

Brexit Alert

November 3, 2016

Brexit on Ice? Court Rules That Only UK Parliament Can Trigger Article 50

Executive Summary

Earlier today, the High Court of Justice ruled that the U.K. government does not have the constitutional capacity to trigger the U.K.'s withdrawal from the European Union without further primary legislation being passed. This decision is likely to delay, potentially significantly, the filing of the U.K.'s Article 50 notice with the European Council, further extending the uncertainty over the timing and the terms of the U.K.'s exit from the European Union ("EU").

Background

During the course of October 2016, a number of separate claims were commenced in the High Court concerning the U.K. government's constitutional capacity to give notice under Article 50 TFEU of the U.K.'s intention to withdraw from the EU. These various proceedings were joined and heard together as *Santos & Miller v. Secretary of State for Exiting the European Union*.

The primary purpose of the relevant claims was for the High Court to determine whether the U.K. government may lawfully use what are referred to as "prerogative powers" to serve a notification under Article 50 TFEU of the U.K.'s intention to withdraw from the EU. These prerogative powers are a quirk of U.K. constitutional law, which allows the government at the time (acting, effectively, on behalf of the Monarch) to conclude certain international treaties and agreements, without a specific enabling Act of Parliament having been passed authorizing the relevant agreement or treaty. In planning to file the U.K.'s notice under Article 50 in March 2017, the U.K. government and Prime Minister had been relying on these prerogative powers. This situation arose by virtue of the fact that the legislation that enabled the June referendum did not provide any statutory framework for filing a notice under Article 50. This is why many commentators refer to the referendum as having been "advisory" in nature.

Key Points of the Judgment

The judgment handed down today is emphatic in upholding the principle of Parliamentary Sovereignty. The submissions made by the government are analysed and dismissed in some detail throughout the judgment. In particular:

- Parliament explicitly has the power to repeal the European Communities Act of 1972, which is the key U.K. statute giving EU law effect in the U.K.
- It is a fundamental principle of U.K. constitutional law that the prerogative powers referred to above do not give the government the power to "displace" primary legislation or enable the government to vary the "law of the land" (the "Principle of Parliamentary Sovereignty").

- The government's prerogative powers with respect to the conclusion of treaties and agreements cannot properly be regarded as applicable in circumstances where those treaties and agreements have effect in U.K. domestic law.

Likely Short-term Impact of the Judgment

The government has already indicated that it will appeal the decision and arrangements are in place for this appeal to be dealt with on an expedited basis by the U.K.'s Supreme Court during December.

Nonetheless, there is a significant likelihood that the judgment will prevent the U.K. from filing its notice under Article 50 in March 2017, as the government had indicated that it planned to do. This delay is likely to create further uncertainty as to the likely course of any Brexit and the terms that would be applicable to the U.K.'s post-Brexit relationship with the EU.

There are also many compelling views already emerging that the appeal is unlikely to succeed. Not only is the judgment handed down by the High Court robust and well reasoned, but it has been delivered by three of the U.K.'s most senior judges (the Lord Chief Justice, the Master of the Rolls and Lord Justice Sales). This diminishes the likelihood of the Supreme Court Justices ruling that the judgment at first instance is flawed in law.

If the appeal to the Supreme Court does not succeed, the government will need to seek Parliamentary authority to deliver the Article 50 notice. Such authority may come in the form of a specific Parliamentary motion or a programme of primary legislation "enabling" Brexit. In either case, it appears likely that either or both of the House of Commons and the House of Lords will require some degree of clarity as to the terms of exit which the government will seek to negotiate with the EU, prior to giving the authorisation. It is not certain that such approval will be forthcoming (particularly in the House of Lords). Prioritisation of the necessary programme has the capacity to interfere significantly with the U.K. government's ability to deliver its domestic legislative agenda, with wide-ranging impacts across a variety of sectors likely.

Alternatively, the government may legislate for either a second (binding referendum) or call an early general election (although this would require the government to call for a vote of no confidence in itself pursuant to the Fixed Term Parliament Act of 2015).

A Window on the Future?

There are several areas of the judgment that are also potentially significant for the U.K. beyond the question of the government's capacity to give notice under Article 50. A further point, in particular, bears highlighting.

It was taken as common ground between the parties that a notice given under Article 50 is irrevocable once given. This question was not therefore considered in substance by the High Court. It continues to be the case that many commentators (including the original draftsman of Article 50 itself) believe that notice could be revoked by the UK once given. The lack of judicial consideration of this question may provide a basis for subsequent further judicial challenges to the Brexit process.

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