

UK Gov't Derailed But Banks Must Ready For Worst

By Mark Taylor

Law360, London (November 3, 2016, 8:18 PM GMT) -- British banks and investment firms shouldn't get carried away with Thursday's High Court ruling that Brexit will require parliamentary approval, and instead should continue to prepare for the worst, lawyers say.

The government's loss in the case challenging its authority to trigger Brexit without parliamentary approval opens a wider window for lobbying for European Union single-market access, lawyers told Law360, but does little to calm fears that the "worst case scenario" outcome has merely been postponed.

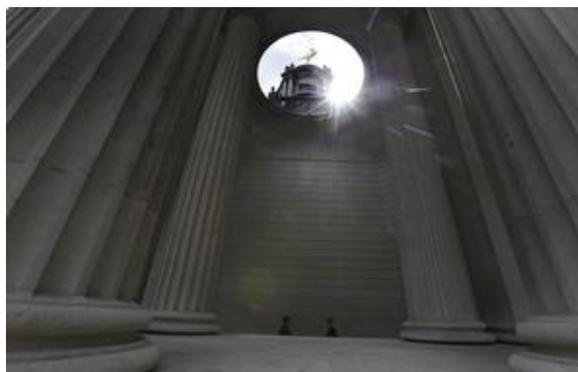
Banks, sweating the details of the U.K.'s plan regarding the retention of passporting rights that allow global financials based in the City to serve the EU single market, may simply have longer to wait for the bad news, lawyers say.

"Accepting that premise means this decision, whilst very interesting, doesn't change from a pragmatic perspective the way financial services ought to be thinking," said James Greig, financial services partner at White & Case LLP. "On the basis they may be hoping for the best in the sense of hoping for 'business as usual after Brexit' but be planning for something worse."

The High Court ruling is likely to cause Prime Minister Theresa May's planned March 2017 exit timetable to crumble, says David Mundy, parliamentary agent and regulatory partner at Bircham Dyson Bell, allowing frustrated firms another chance to get their message across.

"That is in my view where the real opportunity for lobbying allows," he said. "If bankers and lawyers are expressing frustration, the very fact of this case being successful and the likelihood of parliamentary engagement, possibly very long, increases the opportunity for proper consultation."

He says the government had "an almighty task" ahead of it to conclude the Brexit negotiations in the two-year period which follows invoking of Article 50.



The U.K. government may have lost at the High Court this week, but lawyers warn that banks should still prepare for the worst of possible Brexit outcomes. (AP)

"We have to face the fact we are on a conveyor belt that will only last for two years, and an awful lot of discussion and negotiation must go on in that time to work out what we take away from the union at the end of it, for example, financial regulation, public procurement, etc.," he said.

The City, if it feels ignored, will now have room to maneuver and realign lobbying targets, says Charlotte Hill, financial services and regulation partner at Covington & Burling LLP.

"This will cause changes in all sorts of ways," she said. "Hopefully, this will give another opportunity for the industry associations and larger stakeholders in the market to make sure the concerns about single-market access and passporting and other associated issues are listened to."

Although a parliamentary vote is likely to be triggered, there is every likelihood MPs will vote the same way as the British people did, says former attorney general Lord Peter Goldsmith QC, London co-managing partner at Debevoise & Plimpton LLP.

"This latest twist in what has been an all-consuming political story since the summer will certainly cause a pause in the government's plans," he said. "What is for certain is that today's ruling has added another layer of complexity to an already complicated picture."

While it works through next steps, Akin Gump London partner Davina Garrod says she believes the government should move to assure an already unsettled financial sector facing thousands of job losses it has their interests at heart.

"The government will be working hard to maximize the chances of a parliamentary Brexit vote over the next few months," said Garrod, a trade and financial regulatory issues lawyer. "It is imperative for financial markets and industry alike that the U.K.'s fate is known as soon as possible."

Calls for clarity also came from chairman of the influential Treasury Select Committee Andrew Tyrie, who has been pushing for retention of passporting and has called several government figures to account on the matter.

"The U.K. is leaving; a public debate is needed about where we want to arrive. Before taking off, it is always a good idea for the pilot to discuss with the passengers and crew where they might want to land," Tyrie said. "It is the uncertainty about the terms of that relationship, far more than the additional time required to clarify the negotiating position, that carries the more significant cost."

The U.K. exports around £22 billion (\$27.4 billion) of financial and insurance services to the EU, and City lobby groups estimate this could plummet by half, up to £11 billion, without the right to passport.

According to numbers released by the Financial Conduct Authority, 5,500 U.K.-registered financial services firms rely on "passports" to access Europe's single market, a right which could be lost once Britain leaves the bloc.

A further 8,008 firms registered in other European Union or European Economic Area countries hold passports to do business in the U.K.

Should the U.K. negotiate an exit deal which does not retain the current arrangement of access to the EU's single market for London-based financial services with passporting accreditation, it could cripple the City's standing as a global finance capital.

"It is worth mobilizing the troops to ensure the lobbying message is heard through whatever channels a firm has open to it, however, it may be that until the final decision has been made the people who need to hear and be responsive may be preoccupied," Greig added.

He said for those in the financial services sector craving long-term stability, one action is to push for a more negotiated settlement between the U.K. and the EU, softening the rhetoric inclined toward the hard exit thinking.

"In terms of shaping the lobbying and getting a more sophisticated discussion about the realities of assuring continued market access for financial services, there has to be considerations of timing," he said.

A panel of three judges, led by Lord Chief Justice John Thomas, called the government's arguments in favor of prerogative executive powers related to the 1972 Act to join the EU "flawed" at a basic level in their written decision.

The government immediately launched an appeal directly to the Supreme Court, bypassing the Court of Appeal, a process known as "leapfrogging."

The ruling if affirmed will "open a 'Pandora's box' of political frustrations" with significant consequences, says Robert Bell, head of EU and competition law at Bryan Cave LLP.

He says MPs may resist government calls for a quick emergency vote or to guillotine parliamentary debate on an issue of such fundamental importance, further slowing the process.

"The government will likely be forced to reveal more of their negotiating stance to win the legislature's blessing," he said. "In particular, assurances are likely to be sought on whether the U.K. will seek, or be able to retain, EU single-market access without keeping free movement rights."

--Additional reporting by Alex Davis and William Shaw. Editing by Rebecca Flanagan and Catherine Sum.