



Global – Europe Practice | Alert

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Brexit: High Court Decides Approval of UK Parliament is Needed to Trigger Article 50

The English High Court decided on 3 November 2016 that the UK Government must obtain the approval of the UK Parliament before it can trigger the Brexit process governed by Article 50 of the EU Treaty.

The Court's Decision

The Government expressed the view that its prerogative powers – the residue of powers once held by the UK monarch – gave UK Prime Minister Theresa May authority to give notice to the European Council of the UK's decision to withdraw from the EU without first obtaining Parliamentary approval.

This view was challenged by a number of individuals whose interests would be affected by Brexit in a variety of ways. They claimed that use of the Government's prerogative powers would be unconstitutional. In particular, they relied on the principle that only Parliament has the power to alter UK domestic law, and since the Article 50 notification would ultimately result in profound changes to individuals' rights under UK domestic law, it required a vote in Parliament.

The High Court upheld these claims in a clear and unambiguous decision focused on issues of UK constitutional law and Parliamentary sovereignty. Although EU law emanates from the international EU Treaties, it is part of UK domestic law by virtue of a UK statute – the European Communities Act 1972. Prerogative powers cannot displace statute, common law, or custom in the UK and may not be used to confer rights on individuals, nor to deprive individuals of rights, under UK domestic law, unless approved by Parliament. Although prerogative powers enable the UK Government to conduct international relations and to make and unmake international treaties, the High Court decision makes it clear that they cannot be exercised to give notice under Article 50. The UK's exit from EU membership is not simply a matter of unmaking an international treaty. UK membership was given effect by a UK statute and withdrawal from the EU will deprive individuals of their EU-derived rights under UK domestic law.

As a result, the High Court concluded that the Government may not rely on its prerogative powers to give notice under Article 50.

In its judgment the High Court was clear that its decision is limited to determining this question of law, and that it has no bearing on the political case for remaining in, or withdrawing from, the EU. Nor was the High Court concerned with what might happen in the event that prerogative powers are available, or if they are not.

Inevitably, however, the High Court's decision prompts a variety of questions regarding what will happen next.

Will the Government appeal?

The Government has indicated that it will appeal the decision to the Supreme Court, which is understood to have set aside 7/8 December to hear the case.

However, some commentators suggest that the Government may decide not to appeal and instead opt for a vote of Parliament as soon as possible. The logic would be that, if Parliament were to vote in favour of making an Article 50 notification, this would enable the Government to trigger Brexit in line with Mrs May's October announcement that the UK would give the Article 50 notice to the EU no later than the end of March 2017.

How Parliament might vote in these circumstances is, however, by no means certain.

When will the Supreme Court issue its judgment?

Assuming that the Government proceeds with an appeal, the Supreme Court is expected to expedite its decision, which should be available well in advance of 31 March 2017.

Will the Supreme Court's decision delay or prevent the Article 50 notification?

If the Supreme Court upholds the Government's appeal, it is unlikely that there will be any delay in submitting the UK's Article 50 notice.

If, however, the Supreme Court rejects the appeal, the need for a vote in Parliament could create delay. The Government may have to draft legislation to trigger the Article 50 notification and place it before Parliament for debate, and the draft would have to be debated and passed by both the House of Commons and the House of Lords.

Most commentators believe that the House of Commons is unlikely to reject the bill, despite the fact that, just before the referendum vote in June, over 75 percent of Members of Parliament (MPs) were in favour of remaining in the EU. The position of the House of Lords, in which the Government does not have a majority and many of whose peers strongly opposed Brexit, is less clear. However, it is certainly anticipated that both Houses may amend the bill to impose conditions on the Article 50 notification – for example, to give Parliament a vote on the Government's negotiating strategy and impose requirements relating to the UK's future arrangements with the EU which may aim at softening the impact of Brexit.

Will the European Courts have a say?

The High Court assumed for the purposes of its decision that an Article 50 notice could not be withdrawn once given, meaning that giving notice under Article 50 would inevitably result in loss of individual rights under UK domestic law. The assumption was recorded in the decision as common ground between the parties.

The opposite view is held by many commentators, including Lord Kerr, who drafted Article 50. They believe that the notice is in fact revocable.

Article 50, itself, is silent on this point and there are no decided cases. The ultimate authority on the correct interpretation of the Article, because it is a matter of EU law, is the Court of Justice of the European Union (CJEU).

It is generally considered unlikely that the CJEU will be asked for a ruling on Article 50. The Supreme Court would make a reference to it on this point only if the CJEU's interpretation were necessary to its decision on the appeal. The point was not contended before the High Court, so, subject only to how the appeal is framed and the Supreme Court's approach, such an outcome seems unlikely.

Will the High Court decision force an election?

The governing Conservative Party has only a small majority in the House of Commons. Parliament's right of involvement in the decision to trigger the Brexit process is likely to increase existing difficulties faced by the Government in carrying out its promise to achieve Brexit. Protracted debate may prompt a general election, with the Conservative Party aiming to increase its majority and, therefore, its ability to deliver on Brexit.

Further information about issues relating to Brexit can be found [here](#).

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