

## client alert

EU | BREXIT |

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### BREXIT: GOVERNMENT CALLED TO ORDER BY THE COURT

On 3 November 2016 the English High Court released its judgment in the case brought against the Government regarding the proper method of triggering Article 50 of the EU Treaty.

Article 50 is the provision which says that a Member State may decide to withdraw from the EU "in accordance with its own constitutional requirements".

The argument against the UK Government - with which the Court agreed - was that the way in which the Government was proposing to trigger Article 50 was not in accordance with the UK's constitution because the Government should first obtain Parliament's approval to do so.

The Government's stance is that it is entitled to act unilaterally, further to the result of June's referendum, relying on the concept of the "royal prerogative".

This refers to the power of the Government to act in certain circumstances without first obtaining Parliament's consent.

The question before the Court was thus whether this power extends to the giving of notice under Article 50.

#### SUMMARY OF THE ARGUMENTS

In summary the Government's position was (and remains) that the royal prerogative covers the entering into of - and exiting from - international treaties, and that notice under Article 50 was simply the first step of exiting from a treaty and (possibly) entering into a new one.

The Court agreed that the Government alone is entitled to negotiate and withdraw from international treaties, but importantly held that this applies only where such Government action does not have the effect of changing UK law. Here that would not be the case.

The Court emphasised that it is one of the fundamental principles of the UK's constitution that the Government does not have the power to vary the law through the exercise of the royal prerogative.

The Court agreed with the Claimants' argument that the European Communities Act of 1972, and a series of later related Acts of Parliament, had conferred rights directly on individuals and companies in the UK and that those rights could not be removed by the Government acting alone.

The Court indeed went further than this, stating that the profound effect of entering the EU, with all of the associated consequences for domestic legislation, meant that it was very unlikely that when doing so in 1972 Parliament envisaged that all such consequences could be reversed at the Government's discretion.

*“Parliament having taken the major step of switching on the direct effect of EU law in the national legal systems by passing the ECA 1972 as primary legislation, it is not plausible to suppose that it intended that the Crown should be able by its own unilateral action under its prerogative powers to switch it off again.”*

It was agreed by the parties before the Court that a notice under Article 50 is irrevocable and cannot be qualified. Accordingly, notice under Article 50 would inevitably result in the loss of rights granted by the ECA 1972. The fact that Parliament might potentially be invited to review or approve the terms of a deal negotiated with the EU at some time in the future would not change that. Notice under Article 50 would have a direct effect on the relevant rights, even if the Article 50 process might take years to work through.

Finally and importantly, the Court made it clear that the result of the referendum, held pursuant to the Referendum Act of 2015, was not legally binding and did not confer any authority on the Government to issue the notice under Article 50.

The result is that the Secretary of State does not have power to give notice pursuant to Article 50.

## WHAT NEXT?

The Government has announced its intention to appeal the decision.

The appeal will be heard by the Supreme Court in early December. A judgment of the Supreme Court in the Government's favour could leave the Prime Minister's current planned timetable for the triggering of Article 50 unchanged; but a further decision against the Government would mean that parliamentary approval would be required first.

The question then arises as to the basis on which any such approval might be given.

It seems probable that Members of Parliament would, as a minimum, want to know the terms on which the Government intends to leave the EU (notwithstanding that any such position would be subject to negotiation with the EU Member States). MPs are already calling for the Government to disclose its position.

This is very likely to entail significant delay, while the proposed terms of the UK's exit from the EU are debated.

Equally importantly, being forced to “reveal its hand” in public in this way would be wholly inconsistent with the approach taken by the Government so far, which has been not to publicise its intended negotiating strategy at all ahead of the commencement of negotiations.

There are thus numerous reasons why the Government will be keen for the Supreme Court to reverse the High Court's decision.

However, in delivering such a clear-cut and unambiguous judgment, the High Court has ensured that the Government faces an uphill struggle in this regard.

And although the legal action brought before the High Court was ostensibly brought not to challenge the principle of leaving the EU but only the process, the Court's decision introduces an additional hurdle into the Brexit process - making the UK's actual exit from the EU less of an inevitability than it might otherwise have been.

If the Government proves unable to persuade a majority of Members of Parliament to vote in favour of triggering Article 50, then this could result in the calling of a General Election.



Check out our dedicated **Gide / Brexit** LinkedIn page to learn more about the consequences and legal implications of Brexit.

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