

Client Update

UK Supreme Court: Act of Parliament Required to Trigger Brexit

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INTRODUCTION

Following the 23 June 2016 referendum, in which a majority voted in favour of the UK leaving the EU, the UK government announced its plan to notify the European Council under Article 50 of the UK's intention to withdraw without first obtaining parliamentary approval. The government considered that the Crown's Royal Prerogative gave sufficient powers to the government to invoke Article 50 and that an authorising act of Parliament was not required. Various individuals and representative groups commenced proceedings seeking judicial review of this position. On 3 November 2016, the High Court unanimously rejected the government's position.

This morning, by an 8–3 majority, the UK Supreme Court upheld the High Court's ruling, agreeing that an authorising act of Parliament is required for the UK government to give notice pursuant to Article 50 of the Treaty on European Union of the UK's intention to withdraw from the EU.¹ Although the Supreme Court's decision is of the utmost constitutional significance, the practical impact of the ruling will likely be limited. As reported, the government has already prepared authorising legislation and has publicly stated that whatever the outcome of today's ruling, its timetable for giving the Article 50 notice by 31 March 2017 remains intact.

Focus in the Brexit process will now shift to Parliament.

¹ *R (on the application of Miller & Dos Santos) v Secretary of State for Exiting the European Union; Reference by the Attorney General for Northern Ireland—In the matter of an application by Agnew and others for Judicial Review; Reference by the Court of Appeal (Northern Ireland)—In the matter of an application by Raymond McCord for Judicial Review* [2017] UKSC 5. The appeal “leap-frogged” the Court of Appeal and went straight from the High Court to the Supreme Court, a procedure available given the urgent need to obtain authoritative guidance from the Supreme Court.

PARLIAMENTARY SOVEREIGNTY TRUMPS

The Court's president, Lord Neuberger of Abbotsbury, delivering the majority's judgment, held that the change in law required to implement the referendum's outcome must be made in the only way permitted by the UK constitution, namely by primary legislation. To put it simply, notification under Article 50(2) would be unlawful without statutory authorisation. The key rationale behind the decision is that Parliamentary sovereignty—where Parliament is the supreme legal authority, which can make or unmake any law—is a fundamental principle of the UK constitution. Withdrawal would effect a fundamental change to the UK's constitutional arrangements, by cutting off EU law as a source of UK law. Such a change can only be effected by an act of Parliament.

The minority's leading dissent was delivered by Lord Reed. The minority considered that the effect given to EU law by Parliament is inherently conditional on the application of the EU treaties to the UK and therefore on the UK's membership of the EU, which is a matter falling within the UK's international relations. As the government's right to make and unmake international treaties is an accepted part of the Royal Prerogative and, therefore, a matter for government, the minority considered that there is no applicable restriction on the government exercising its prerogative powers in respect of the UK's membership by invoking Article 50.

Whilst the disagreements raised by the minority concerning the scope of the Royal Prerogative and other issues will be of significant academic interest, the government has no right to appeal the Supreme Court's decision and has already announced that it will respect the ruling.

Contrary to some media reports, the Supreme Court's decision was not concerned with wider political questions regarding the UK's relationship with the EU, but simply with the manner in which the government can begin the formal process of leaving. The judgment is not concerned with the consequences that withdrawal from the EU will have on UK domestic law. As such, the uncertainty surrounding the consequences of Brexit on the UK's legal and economic landscape remains.

IMPACT ON BREXIT TIMETABLE

The UK government had previously set a deadline of 31 March 2017 for invoking Article 50. Following this judgment, the government has emphasised that it still intends to meet this deadline, but whether it is realistic remains to be seen. A bill will need to be tabled and debated in Parliament and both the House of Commons and the House of Lords may suggest amendments and additions to

the bill which could slow down its passage. However, the Supreme Court made it clear that the form of the authorising legislation is a matter for Parliament. The government has indicated it will table a very short, narrow bill which, under the rules of Parliament, would make it much harder to amend.

Pursuant to Article 50(3), once the UK government gives notice of its intention to withdraw, the UK will cease to be a member of the EU either on (a) the date of entry into force of a withdrawal agreement, or (b) two years after the notice is given (unless the period is extended by agreement between the UK and the remaining 27 Member States). Whether the Brexit process could be stopped by the UK withdrawing its notice under Article 50 remains a matter of debate, although the government's working assumption would appear to be that notice is irrevocable. In today's ruling, the Supreme Court did not need to resolve this issue. A claim, led by English tax barrister Jolyon Maugham, reportedly is to be launched before the Irish courts later this month, in which a referral to the Court of Justice of the European Union is sought concerning this very issue. If these proceedings are launched, their outcome is likely to have a significant impact on the Brexit process and the UK's negotiations with the EU.

NO SEPARATE SAY FOR NORTHERN IRELAND, SCOTLAND AND WALES

The Supreme Court also unanimously held that the devolved legislatures in Northern Ireland, Scotland and Wales cannot block the UK government invoking Article 50. Whilst devolution legislation in the UK has given some competences back to Belfast, Edinburgh and Cardiff, they do not enjoy parallel legislative competence in relation to the issue of withdrawing from the EU.

BREXIT LIKELY TO RETURN TO THE SUPREME COURT

Another case is pending in the English High Court over whether the UK government has the power to take the UK out of the treaty establishing the European Economic Area when it leaves the EU. Certain countries are part of the European Economic Area but not the EU. The UK government asserts that the UK is only party to the EEA in its capacity as an EU member state, and once the UK leaves the EU it will automatically cease to be a member of the EEA. The claimant, a foreign policy think-tank called British Influence, argues that the June 2016 referendum asked the public a single question over whether the UK should leave the EU, and a separate notice pursuant to the EEA Agreement would be needed to withdraw from the European Single Market. According to Article 127, contracting parties (of which the UK is one) are required to give "at least twelve months" notice before leaving—which possibly suggests a separate departure process from Article 50.

Without doubt, the Supreme Court has today brought some clarity to the Brexit process, but the judiciary's role in it is unlikely to end here. Furthermore, uncertainty remains as to the broader consequences of the UK's exit from the EU. For a further discussion on what the legal consequences may be following a "hard Brexit" – as set out in the UK prime minister's speech last week – [please see here](#).

Please do not hesitate to contact us with any questions.