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Briefing

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Brexit – Article 50 Notice Requires an Act of Parliament

On 24 January 2017, the Supreme Court of England and Wales, by a majority of 8 to 3, upheld the High Court's November 2016 decision that an Act of Parliament is needed before the UK Government can serve notice (under Article 50 of the Treaty on European Union) on the European Council of the UK's intention to leave the EU.

The Supreme Court's judgment is here and its summary of that judgment is here.

The Supreme Court also confirmed that consent is not required from the Northern Ireland Assembly, the Scottish Parliament or the Welsh Assembly before the Article 50 notice can be served.

The European Union (Notification of Withdrawal) Bill 2017 was then published on 26 January 2017. As signalled by David Davis, Secretary of State for Exiting the EU, the draft is straightforward and simply authorises Theresa May to serve the Article 50 notice. MPs are scheduled to begin debating the Article 50 Bill on 31 January 2017.

KEY ASPECTS OF THE SUPREME COURT JUDGMENT

In deciding that the UK Government could not use its prerogative powers to serve the Article 50 notice, and that legislation is needed to allow the UK Government to do so, the Supreme Court held that:

» the terms of the European Communities Act 1972 are inconsistent with the UK Government withdrawing from the EU treaties without an Act of Parliament;

» Brexit will fundamentally change the UK's constitutional arrangements by removing EU law as a source of law. That change will be a direct consequence of the Article 50 notice being served and is so fundamental in nature that it can only be effected by an Act of Parliament; and

» as Brexit will remove certain existing domestic rights of UK residents, the UK Government cannot progress Brexit without an Act of Parliament.

UK GOVERNMENT RESPONSE TO THE JUDGMENT

David Davis, Secretary of State for Exiting the EU, gave a statement to the House of Commons a short time after the judgment was delivered in which he indicated that the UK Government's timetable for serving the Article 50 notice before the end of March 2017 remains the same.

The UK Parliament is not expected to vote against the Article 50 Bill, in particular in light of the resolution passed by the House of Commons in December 2016 acknowledging that the result of the Brexit referendum should be respected and calling on the UK Government to serve the Article 50 notice by 31 March 2017. However, it is possible that some MPs could seek amendments relating to the UK Government's negotiating strategy, or the provision by the UK Government of updates to the UK Parliament as Brexit negotiations progress.

Once the Article 50 Bill becomes law and the Article 50 notice can be served, the '*Great Repeal Bill*' is then expected to be presented to Parliament setting out how the UK intends to convert the existing body of EU law that applies in the UK into UK law, with a view to maximising certainty as to what laws will apply when Brexit takes effect.

UK GOVERNMENT STRATEGY

In her speech of 17 January 2017, Theresa May confirmed that the UK Government is seeking a '*hard*' Brexit, and outlined the UK Government's intention to exit the single market (in particular in light of its desire to impose certain controls on immigration), negotiate a comprehensive free trade agreement with the EU, and negotiate individual free trade agreements with other non-EU countries. As this option does not involve EEA membership, it will result in the loss of the financial services passport. Theresa May also signalled the UK Government's intention to exit the current customs union arrangements, while hoping to negotiate tariff-free trade with Europe.

In the same speech, Theresa May also confirmed that the UK Government would be seeking a phased approach to Brexit. Once the Article 50 notice is served, Article 50 provides for a two year negotiation period which can be extended if the European Council unanimously agrees to do so. While the UK Government intends to agree on the terms of the UK's future relationship with the EU within that two year period (i.e. by the end of March 2019), it is hoping for a subsequent phased implementation process across various key areas, with a view to avoiding a 'cliff-edge' effective date for Brexit.

Following Theresa May's speech, the European Council's President, Donald Tusk stated that the "*...EU stands ready to start the negotiations when the UK notifies its departure... Yesterday's speech by Prime Minister May proves that the unified position of 27 Member States on the indivisibility of the Single Market was finally understood and accepted by London. It would be good if our partners also understood that there will be no place for pick-and-choose tactics in our future negotiations.*" The Prime Minister of Malta (which holds the rotating EU presidency and is likely to be holding that role when the Article 50 notice is served) also stated that: "*We want a fair deal for the UK, but that deal needs to be inferior to membership. This should not come as a surprise.*"

CENTRAL BANK OF IRELAND

In a speech on 23 January 2017 at Brexit and Asia: Implications for Financial Services in Ireland, Gerry Cross (the Central Bank's Director of Policy and Risk) issued a reminder that financial services firms hoping to be authorised in Ireland would find the Central Bank to be "*...engaged, efficient, open and rigorous*".

He confirmed that a significant number of preliminary queries had been received from firms exploring Ireland as a location, with some of those firms now perhaps beginning to focus in greater detail on Ireland. He reiterated that if a firm is authorised by the Central Bank in Ireland, it should run its business from Ireland with its "*mind and management*" located here, albeit that it can still form part of a wider group structure.

IRISH GOVERNMENT

Minister for State at the Department of Finance Eoghan Murphy, speaking after Theresa May's '*hard Brexit*' speech, stated that "*Ireland can be a rock of certainty for those seeking to continue and expand their investment in to the single market*" and noted that IFS Ireland had increased its marketing of Ireland as an investment location as part of its Brexit preparations.

In his opening remarks to the European Financial Forum in Dublin Castle on 25 January 2017, Taoiseach Enda Kenny emphasised that Ireland will continue to be an "*enthusiastic member*" of the single market, and highlight certain aspects of Ireland's preparations for the impact of Brexit. In particular, he noted that Ireland offers a "*stable, predictable and certain business environment alongside continued access to the European market...*", with Brexit providing Ireland with opportunities to ensure that its existing offering remains competitive, and to attract new business.

FURTHER UPDATES

We have been advising, and will continue to advise, our clients in Ireland, the UK and further afield on the potential legal implications for their businesses of the UK leaving the EU.

We will issue further updates when the Article 50 Bill becomes law, when the Article 50 notice is served, when the Great Repeal Bill is presented to Parliament and as the Brexit negotiations progress.

In the meantime, if you have any questions on the implications of Brexit, please contact your usual Arthur Cox contact or any member of our Brexit Team.

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