

UK Supreme Court Rules That UK Government Can Only Trigger Process of Withdrawal from EU with Parliamentary Legislation

January 24, 2017

Firm General and Europe

Today, the UK Supreme Court held (by a majority of 8:3—an unprecedented 11 Justices heard the case) that the UK Government does not have the power to trigger the process of withdrawal from the EU (“Brexit”) without first obtaining Parliamentary approval in the form of an Act of Parliament. The decision is largely aligned with the [Divisional Court’s ruling](#) on November 3, 2016.

The UK Supreme Court also held (unanimously) that the UK Government is under no legal obligation to consult or obtain the approval from the devolved legislatures in Northern Ireland, Scotland, or Wales.

Triggering the process of withdrawal must be authorized by legislation (specifically, an Act of Parliament) that will be debated and voted on by both Houses of Parliament—the House of Commons and the House of Lords.

Importantly, the case and judgment do not concern the merits or otherwise of withdrawal from the EU—indeed it was accepted by all parties that the political decision for Brexit had been made by the referendum held on June 23, 2016 (where the UK voted by 52 percent to 48 percent to leave the EU).

Background

To leave the EU, the UK must issue a formal notice in accordance with Article 50 of the Treaty on European Union. Article 50 has never been used before.

Article 50 states that the decision to leave the EU has to be made by an EU Member State “in accordance with its own constitutional requirements.” In the aftermath of the Brexit vote, the UK Government claimed that it could trigger Article 50 at a time of its choosing and on its own authority without obtaining Parliamentary approval. However, a number of individuals challenged this, arguing that only the UK Parliament could authorize the use of Article 50.

UK Supreme Court Decision

The arguments concerned precisely what the UK’s “constitutional requirements” are with regards to withdrawal from the EU, an issue complicated by the fact that the UK has no codified written constitution.

Reflecting the fundamental importance of the issues it was being asked to determine, for the first time, the Supreme Court sat with all 11 Justices on the bench. It decided today that the UK Government could not decide, on its own by the exercise of prerogative powers, to commence the process for exiting the EU. Instead, the UK Parliament (the House of

Commons and the House of Lords) needs to authorize the use of Article 50 by passing legislation in the form of an Act of Parliament.

The Supreme Court reiterated the traditional position that international treaties are made by the exercise of prerogative powers and, hence, fall within the powers of the UK Government. However, it decided that the UK's European Communities Act 1972, by which the UK gave effect to its membership of the EU, was inconsistent with the future exercise of prerogative power by the UK Government to withdraw from the EU Treaties.

Devolved Administrations

The UK Supreme Court held that relations with the EU and other foreign affairs matters are reserved to the UK Government and UK Parliament, not to the devolved institutions in Northern Ireland, Scotland, or Wales, respectively. Accordingly, the devolved legislatures do not have a veto or indeed any legal role in relation to the UK's decision to trigger Article 50. Existing constitutional conventions whereby the UK Parliament does consult with the devolved legislatures are political rather than legal constructs: "the policing of its scope and the manner of its operation does not lie within the constitutional remit of the judiciary, which is to protect the rule of law."

What Next?

The Supreme Court emphasized that prior authorization to trigger Article 50 from Parliament must be in the form of an Act of Parliament, rather than a Parliamentary motion or amendment to existing legislation (a resolution, of the kind passed by the House of Commons on December 7, 2016, committing to triggering Article 50 by the end of March 2017¹ is not sufficient). The UK Government confirmed that draft legislation will be introduced "within days" and that the draft will be "the most straightforward [draft Act of Parliament] possible" empowering the UK Government to trigger Article 50.

Today's decision adds to the uncertainty as to whether the UK will meet the Prime Minister's aim to trigger Article 50 by the end of March², but the UK Government remains committed to that timescale. It is possible that Parliament (in either the House of Commons or House of Lords) could technically amend or vote against the adoption of any legislation triggering Article 50. It is unlikely that the draft legislation will be blocked outright but a number of MPs have indicated that they will be introducing amendments to the draft legislation which may delay the passage of the legislation through Parliament.

Triggering Article 50 begins a two-year period (or longer if all of the other EU Member States agree) for the UK to negotiate the arrangements for its withdrawal, taking into account the framework of its future relationship with the EU. Assuming that Article 50 is, indeed, triggered by March 2017, this puts the UK on course for Brexit by the second quarter of 2019, before the next elections to the European Parliament. Political sentiment, albeit not unanimous, in the UK and in the EU institutions is that achieving Brexit and a future UK-EU

¹ See <https://www.parliament.uk/business/news/2016/december/mps-debate-the-governments-plan-for-brexit/>.

² See <http://www.bbc.com/news/uk-politics-37532364>.

deal by summer 2019 may be ambitious, and a transitional period will be needed as a bridge between the UK's withdrawal (i.e., at the end of the two years) and the entry into force of a new agreement establishing the longer term relationship between the UK and the EU.

UK Government Brexit “Plan”

Today's Supreme Court ruling comes one week after the Prime Minister's speech, delivered on January 17, 2016, unveiling the UK Government's initial Brexit plan.

- **UK Leaving the Single Market.** The Prime Minister confirmed that the UK will pursue a future trading relationship with the EU outside of the EU Single Market—the Prime Minister and UK Government have rejected pursuing a trade relationship with the EU along the lines of the “Norway model” under the European Economic Agreement (EEA).
- **UK-EU Free Trade Agreement.** Instead of Single Market membership, the UK will pursue a “bold and ambitious free trade agreement” that allows for the “freest possible trade in goods and services between Britain and the EU's Member States.” This arrangement will ensure that the UK has the “greatest possible access to [the Single Market].” The Prime Minister indicated that existing arrangements (e.g., on financial services and the manufacturing of cars) in the Single Market could be cherry-picked and developed in a future UK-EU arrangement, though there have been several indications from the EU that cherry-picking will not be agreed.
- **Bespoke UK-EU Customs Union.** The Prime Minister indicated her preference for “tariff-free trade with Europe and cross-border trade there to be as frictionless as possible” but with the UK not being part of the Common Commercial Policy or the Common External Tariff. Instead, the UK will pursue a new and bespoke customs agreement with the EU—although that agreement could maintain “some elements” of the existing EU customs rules.
- **All EU Law to Apply in the UK on Brexit.** In May 2017, the UK Government will introduce draft legislation in the form of the “Great Repeal Bill” that will enshrine into UK law all EU law on the day of Brexit. Thereafter, the UK Government will review those laws derived from EU law and seek to either amend, repeal, or maintain those laws.

The Prime Minister confirmed that the UK Parliament will have a vote on the final negotiated deal for the UK, though that may prove to be a vote only between the negotiated deal and no deal at all. In the latter case, the UK would fall back on WTO rules to govern its relations with the EU.

Covington has formed a [Brexit Task Force](#) staffed by senior lawyers and advisors linking its offices in London, Brussels, and Washington to monitor events and to keep clients apprised of legal, regulatory, and policy developments.

If you have any questions concerning the material discussed in this client alert, please contact the following lawyers:

Kevin Coates
Elaine Whiteford
Joseph Jones

+32 2 549 52 32
+44 20 7067 2390
+44 20 7067 2193

kcoates@cov.com
ewhiteford@cov.com
jjones@cov.com

This information is not intended as legal advice. Readers should seek specific legal advice before acting with regard to the subjects mentioned herein.

Covington & Burling LLP, an international law firm, provides corporate, litigation and regulatory expertise to enable clients to achieve their goals. This communication is intended to bring relevant developments to our clients and other interested colleagues. Please send an email to unsubscribe@cov.com if you do not wish to receive future emails or electronic alerts.