

Article 50 notification – Parliamentary approval is required

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Issue in focus

In a hugely important constitutional and political decision, the English High Court has today ruled against the UK Government, declaring that the Government cannot trigger the process of leaving the European Union without the consent of Parliament.

The UK Government has indicated that it intends to appeal directly to the Supreme Court, and an expedited appeal is likely to be heard in early December.

The decision is also of great practical significance as it has the potential to delay the timetable for the UK's exit from the EU. This in turn may have a material impact on the approach that commercial parties take to their Brexit contingency planning.

If the High Court's decision is upheld by the Supreme Court, Parliament may in practice have an opportunity to influence the UK Government's approach to the Brexit process, for example by requiring the Government to set out its goals in the negotiations with the other Member States before any approval is granted. Given the significant concerns arising from the on-going uncertainty as to exactly what Brexit will involve, businesses operating in the UK and the EU may welcome greater clarity as to what the UK Government will seek to achieve in the negotiations. However, one less desirable consequence is that a delay in the service of an Article 50 notice may prolong the uncertainty as to the form that the UK's post-Brexit relationship with the EU will ultimately take.

There has been an enormous amount written about the High Court's judgment today. In this bulletin, we provide a legal analysis of the decision, consider the wider commercial impact of the proceedings and discuss what might happen next.

Article 50 proceedings

Background

Article 50 of the Treaty of the European Union (**TEU**) sets out the process by which an EU Member State may withdraw from the European Union. It provides that a Member State may decide to withdraw "*in accordance with its own constitutional requirements*" and that it must then notify the European Council of its intention (an **Article 50 notice**). Unless agreed otherwise, service of an Article 50 notice triggers a two year negotiating period, at the end of which the relevant Member State leaves the EU, whether or not a withdrawal agreement is in place.

These proceedings, comprising a number of separate claims which were heard together by three senior judges over three days last month, were commenced shortly after the UK referendum on 23 June 2016.

The sole question before the Court was whether, as a matter of the constitutional law of the UK, the Crown – acting through the Government of the day – is entitled to use its prerogative powers to give notice under Article 50 for the UK to cease to be a member of the EU.

Article 50 TEU

1. Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.
2. A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.
3. The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.
4. For the purposes of paragraphs 2 and 3, the member of the European Council or of the Council representing the withdrawing Member State shall not participate in the discussions of the European Council or Council or in decisions concerning it. A qualified majority shall be defined in accordance with Article 238(3)(b) of the Treaty on the Functioning of the European Union.
5. If a State which has withdrawn from the Union asks to rejoin, its request shall be subject to the procedure referred to in Article 49.

The claimants' arguments

The Court summarised the claimants' primary submissions broadly as follows:

- a. The question in this case is to be approached on the basis that it is a fundamental principle of the UK constitution that the Crown's prerogative powers cannot be used by the executive Government to diminish or abrogate the rights under the law of the United Kingdom (whether conferred by common law or statute), unless Parliament has given

authority to the Crown (expressly in, or by necessary implication from, the terms of an Act of Parliament) to diminish or abrogate such rights.

- b. No words can be found under which Parliament has given such authority either expressly or by necessary implication in the European Communities Act 1972 (the **ECA 1972**, the Act by which EU law is made applicable or given effect in the UK) or subsequent legislation relating to the EU.
- c. The giving of an Article 50 notice would pre-empt any ability of Parliament to decide on whether statutory rights should be changed. The notice would automatically abrogate in due course certain rights conferred by the ECA 1972 and European law and would remove from Parliament the decision to maintain certain rights.
- d. Ratification by Parliament of a withdrawal treaty (if any such treaty was agreed between the UK and the EU) would not cure the pre-emption, as the effect of giving the Article 50 notice would in effect inevitably remove the real decision from Parliament.
- e. Parliament did not give authority by the 2015 Referendum Act for the Crown to give notice of withdrawal under Article 50.
- f. Alternatively, any power under the Crown's prerogative was removed by the ECA 1972 or by subsequent legislation in relation to the European Union.

The Government's arguments

The Court's summary of the Government's case was broadly as follows:

- a. Parliament could choose to leave (or not to abrogate) prerogative power in the hands of the Crown, even if its use would result in a change to common law and statutory rights.
- b. Unless express words could be found in a statute (or possibly by necessary implication), Parliament could not be taken to have abrogated the Crown's prerogative powers in relation to the EU Treaties. Therefore an Article 50 notice could be given with the consequences that followed in the form of either a withdrawal treaty or automatic departure.
- c. No words could be found in the ECA 1972 or any other statute which abrogated that power expressly or by necessary implication.

- d. In particular, it is notable that statutes that had been enacted since Article 50 came into existence did not restrict the Crown’s prerogative power to give an Article 50 notice. On the contrary, the statutes in question implicitly recognised that such prerogative power existed as no restriction was placed on the power of the Crown to invoke that right exercisable under the TEU, as amended by the Lisbon Treaty.
- e. Nor were there any express words in any UK legislation that abrogated the Crown’s prerogative power to withdraw from the Treaties as distinct from amending them.
- f. As it is likely that any withdrawal treaty would contain a provision requiring ratification, the withdrawal treaty would in any event have to be approved by Parliament by way of the negative resolution procedure in the Constitutional Reform and Governance Act 2010 before that occurred; if it contained provisions requiring application in domestic law, primary legislation would also need to be introduced to allow that. This would be consistent with the proper sequencing of the respective functions of the Crown and of Parliament, as had invariably happened in the past: once an EU treaty had been made, domestic law was brought into line by Parliament through legislation and then the treaty was ratified.
- g. Although the 2015 Referendum Act does not itself confer statutory power on the Secretary of State to give the Article 50 notice, the implication from the fact that the 2015 Referendum Act is silent on the issue of whether legislation is required before notice could be given supports the contention that Parliament accepted the continued existence of the prerogative powers of the Crown to give such notice; it certainly contains no restriction on such prerogative power as may still exist.

The judgment

The High Court held that statutory interpretation, particularly of the ECA 1972 (which is a constitutional statute), must proceed having regard to the relevant background constitutional principles. These principles inform the inferences to be drawn as to what Parliament intended by legislating in the terms it did.

Where background constitutional principles are strong, there is a presumption that Parliament intended to

legislate in conformity with them and not to undermine them. The Court found that the Government’s submissions “*gave no value to the usual constitutional principle that, unless Parliament legislates to the contrary, the Crown should not have power to vary the law of the land by the exercise of its prerogative powers*”.

The Court further stated that this view is reinforced by reference to two constitutional principles. The first is that the Crown cannot use its prerogative powers to alter domestic law which, it said, was “*the product of an especially strong constitutional tradition*” in the UK, which evolved through the long struggle which “*had its roots well before the war between the Crown and Parliament in the seventeenth century but was decisively confirmed in the settlement arrived at with the Glorious Revolution in 1688 and has been recognised ever since.*” The second was the principle that the Crown’s prerogative power operates only on the international plane. The Court said that the justification for non-interference with the Crown’s prerogative in international affairs is substantially undermined in a case such as this, where the Government was asserting that it could use the prerogative to bring about major changes in domestic law.

The Court concluded that: “*Interpreting the ECA 1972 in the light of the constitutional background referred to above, we consider that it is clear that Parliament intended to legislate by that Act so as to introduce EU law into domestic law...in such a way that this could not be undone by exercise of Crown prerogative power...The Crown therefore has no prerogative power to effect a withdrawal from the relevant Treaties by giving notice under Article 50 of the TEU.*”

Revocability of an Article 50 notice

Both the claimants and the Government had asserted during the course of the proceedings that an Article 50 notice, once served, is irrevocable. The question of whether an Article 50 notice is revocable is a question of European law and therefore one that is potentially referable to the Court of Justice of the EU (CJEU). On the first day of the hearing, the Court appeared to recognise that the assertion that an Article 50 notification is irrevocable was “*central*” to the claimants’ case. The Court did not appear minded to accept the invitation to *assume* that such a notice is a “*one-way trigger*” that “*can’t be stopped*” and indicated

that it would be “*absolutely essential*” for it to decide the matter rather than to proceed on an assumption.

The Court did not, however, grapple with this issue in its judgment, noting simply that “*Important matters in respect of Article 50 were common ground between the parties: (1) a notice under Article 50(2) cannot be withdrawn, once it is given; and (2) Article 50 does not allow for a conditional notice to be given...*”. The Court did not therefore feel compelled to refer the matter to the CJEU.

What does this mean for the Government?

The Government has today indicated that it intends to appeal the UK Supreme Court and counsel for the Government made an application after the judgment was handed down for a certificate that would permit the Government to ‘leapfrog’ the Court of Appeal and appeal directly to the Supreme Court. The application for a certificate was granted by the Court.

To pursue an appeal, the Government must now make an application for permission to appeal to the Supreme Court. Given the immense importance of this case, however, it is almost inconceivable that permission will be refused.

As noted above, the substantive appeal is likely to be heard next month. It is likely that the Supreme Court’s judgment will be handed down in January at the latest.

Why does all of this matter?

If the High Court’s decision is upheld on appeal, the process of obtaining Parliamentary approval via an Act will necessarily involve readings, debates and votes in both Houses of Parliament (the House of Commons and the House of Lords). Whilst in theory this process can be expedited if there is sufficient political will to do so, such that it is achievable by the end of March 2017, in practice it may well be difficult to legislate within that timescale. As such, it is by no means clear that it will be completed in sufficient time to allow the Government to

serve the Article 50 notice by the end of March. It is likely to be particularly difficult to pass legislation quickly if MPs or members of the House of Lords seek to require assurances as to the Government’s proposed stance in negotiations with the other Member States before any approval is given.

Another scenario that may have an impact on timing is that the Supreme Court may decide that it needs to refer the question of whether the Article 50 notice is revocable to the CJEU, notwithstanding the fact that this was not in issue between the parties before the High Court. This would almost certainly delay the date of service of an Article 50 notice beyond March 2017.

There is also another possible – though perhaps unlikely – consequence of any decision by the Supreme Court to uphold the High Court’s decision (whether before or after a reference to the CJEU). Parliament, with a majority (on paper) of pro-remain MPs, a slim Government majority and an independent minded House of Lords may conceivably decide not to approve service of the Article 50 notice at all. Whether this is a likely scenario is largely a political assessment, but is another uncertain factor in this analysis.

If, on the other hand, the Supreme Court overturns the High Court’s judgment (and assuming it does so before the end of March 2017), this would allow the Government to serve the Article 50 notice in accordance with the timetable set out by the Prime Minister.

All of this is of profound significance constitutionally and politically but also practically for those doing business in the EU and the UK. The EU has indicated that it will not begin negotiations until the Article 50 notice has been served, which means that if service is delayed, it is likely to extend the period of uncertainty for commercial parties as to the form that the UK’s future trading relationship with the EU will take and, ultimately, the date of Brexit itself. On the upside, however, it will allow the UK Government, and those doing cross-border business in the UK and the EU, more time to plan for that future relationship and to execute whatever restructuring might be necessary.

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