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Article 50 – Government Loses Supreme Court Case

The Supreme Court by a majority of 8 to 3 has dismissed the Secretary of State's appeal (Lord Neuberger, Lady Hale, Lord Mance, Lord Kerr, Lord Clarke, Lord Wilson, Lord Sumption and Lord Hodge in the majority with Lord Reed, Lord Carnwath and Lord Hughes dissenting). In a joint judgment of the majority, the Supreme Court held that an Act of Parliament is required to authorise ministers to give notice of the decision of the UK to withdraw from the European Union. The Supreme Court considered that the terms of the European Communities Act 1972, which gave effect to the UK's membership of the EU, are inconsistent with the exercise by ministers of any power to withdraw from the EU Treaties without authorisation by a prior Act of Parliament.

It is important to note that the Supreme Court ruling does not address whether the United Kingdom should exit the European Union. The judgment considers only the proper legal process by which the UK government can trigger the UK's withdrawal from the EU.

What does the UK government now need to do in order legally to trigger Article 50 TEU?

The Supreme Court has ruled that an Act of Parliament is required before Article 50 of the Treaty on European Union ("Article 50") can be triggered.

The Government will need to present a Bill to both the House of Commons and the House of Lords who will scrutinise and debate its contents and implications. The Bill must then be approved in the same form by both Houses to become an Act of Parliament and have legal effect in the UK.

Consent of Northern Ireland, Scotland and Wales Legislatures not required

The Supreme Court decided that devolution Acts were passed by Parliament on the assumption that the UK would be a member of the EU, but they do not require the UK to remain a member. Relations with the EU and other foreign affairs matters are reserved to the UK Government and Parliament, not to the devolved institutions. Withdrawal from the EU will alter the competence of the devolved institutions, and remove the responsibilities to comply with EU law.

How long is the process expected to take and when can we expect Article 50 to be triggered?

Parliament will need to pass a new Bill to give the Government the authority to trigger Article 50. It is likely that the Government will present both Houses with a short Bill due to the urgency of its approval and in order to minimise the potential for either of the Houses to call for amendments to be made. Bills have previously been passed through Parliament within a few days.

In the House of Commons a programming motion will be passed to determine the timeline under which the Bill will be scrutinised. The Government will need majority support for the process to be carried out urgently. In contrast, the House of Lords will not be required to decide a timetable for the passage of the Bill. Both the Lords Constitution Committee and the Lords EU Committee will scrutinise the Bill and its repercussions.

It should be noted that on 7 December 2016, Members of Parliament voted in support of Theresa May's proposal to trigger Article 50 by the end of March 2017 by a majority of almost 400. Accordingly, it is still expected that the Government will be able to give notice under Article 50 before the end of March 2017.

What further hurdles could the Government face?

Both Houses are able to call for amendments to be made to the Bill. Amendments could include mechanisms for Parliament's involvement in the withdrawal process or a second referendum determining the terms of the withdrawal.

Is there a chance that we could see a further appeal to this decision?

The Supreme Court is the final court of appeal in the UK, therefore its judgments cannot be appealed.

Nevertheless, a point of law that forms part of the judgment may be referred to the Court of Justice of the European Union (CJEU). The CJEU can give a ruling on the interpretation of treaties when the matter is necessary for a court to pass judgment (Article 267 TFEU). This could arguably become relevant, for example, in relation to the issue of the revocability of the Article 50 notification. The parties to the case agreed to assume that an Article 50 notification could not be revoked, but very little was said on the point. It is therefore possible, theoretically at least, that the issue of revocation could eventually be referred to the CJEU, for example, in fresh proceedings, although presumably there would need to be some likelihood of an attempt at revocation to crystallise the issue.

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