

Article 50 litigation – decision of the Supreme Court

24 January 2017

Parliamentary approval required

The UK Supreme Court has today confirmed that the UK Government cannot trigger the formal process of leaving the European Union without an Act of Parliament.

The arguments before the Supreme Court turned on the correct application of fundamental constitutional principles relating to the scope and nature of prerogative power exercisable by the UK Government and the role of the UK's devolved legislatures in the decision to serve an Article 50 notice.

The case was heard by all 11 members of the Supreme Court (a constitutional first, at least in modern times) over four days in December 2016. The Supreme Court dismissed the Government's appeal and upheld the decision of the English High Court (the **Divisional Court**) on the role of Parliament in the process by an eight to three majority. The Court also determined that the devolved legislatures have no legal veto over any decision to give notice.

Immediately after the judgment was handed down, the Government confirmed that it will comply with the decision of the Court. David Davis MP, the Secretary of State for Exiting the EU, confirmed in the House of Commons at lunchtime that in the next few days the Government would propose the "*most straightforward Bill possible*" to allow the triggering of Article 50.

The Supreme Court's judgment was widely anticipated and provides helpful clarity on the constitutional requirements for the UK to begin the process of leaving the EU, although some important questions remain unanswered. In this article, we summarise the decision and the reaction to it so far and consider the effect it may have on commercial parties as they begin to refine and implement their Brexit contingency plans.

For further detail on this hearing and the background to it, you may also wish to read:

- Our analysis of the Divisional Court's judgment, available [here](#).
- Our preview of the Supreme Court hearing, available [here](#) and our summaries of the oral arguments put forward by parties and the interveners, available [here](#); and
- The press release and full transcript of the Supreme Court's judgment, available on the Supreme Court's website, [here](#).

The judgment

The majority view

Lord Neuberger (with whom Lady Hale and Lords Mance, Kerr, Clarke, Wilson, Sumption and Hodge agreed), gave the leading judgment. He began by summarising the history of the relationship between the EU and the UK, outlining the parties' arguments and describing the background to the UK's constitution,

which he described as having developed over time in "a pragmatic as much as in a principled way, through a combination of statutes, events, conventions, academic writings and judicial decisions". Among other things, Lord Neuberger discussed the role of the King in meetings of his Council in the 11th Century, the Case of Proclamations (1610) and the Bill of Rights in 1689. He noted that Parliamentary sovereignty is a fundamental principle and that the prerogative encompasses the *residue* of powers which remain vested in the Crown, and which are now exercisable by the Executive, provided that the exercise is consistent with Parliamentary legislation. He also noted that, consistently with Parliamentary sovereignty, a prerogative power, however well established, may be curtailed or abrogated by statute and that it is a fundamental principle of the UK constitution that, unless primary legislation permits it, the prerogative does not enable ministers to change statute law or common law.

Lord Neuberger then commented on the status and effect of the European Communities Act 1972 (**ECA 1972**). He said that the ECA 1972 provided for a new constitutional process for making law in the UK. It authorised a dynamic process by which, without further primary legislation, EU law becomes a source of UK law and takes precedence over domestic sources of UK law, including statutes. Thus the ECA 1972 is "*the conduit pipe*" by which EU law is introduced into domestic law, rather than the originating source of that law. Accordingly it is a statute with a constitutional character.

Turning to the nub of the issue before the Court, it was the majority's view that Parliament endorsed and gave effect to the UK's membership of the EU in the ECA 1972 in a way which was inconsistent with the future exercise by ministers of any prerogative power to withdraw from the EU Treaties. Specifically, the majority considered that:

- "...the fact that EU law will no longer be part of UK domestic law if the United Kingdom withdraws from the EU Treaties does not mean that Parliament contemplated or intended that ministers could cause the United Kingdom to withdraw from the EU Treaties without prior Parliamentary approval. There is a vital difference between changes in domestic law resulting from variations in the content of EU law arising from new EU legislation, and changes in domestic law resulting from withdrawal by the United Kingdom from the

European Union. The former involves changes in EU law, which are then brought into domestic law through section 2 of the 1972 Act. The latter involves a unilateral action by the relevant constitutional bodies which effects a fundamental change in the constitutional arrangements of the United Kingdom."

- Although the ECA 1972 provided for the application of EU law as it stands from time to time in domestic law, it did not follow from this that prerogative powers could be used to withdraw from the Treaties and so "*cut off the source of EU law entirely.*"
- "*A complete withdrawal represents a change which is different not just in degree but in kind from the abrogation of particular rights, duties or rules derived from EU law. It will constitute as significant a constitutional change as that which occurred when EU law was first incorporated in domestic law by the 1972 Act. And, if Notice is given, this change will occur irrespective of whether Parliament repeals the 1972 Act. It would be inconsistent with long-standing and fundamental principle for such a far-reaching change to the UK constitutional arrangements to be brought about by ministerial decision or ministerial action alone. All the more so when the source in question was brought into existence by Parliament through primary legislation, which gave that source an overriding supremacy in the hierarchy of domestic law sources."*

The majority therefore found that such a major change to UK constitutional arrangements could only be effected by Parliamentary legislation and that this conclusion appeared to follow "*from the ordinary application of basic concepts of constitutional law to the present issue.*"

They went on to consider and reject the more specific and subsidiary arguments put forward by the Government in relation to the ECA 1972, and to reject arguments based on the effect of legislation and events since 1972.

The majority then turned to the question of the form that the legislation approving the service of an Article 50 notice should take. They held that this was entirely a matter for Parliament, noting that "*the fact that Parliament may decide to content itself with a very brief*

statute is nothing to the point. There is no equivalence between the constitutional importance of a statute, or any other document, and its length or complexity."

The dissenters

Each of the dissenting Justices (Lords Reed, Carnwath and Hughes) delivered separate judgments, but came to the same conclusion in relation to scope of the ECA 1972. In their view, the effect of Parliament's inclusion of EU law into domestic law under the ECA 1972 is inherently conditional on the UK remaining a member of the EU, and therefore does not affect the exercise of prerogative powers in respect of the UK's membership. Accordingly, they would have allowed the Government's appeal.

No "legal veto" for devolved legislatures

The Supreme Court confirmed (unanimously) that it was "*not a legal requirement*" to seek or obtain the consent of the devolved legislatures in Scotland, Wales or Northern Ireland. The Court concluded that the "Sewel Convention" under which the Westminster Parliament will "*not normally legislate with regard to devolved matters*" without the consent of the relevant devolved legislature was merely a "*political restriction on the UK Parliament*", notwithstanding that it now, at least as far as Scotland is concerned, appears in the Scotland Act.

Rejecting arguments from the Scottish Government and the Northern Irish claimants, the Justices said that they are "*neither the parents nor the guardians of political conventions; they are merely observers*". While they could recognise the operation of the convention, they "*cannot give legal rulings on its operation or scope*" because it "*does not lie within the constitutional remit of the judiciary*".

Implications for commercial parties

Political dimension and timing

As indicated in our bulletin on the Divisional Court's judgment, the immediate practical significance of this decision for commercial parties lies in its potential to delay the commencement of the Brexit process.

The Prime Minister has repeatedly indicated that the Government intends to serve an Article 50 notice by the end of March this year. The House of Commons itself

also passed a resolution on 7 December 2016, which, according to the Court, resolved to recognise that the House should respect the wishes of the UK as expressed in the referendum and to call on the Government to invoke Article 50 by 31 March. This morning's decision makes it clear that, before that can happen, the Government will have to complete the process of obtaining Parliamentary approval via a formal Act of Parliament.

The passage of an Act of Parliament requires multiple readings, debates and votes in both Houses of Parliament. As previously discussed, this is achievable by the end of March, provided there is sufficient Parliamentary support. In Parliament this afternoon David Davis MP announced that the Government would "*within days*" introduce the "*most straightforward Bill possible*" to comply with the Supreme Court's ruling and authorise the service of an Article 50 notice. He also reiterated that, irrespective of the need for legislation, it was still the Government's intention to stick to its proposed timetable. It is clear, therefore, that Government intends to move quickly.

Political commentators have reported that it is very unlikely that the number of Members of Parliament voting against the Bill will be large enough to prevent the legislation being passed and, if the December resolution by the House of Commons is anything to go by, there does seem to be political will to trigger the process sooner rather than later.

However, Sir Keir Starmer QC MP (the Labour Party's Shadow Brexit Secretary) today stated that, while his party will not seek to frustrate the process of leaving the EU, it will seek to propose amendments to the Article 50 Bill with a view to ensuring proper scrutiny of the Government's plans. Other opposition parties have also indicated they intend to propose amendments, including the Scottish National Party, which announced that it expects to propose fifty "*substantive*" amendments. If there are lengthy debates on proposed amendments to the legislation, this could still potentially derail the Government's timetable.

In any case, the increased scrutiny of the Government's plans that will inevitably occur in the Parliamentary debates may give observers further clues as to the UK's negotiating position and objectives and hence the potential shape of the final deal.

Indeed, in commenting on potential amendments to the Bill today, Sir Keir Starmer QC MP called for the

Government to bring forward a White Paper (ie a detailed Government report) on its strategy for Brexit. He also suggested an amendment aimed at ensuring a procedure for reporting back to Parliament on negotiations and one requiring a "meaningful vote" on the final Brexit settlement agreed. However, if an Article 50 notice is irrevocable, it is difficult to see what sort of "meaningful vote" could be held. If Parliament (or the electorate) was given a binding vote on the final exit deal and ultimately rejected it, the current consensus appears to be that the UK would leave the EU with no deal at all.

As we have previously indicated, any delay in triggering the Brexit process may extend the period of uncertainty for commercial parties as to the form that Brexit will take. However, a delay may also provide parties with some breathing space to allow them to reassess their contingency plans in the light of the 12 negotiating objectives articulated by the Prime Minister last week and in the light of any further clarity obtained during the passage of the Bill and to adjust those plans where necessary.

Position of Scotland and Northern Ireland

The UK Government has welcomed the confirmation by the Supreme Court that it is not legally required to seek the consent of the devolved legislatures in Scotland, Wales and Northern Ireland and the clarity that there can be no veto from the devolved administrations. However David Davis MP today reiterated the Government's intention to "work closely with" the devolved administrations.

It is also worth noting that the Supreme Court itself indicated that it did not "*underestimate the importance of constitutional conventions*" – a statement that could well feature in upcoming Parliamentary debates. The Scottish Government has said that the Scottish Parliament will still vote on Article 50 even though this will have no legal effect.

What might the Article 50 notification look like?

There is no guidance in Article 50 itself as to the form that any Article 50 notice will take. It seems likely that it will simply take the form of a letter to the European Council or potentially a formal statement in a Council meeting. It is unlikely that the Government will seek to include any conditions in an Article 50 notice (for

example, a statement that the notice is intended to be revocable), not least because it is unclear whether a conditional notice would be permissible as a matter of EU law. It was certainly common ground in these proceedings that an Article 50 notice cannot be given in qualified or conditional terms, and the Court was willing to proceed on this basis, although it noted that it was not expressing a view of its own on the point.

Wider constitutional implications

While most of the attention on today's judgment will focus on the Article 50 negotiation itself, this ruling has wider significance. It is an important precedent on the limits on the Government's power to act without legislative authority, particularly when granting or curtailing the rights of individuals.

Is there scope for further appeals?

The Supreme Court noted in its judgment that it was common ground that, once given, an Article 50 notice cannot be withdrawn. The Government had asserted that, even if this common ground was mistaken, it would make no difference to the outcome of these proceedings. In light of the Government's position, the Court was content to proceed on the basis that the agreed position was correct, without expressing any view on the point. Thus the Court did not refer the question (which is one of EU law) to the Court of Justice of the EU, and this decision represents the end of the line in these proceedings (although not necessarily the end of all litigation on the Article 50 process, as our post-script below indicates).

A post script on other Brexit litigation

Article 127 claim

We understand that an application for judicial review has been made to the English courts which, if it proceeds, will involve consideration of whether the UK must take specific steps to withdraw from the treaty establishing the European Economic Area (the **EEA Agreement**) in addition to serving notice under Article 50 to withdraw from the EU, or whether withdrawal from the EU will result in the UK's automatic withdrawal from the EEA. We understand the proceedings will also consider whether Parliamentary approval would be required for such a step. As continued membership of the EEA would arguably mean continued membership of the Single

Market, this is in theory an important question, in particular given the Prime Minister's confirmation in her recent speech that the Government does not intend to seek to negotiate continued UK participation in the Single Market.

It is unclear at this stage whether, in light of today's decision, the Government will seek Parliamentary approval for a withdrawal from the EEA at the same time as seeking approval in relation to its withdrawal from the EU in order to circumvent the legal issues raised in the Article 127 proceedings. However, if it does it may face opposition from MPs taking the position that, although the referendum may have

provided a mandate for withdrawal from the EU, it was completely silent on whether the UK should also leave the EEA.

Irish claim

We understand that separate proceedings may also be commenced shortly before the Irish courts which will consider the issue that the Supreme Court did not have to decide: whether an Article 50 notice can be revoked once served.

If this question were to go before the Court of Justice of the EU it could substantially change the dynamics of the UK's exit negotiations.

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