

Briefing

November 2016

Brexit – UK Government cannot serve Article 50 notice without Parliament’s approval

High Court delivers its judgment in constitutional challenge to UK Government’s plan

CONSTITUTIONAL CHALLENGE

Following the UK vote in favour of Brexit on 23 June 2016, a constitutional challenge was brought to the UK Government’s plan to serve notice of the UK’s intention to leave the EU, under Article 50 of the Treaty on European Union, without the approval of Parliament.

POSITION OF THE UK GOVERNMENT

In early October 2016, Theresa May emphasised in a speech to the Conservative Party Conference that “...[it] is up to the Government to trigger Article Fifty and the Government alone.” She did agree to a debate in Parliament before serving the notice, but did not agree to a vote on either the service of the notice or the Government’s intended strategy for the Brexit negotiations which would follow.

HIGH COURT DECISION

The constitutional challenge was heard in the High Court on 13, 17 and 18 October 2016 and, on 3 November 2016, the High Court [delivered its decision](#), holding that the UK Government does not have the power, under what is known as the ‘Crown’s prerogative’, to give notice under Article 50.

KEY COMMENTS MADE BY THE HIGH COURT

Key comments made by the High Court in its decision were as follows:

- » the conduct of international relations, and the making (and unmaking) of treaties, are viewed as matters for the Government in exercising its prerogative powers;
- » however, while making and unmaking treaties can have a legal impact on matters of international law, domestic law cannot be changed on foot of this (where this would involve depriving individuals or companies of rights, or conferring rights on individuals or companies) without Parliament’s approval;
- » the Government cannot use prerogative powers to override legislation enacted by the Parliament (in this case, the European Communities Act 1972 and the other laws which give effect to EU law at a domestic level in the UK) – Parliament had “...taken the major step of switching on the direct effect of EU law...” in 1972 and the Government should not be allowed to unilaterally switch that off again; 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 parties that brought the constitutional challenge had also argued that even if any withdrawal treaty drafted to reflect the final shape of Brexit agreed between the UK and EU was put before Parliament (as suggested by the Secretary of State in his submissions), the serving of the Article 50 notice by the Government at the outset would effectively “...remove the real decision from Parliament”, leaving the Parliament with a choice between a withdrawal treaty which it might not like or (if that treaty was not approved by Parliament) Brexit

taking place without any agreement being reached (i.e. “*hard Brexit*” in its most extreme form).

result of the appeal will affect the scope or timing of the ‘*Great Repeal Bill*’, which is intended to convert the existing body of EU law into UK law at the time of Brexit.

UK GOVERNMENT REACTION

Following the decision, a Government spokesperson stated that “*The government is disappointed by the Court’s judgment. The country voted to leave the European Union in a referendum approved by Act of Parliament. And the government is determined to respect the result of the referendum. We will appeal this judgment.*” The UK Government has since confirmed that Theresa May remains committed to serving notice under Article 50 before the end of March 2017, with parliamentary consent if required.

APPEAL

The Supreme Court is expected to hear the appeal in early December 2016. The hearing itself could last two to three days and David Davis, Secretary of State for Exiting the EU, has cautioned that it could take a further two to three weeks for the written judgment to become available.

Unless the UK Government succeeds on appeal, the timing for the service of the Article 50 notice 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 strategy, with MPs tabling amendments, even though Theresa May had previously signalled that she would not be providing the public with continuous updates on the state of play of the Brexit negotiations once they began. However, David Davis has also indicated that the UK Government does not want to disclose too much about that strategy to avoid prejudicing its negotiations with the EU.

It also remains to be seen whether the

NORTHERN IRELAND

Separately, the High Court in Northern Ireland recently [dismissed](#) two judicial review challenges to the result of the Brexit referendum (that decision is also being appealed). As part of that decision, the judge indicated that he believed that the Government could trigger Article 50 without reference to Parliament (or to the Northern Ireland Assembly). He did, however, note that this was without prejudice to the issues being considered at the same time by the High Court of England and Wales. The judgment of the High Court of England and Wales was critical of the “*starting point*” used in the High Court of Northern Ireland’s decision in relation to questions of the Government’s prerogative, and of the analysis supplied to the High Court in Northern Ireland regarding whether service of the Article 50 notice would ultimately lead to changes in UK law.

FURTHER UPDATES

We will issue a further update once the appeal to the Supreme Court is heard. In the meantime, 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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