



EU, COMPETITION AND REGULATED MARKETS

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# Parliamentary Approval Required for Brexit

by **Marco Hickey**

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16th November 2016 | by Marco Hickey

The UK Government is currently preparing to appeal the High Court's decision on 3 November 2016 that Article 50 of the Treaty on European Union (TEU), which provides the formal mechanism for a Member State's withdrawal from the European Union (EU), cannot be triggered by the UK Government without the approval of Parliament.

## Background

As a brief background, a judicial review was brought by Gina Miller and Dier Tozetti Dos Santos as principal claimants against the Secretary of State for exiting the European Union, focusing on the specific issue of whether the authority of Parliament is required before Article 50 can be triggered. Since the June referendum, there has been a continuing debate as to what the UK needs to do for the purpose of "its own constitutional requirements" in order to serve notice under Article 50 of the TEU.

## The Arguments

The UK Government had argued that it has a unilateral right to trigger Article 50 pursuant to prerogative powers, which it submitted applied in relation to the making or breaking of international treaties. The claimants' position was that prerogative powers cannot be used to override existing Acts of Parliament (in this case the European Communities Act 1972 which gives effect to EU law in the UK), or to remove fundamental rights of UK citizens which currently exist under EU law.

## High Court Decision and Rationale

Following a three-day hearing, the High Court delivered a decisive and unanimous judgment that the Government cannot use the prerogative powers to notify the EU of the UK's decision to invoke Article 50. The Court found that invoking Article 50 would essentially repeal the European Communities Act 1972, the law that allowed for the incorporation of European law into the British legal system, and that only Parliament therefore had the power to invoke Article 50.

The Court further stated that there is nothing in the text of the 1972 Act to support the Government's contentions, and that the Government's argument is contrary both to the language used by Parliament in the 1972 Act and to the fundamental constitutional principles of parliamentary sovereignty and the absence of any entitlement on the part of the Crown to change domestic law by the exercise of its prerogative powers.

## **Practical Implications**

The practical implication of the ruling is that if Members of Parliament and peers have to approve the triggering of Article 50, and they choose not to do so, the outcome of the June referendum could be defeated and Brexit effectively blocked. However, it will be interesting to see whether Parliament would choose to go against the majority public opinion expressed through the referendum.

At any rate, this is not the end of this story. The Government will be appealing the High Court's decision to the Supreme Court. In the event that the appeal is unsuccessful, it appears that Theresa May has little choice other than to seek parliamentary approval.

## **Appeal**

At the High Court stage, both the Government and the claimants agreed that the Article 50 notice was irrevocable. At the appeal stage, however, the Government is planning to retract their argument that Article 50 is revocable. What they intend to do with this is to argue, as an extension, that if Article 50 can be reversed at any point, there is not as much encroachment on parliamentary sovereignty and as such, not as much need for parliamentary approval before the Article is triggered.

**For more information, please feel free to contact Marco Hickey, Partner and Head of the EU, Competition and Regulated Markets team at [mhickey@lkshields.ie](mailto:mhickey@lkshields.ie). Marco is the author of [Merger Control in Ireland](#) published by Thomson Reuters.**

## About the Author



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