
UK High Court ruling that Government cannot trigger Brexit without Parliament

Executive Summary

- > According to a recent High Court decision, the UK Government is not entitled to use its prerogative powers to give notice under article 50 of the TEU for the UK to exit the EU (i.e. to trigger the Brexit) without involving Parliament.
- > Should the Supreme Court affirm the High Court judgement, it will be necessary for a bill to be introduced in and passed by Parliament.
- > It is well possible that these court decisions slow down the withdrawal process. However, the court decisions discussed here are about the "procedure" of the Brexit, not the Brexit itself (although in theory the Parliament could vote against Brexit)

1. What happened?

On 3 November 2016, the High Court of Justice – Queen’s Bench Division – Divisional Court (the "**High Court**") has ruled that the Government of the United Kingdom ("**UK**") is not entitled to give notice of the intent to leave the European Union ("**EU**") under article 50 of the Treaty on European Union ("**TEU**") by exercise of the so-called "royal prerogative" and thus not without involving the British Parliament (also known as "**Westminster**").

Prime Minister Theresa May wanted to prevent an involvement of Parliament with the argument that a discussion there would harm the UK’s negotiating position in the withdrawal process. The High Court held that the Government is not entitled to give notice of its decision to leave the EU, thereby triggering the EU withdrawal procedure under article 50 of the TEU "by exercise of the Crown’s prerogative powers and

without reference to Parliament". The court continued by arguing that this "is a pure question of law", whereas the actual Brexit were "a political issue" on which they do not express any view.

2. Why the High Court has a point

The area of conflict between the rights of a parliament versus the rights of a government is in most jurisdictions an exiting constitutional law issue. This is even more so the case if the relevant jurisdiction (here the UK) does not have an elaborated written constitution, but nevertheless does have a constitution.

However, under this UK constitution, the concept of parliamentary sovereignty plays a central role (much more than, for example in Germany where there is a specific Constitutional Court to review also acts of parliament) and this includes the point that a valid Act of Parliament cannot be questioned by a court, as Parliament is the supreme lawmaker. Among certain legal scholars this may today be seen controversially but it is still the prevailing view in the UK. This particular concept of parliamentary supremacy is not recognised under EU law. As a result, where UK courts currently accept the supremacy of EU law, this is conceptually based on the European Communities Act 1972 ("**ECA**"), which as a piece of UK legislation could be repealed by a future Parliament.

In contrast, the royal prerogative is a customary authority forming the source of many executive powers of the Prime Minister, other ministers or other government officials. This includes for example the executive powers in the area of foreign affairs including the conclusion of trade agreements. However, generally, the exercise of such executive powers can be examined by the

courts, depending on the nature of these powers.

In the case at hand, the High Court found that, under UK law, in order to give EU law effect in the domestic law of the UK (as required under EU law) primary legislation (in the form of the ECA) was necessary. The court further analysed the article 50 of the TEU procedure and found that some rights under EU law as incorporated under the ECA would inevitably be lost as a result of the said withdrawal process. Therefore, the High Court effectively concluded that Government, by exercising powers under the royal prerogative, cannot take rights away granted under primary UK legislation, the ECA. Only Parliament should have the right "to choose whether EU law should continue to have effect in the domestic law of the UK or not."

Furthermore, in contrast to the Government's arguments in this case, the High Court did not find anything in the ECA indicating that Parliament when enacting the ECA had intended that prerogative powers of the Crown could be used to effect a withdrawal from the EU (which is by the way, under EU law, logical as in 1972 a withdrawal from the EU was not considered a future option; the withdrawal provision of article 50 of the TEU was only introduced in 2008 by the Lisbon Treaty).

3. And next?

Not surprisingly, the Government has appealed against the here discussed High Court ruling and now the UK's highest court, the Supreme Court (for the first time with all eleven judges sitting on the panel) will start its proceedings on 5 December 2016. These proceedings are likely to last four days (5 to 8 December), but a decision is more likely to be made in early 2017.

Should the Supreme Court disagree with the High Court and find that the Government can use the royal prerogative to initiate the

withdrawal procedure under article 50 of the TEU, Prime Minister May will, as announced a couple of weeks ago, trigger the withdrawal procedure before the end of March 2017. This means that a withdrawal agreement between the UK and the EU would have to be concluded before the end of March 2019 – a herculean task! For further details, please see the "Brexit" site on our GSK homepage: www.gsk.de.

Should the Supreme Court agree with the High Court and also come to the conclusion that Parliament needs to get involved, the Government would have to introduce a respective bill and Parliament would have to vote on it. As the UK's Brexit referendum does not legally bind the Parliament, the Members of Parliament could in theory use parliamentary supremacy and vote in majority against a Brexit. From all we hear, this is a rather unlikely scenario. In contrast, very likely is that Parliament would vote in favour of Brexit and, thus, the start of the withdrawal procedure might (or actually might not) be postponed a little, but Brexit will come. See above!

4. Conclusion

The High Court judgement is based on a convincing legal reasoning, with which the probably more political Supreme Court might agree or not. From an UK constitutional law point of view, they are very exiting decisions. From a practical point of view, they are unlikely to significantly alter what is coming: the Brexit.

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