

November 3, 2016

High Court Rules U.K. Government Cannot Trigger Brexit Without Parliamentary Authorization

The U.K. High Court on November 3 held that the U.K. Secretary of State does not have the power under the Crown's prerogative to give notice pursuant to Article 50 of the Treaty on the European Union for the United Kingdom to withdraw from the European Union. According to the Court's ruling, to give such notice and thus commence the process of withdrawal from the European Union, or "Brexit," the U.K. Government must first obtain the authorization of the U.K. Parliament.

Prime Minister Theresa May had previously announced her intention to trigger the Brexit process by March 2017. The High Court's decision may make it difficult for her to achieve this timetable.

The U.K. Government has announced its intention to appeal the decision. Because of the significance and urgency of the matter, the appeal will "leapfrog" the Court of Appeal and be heard – reportedly in early December – by the U.K. Supreme Court. It is not yet clear when the Supreme Court might render its decision. The U.K. Government has found itself in the unenviable position of championing the authority of the Prime Minister to act without the approval of Parliament following the outcome of a referendum that, for many, was a vote in favor of reasserting control by repatriating legislative powers from Brussels to the United Kingdom (and hence Parliament).

Over the course of the past few months since she became Prime Minister, Theresa May has taken the position that she intends to give notice under Article 50 without parliamentary authorization. The requirement to obtain parliamentary approval is politically challenging. Before the referendum, 479 members of the House of Commons, including 185 members of the Conservative Party, had expressed their support for remaining within the European Union, while only 138 had supported Brexit. To obtain parliamentary support for giving the notice, Theresa May will need to convince a significant percentage of those who supported the "Remain" campaign to switch sides in deference to the outcome of the referendum, and also to persuade the House of Lords (which may prove an even trickier task).

The High Court's ruling acknowledged as settled that the conduct of international relations and the making and unmaking of treaties on behalf of the United Kingdom are regarded as matters for the Crown – or in practice the executive government of the day – in the exercise of the Crown's prerogative powers. Nevertheless, in deference to another bedrock principle of U.K. constitutional law – the supremacy of Parliament – the High Court concluded that Parliament had intended E.U. rights to have effect in domestic law and that this effect should not be capable of being undone or overridden by action taken by the executive in exercise of the so-called "royal prerogative." Noting the profound effects that the

European Communities Act 1972, which brought the United Kingdom into the European Union, had on domestic law, and the similarly profound and far-reaching effects that Brexit would have on citizens' rights under domestic law, the High Court further ruled that the executive could not (without parliamentary authorization) give notice under Article 50 that would lead inexorably to the loss or modification of those rights.

The ruling also comes against the backdrop of repeated calls, including from some within the Conservative Party, for greater transparency in relation to the Government's priorities and strategy for post-Brexit trade and other relations with the European Union. In recent days, for example, the Government has provided written assurances to Nissan that induced it to commit to further investment in its U.K. automotive manufacturing operations (which could be badly hurt by loss of access to the European Union's single market), but has refused to disclose the specific nature of those assurances. Similarly, press reports emanating from Ireland suggest that the U.K. Government has provided assurances that the previous "hard" border between the Republic and Northern Ireland would not be reintroduced upon Brexit, but the United Kingdom has declined so far to clarify the nature of those assurances. These and many similar questions are likely to be raised in the debates that would inevitably surround any attempt to obtain Parliament's authorization to deliver notice under Article 50.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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