill'.

WHAT FORM MIGHT BREXIT TAKE?

The phrases “*Brexit means Brexit*” and “*hard Brexit*” have been much used in the media recently. While Theresa May has emphasised that she will not be providing continuous updates on the state of play of the Brexit negotiations while they take place (but acknowledged that the public will be kept informed on key aspects), she stated that “...*it is not going to be a “Norway model. It's not going to be a “Switzerland model”...*” It remains to be seen whether the UK can negotiate its own unique relationship with the EU, but many commentators took Theresa May's words at the Conservative Party Conference to mean that a “*hard Brexit*” is perhaps likely. Equally, much will depend on what mandate is given to the EU's negotiation team and how they will view the UK's apparent wish to benefit from access to the single market, while having freedom to set its own immigration controls.

If the UK Government does not succeed in its appeal of the recent High Court decision, and a parliamentary vote is then required, it is very likely that details of the UK Government's intended Brexit negotiating position will become the subject of public debate in Parliament, and that amendments could be tabled, albeit that the UK Government has indicated that it will resist disclosing too much detail about its position so as to avoid prejudicing its position in the negotiations with the EU when they eventually begin.

If a negotiated agreement is not reached within the 2 years after the Article 50 notice is served, and the European Council does not unanimously agree to extend the negotiation period, the WTO model (outlined in our [post-referendum Brexit briefing](#)) seems the most likely outcome (“*hard Brexit*” in its most extreme form). However, this arrangement would not cover financial services as passporting would not be available and, unless it negotiated a specific agreement with the EU, the UK would not be able to carry out financial services business in the EU on terms more favourable than any other third country.

FINANCIAL SERVICES – CENTRAL BANK SPEECHES

In a [speech](#) delivered on 3 October 2016, the Central Bank's Director of Policy and Risk, Gerry Cross, outlined the implications of Brexit on the Central Bank's supervisory and regulatory work. He noted the potential for a significant increase in the number of applicants applying for authorisation in Ireland if passporting may no longer be available, and stated that the Central Bank was open to engagement in this area (the Central Bank's Director of Credit Institutions Supervision, Ed Sibley, has also [noted](#) that the Central Bank is keeping a “*broadly neutral view*” on this point). Gerry Cross did, however, reiterate that the Central Bank expects any applicant to intend to have a “*substantive presence*” in Ireland, with its “*mind and will*” located here. In his speech, which focused on credit institutions, Ed Sibley also reiterated the need for “*mind and management*” to be located in Ireland, with any outsourcing arrangements being well-managed.

LEGAL IMPLICATIONS OF BREXIT

In [our post-referendum Brexit briefing](#), we mentioned a wide range of areas which will need to be considered in detail once the form of Brexit becomes clear. It will not be until the UK-EU negotiations formally get underway that the possible shape of Brexit will become clearer, enabling the implications of Brexit on those areas to be considered in more detail. However, as mentioned above, if the UK Government loses its appeal of the High Court decision of 3 November 2016, details of its preferred negotiating position may become clearer during the course of parliamentary debates.

OUR TEAM

If you have any questions on Brexit, please contact your usual Arthur Cox contact or any member of [our Brexit team](#).



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