

BREXIT: PARLIAMENTARY APPROVAL REQUIRED FOR UK TO LEAVE THE EU

The English High Court has decided in *R (oao Miller) v DExEU* that the Government needs prior authorisation from Parliament to give the article 50 notice that will start the process of the UK leaving the EU. The Government must therefore either appeal successfully or it must engage with Parliament. If an appeal fails, there could be delays while Parliament grapples with Brexit, and uncertainty as to what the outcome will be.

In *R (on the application of Miller) v Secretary of State for Exiting the European Union* [2016] EWHC 2768 (Admin), the Divisional Court in London firmly rejected the UK's Government's contention that the Government has power on its own to give notice to the European Council under article 50 of the Treaty of European Union of the UK's decision to withdraw from the EU. The high-powered Court, consisting of the Lord Chief Justice, the Master of the Rolls and Sales LJ, decided that the Government could only give notice under article 50 if it was first authorised by Parliament to do so.

This is a major reversal for the Government, and requires it either to overturn the decision on appeal or to persuade Parliament to pass legislation empowering the Government to give the notice.

In this briefing, we look at the decision itself in Miller, what the Government might do in the light of the decision, and what affect it could have on the UK's departure from the EU, including timing.

THE WITHDRAWAL PROCESS

In the referendum of 23 June 2016, 51.89% of those who cast their ballots voted for the UK to leave the EU. The process for departure from the EU is set out in article 50 of the TEU. This provides that a member state may decide to withdraw from the EU in accordance with its own constitutional requirements. Once that decision has been made, the withdrawal process is initiated by the member state giving notice to the European Council of its intention to withdraw. Withdrawal actually occurs on the date of entry into force of a withdrawal agreement between the EU and the (former) member state or, failing that, two years after the notification unless the European Council (ie the member states) and the withdrawing state decide unanimously to extend the period.

Miller concerned the UK's constitutional requirements for making the decision to withdraw from the EU and, as a result, what authorisation the Government needs before it can give notice. The Government contended that it required no authorisation to give the notice under article 50 - it was entitled to give

notice as and when it saw fit. The claimants in *Miller* argued that notice could only be given if an Act of Parliament was first passed authorising the notice.

THE DECISION IN *MILLER*

The Divisional Court in *Miller* decided in favour of the claimants.

The Court considered that the most fundamental rule of UK constitutional law is that Parliament (strictly the Crown in Parliament) is sovereign. If Parliament has conferred rights, the Government cannot take them away.

The Court decided that the European Communities Act 1972, which provided for the UK to join the European Communities (now the EU), has conferred rights on the citizens of the UK. EU law, which 1972 Act brought into UK law, provides numerous rights, such as under the EU's working time directive and to refer matters of EU law to the Court of Justice of the European Union.

These rights would inevitably be lost if the Government gave the article 50 notice. It was no answer that Parliament could, if it chose, provide some (it could not provide all) of these rights in UK domestic law. The Government could not controvert legislation in that way.

The Government's principal argument was that the conduct of foreign affairs is a matter for the Government, using the Royal prerogative. This includes the right to enter into and to withdraw from treaties. The 1972 Act had not expressly deprived the Government of the ability to withdraw from the EU's treaties, and so it should be assumed that Parliament intended this prerogative power to remain.

The Divisional Court considered that entering into a treaty is in the hands of the Government because treaties have no direct effect in domestic law unless Parliament passes legislation to that effect. Here Parliament had passed the European Communities Act 1972, which brought EU law to the UK. Parliament could not have intended to leave with the Government the ability to strip the 1972 Act of its content by serving notice under article 50 of the TEU.

One important aspect of the *Miller* case is the Government's acceptance that, if an article 50 notice is given, it cannot be revoked. This is a contentious issue of EU law, upon which there are divergent views. If Government had chosen to argue that notice is revocable, it could - indeed, should - have led to the *Miller* case on the UK's constitutional requirements to withdraw from the EU being referred to the CJEU. Presumably the Government decided to concede the point in order to avoid this somewhat surreal, and politically unacceptable, position.

The Divisional Court was keen to stress that its decision was purely one of law as to the UK's constitutional requirements to withdraw from the EU. It had nothing to do with the merits or demerits of doing leaving the EU.

WHERE NOW?

So where does that leave the Government? It cannot now serve notice on the European Council under article 50 of the TEU of the UK's decision to withdraw from the EU without either overturning on appeal the Divisional Court's decision or securing the passage through Parliament of legislation authorising it to give the notice. No notice, no withdrawal.

A summary timeline showing possible scenarios is set out at the end of this briefing.

In more detail, though many aspects remain necessarily speculative, the Government will almost certainly appeal against the decision in Miller. The Divisional Court in Miller certified under section 12 of the Administration of Justice Act 1969 that the case is suitable to leapfrog the Court of Appeal and go straight to the Supreme Court because of its national importance. The Government still requires the permission of the Supreme Court for the leapfrog to take place, but that will be a formality.

The Supreme Court has, according to the Government's lawyer, set aside time between 5th and 8th December 2016 to hear the appeal. A panel of seven or nine, or even an unprecedented eleven, Supreme Court justices could ultimately determine the case. The Prime Minister's indication that she does not wish the UK to give its article 50 notice until March 2017 may offer the Supreme Court the opportunity to mull the issues over its Christmas mince pies, leaving the decision until early next year rather than being forced to give it this year.

AN INSURANCE POLICY?

Even if the Government does take the case to the Supreme Court, as surely it will, that is not all that the Government can do. It could also, as a form of insurance, introduce a short Bill into Parliament now authorising the Government to give the article 50 notice as and when the Government sees fit.

If this Bill were to pass into legislation before the appeal is decided, the appeal would become redundant; if the Bill has not been passed by the time of the appeal judgment, success in the appeal would allow the Government to withdraw the Bill (though the Government would want to consider the political price of being perceived to involve Parliament and then to shun it); and if the Government loses the appeal, the process of securing the necessary legislation would be further advanced than if the Government were only to start the legislative process after the Supreme Court has upheld the Divisional Court's decision. The politics and timing of legislation are considered further below.

GOVERNMENTAL SUCCESS IN THE SUPREME COURT

If an appeal to the Supreme Court is trumped by legislation or if the Government wins its appeal to the Supreme Court, the Government will be able to serve the article 50 notice in March 2017 in accordance with the Prime Minister's announced intention. If that happens, the UK will leave the EU in March 2019 at the latest (here, as below, assuming the absence of unanimous agreement to extend the two year period provided in article 50 and, perhaps, subject to the legally uncertain issue of whether a withdrawal agreement that comes into force within two years of the notice can provide for withdrawal from the EU after two years).

GOVERNMENTAL DEFEAT IN THE SUPREME COURT: THE NEED FOR LEGISLATION

If the Government loses its appeal to the Supreme Court, its only option will be legislation authorising it to give the article 50 notice. It could add a clause to this effect to the Great Repeal Bill, heralded by the Prime Minister at her Party's recent conference, but that would delay the process of giving notice for two reasons.

First, the Great Repeal Bill is due to be introduced in Parliament's next session, ie in the summer of 2017 at the earliest, though this planned timing could be accelerated.

Secondly, if the Great Repeal Bill were to include provision covering the giving of the article 50 notice, the notice provision would be just one of a range of potentially contentious issues in the Bill. These issues could lead to lengthy Parliamentary debate and scrutiny, delaying its passage through Parliament until, potentially, the latter part of 2017 or even later.

The Government may well, therefore, prefer to keep any legislation responding to a defeat in the Supreme Court early, short and specific rather than to allow the issue of notice to become just one of a number of controversial Brexit-related issues.

A short Bill could, in principle, pass through Parliament quickly, even within a single day, but that is improbable. In any event, in case the House of Lords proves difficult, the

Government will be conscious of the need to ensure that its Bill passes from the House of Commons to the House of Lords at least one month before the end of the current session of Parliament (see below). This session of Parliament was opened by the Queen on 18 May 2016, and might be expected to end in late spring 2017. The Government is therefore likely to want to secure the Bill's passage through the House of Commons by early to mid-March 2017 at the latest though, in order to try to meet the Prime Minister's stated aspiration of giving the article 50 notice by the end of March 2017, the Government may demand a more accelerated Parliamentary timetable.

ARTICLE 50 LEGISLATION AND THE HOUSE OF COMMONS

The critical issue for any legislation is whether it will be approved by the elected chamber of Parliament, the House of Commons. MPs overwhelmingly support the UK's remaining in the EU. They could hold firm to the view espoused by Edmund Burke, a Whig politician commonly regarded as the founder of modern conservatism, in his speech to the electors at Bristol in 1774. An MP, according to Burke, "owes you [his constituents], not his industry only, but his judgment; and he betrays, instead of serving you, if he sacrifices it to your opinion". On this approach, an MP should vote according to his or her own views and conscience, not on the instructions of the electorate. Whether such purity of principle would always prevail over the more mundane aspects of an MP's existence (notably, the desire to be re-elected) is, however, questionable.

Some MPs may consider that they have mandates from their electorates to vote against withdrawal from the EU (notably MPs in London, Northern Ireland and Scotland, though, for example, some London MPs whose constituents voted overwhelmingly to remain in the EU were fervent members of the leave campaign). The Government has a working majority in the House of Commons of, at best, a mere fifteen (it was sixteen prior to Zac Goldsmith's resignation over Heathrow - the by-election in his constituency of Richmond Park will be held on 1 December 2016). It would only require a small number of Conservative MPs to defy the Government's whips in order to defeat the Government, but this does also depend upon the opposition parties being sufficiently united and organised to vote in large enough numbers against the Government.

There are indications that the opposition parties may turn out to be neither united nor organised. The Scottish National Party, with 56 MPs, will have little difficulty in being both, but other MPs may feel reluctant in principle to defy the wishes of the electorate as a whole so recently expressed. Others, including perhaps Labour MPs in the north of England, may study nervously the level of the leave and UKIP votes in their constituencies and wonder whether they would retain their seats at the next Parliamentary election if they were to go against their electorates.

Against this, some MPs may feel able to justify a vote against any article 50 legislation on the basis that it should be included in the (later) Great Repeal Bill or that the decision to give a potentially irrevocable notice of withdrawal from the EU should only be taken when there is greater detail - indeed, any detail - as to the Government's intentions for the UK's future relationship with the EU and the EU's likely response. Still others may be retiring from Parliament and not care what their electorate thinks.

The truth is that no one knows what the House of Commons will do if faced with legislation authorising the Government to give notice to the European Council under article 50 of the TEU, which may be one reason why the Government has been keen to keep the decision to itself.

History records that a Government usually gets its business through the House of Commons, but this situation may prove anything but usual. For example, the ultimate threat from Government whips in order to secure compliance from backbench MPs is that voting against the Government might lead to a general election at which the MP might suffer the ultimate calamity of losing his or her seat. However, this threat may, in the current political climate, have consequences diametrically opposite the usual: some Conservative MPs might welcome the prospect of a general election rather more than opposition Labour MPs, whose lack of confidence in their electoral prospects under their current leadership has been made manifest in recent months. Against this, some Conservative MPs may be concerned at the rise in the Liberal Democrat vote at the recent Witney by-election, and be looking with interest or apprehension at the Richmond Park by-election on 1 December. Individual MPs will be faced with individual influences.

DEFEAT IN THE HOUSE OF COMMONS: WHAT NEXT?

Suppose the House of Commons rejects the Government's article 50 legislation. What will follow (though the Government could try more than once to persuade the House of Commons to pass the legislation, whether in amended form, with commitments as to what Brexit means or with other sweeteners)?

The Government could accept that the House of Commons' decision means that the UK will not leave the EU. That is, however, perhaps the least likely outcome. The electorate has expressed a wish to leave the EU, if only by a narrow majority. The party that held the referendum to douse the flames of internal division is unlikely to welcome their re-ignition, especially when fanned by the popular vote. That probably leaves two main options.

First, the Government could call a general election. This is not as easy as it used to be. Before the Fixed Term Parliaments Act 2011, the Government could in practice dissolve Parliament and call a general election whenever it wished. No longer. The Act provides for general elections every five years, the next being due on 7 May 2020. General elections can only be held outside this schedule if the House of Commons votes by a two-thirds majority that there

should be a general election or if the House of Commons passes a motion of no confidence in the Government.

Whether the Government could secure a two-thirds majority in the House of Commons is unclear. Even the simple majority required for a vote of no confidence could lead to the bizarre situation of MPs from the Government's party voting against their Government, with opposition MPs and committed remain supporters voting for the Government in order to avoid a general election. But stranger things have happened in the House of Commons.

Even supposing there were to be a general election, the political parties may have difficulty in deciding what their manifestos should say about Brexit. The SNP, and perhaps the Liberal Democrats, would oppose Brexit. But could either of the two largest parties in Parliament put forward a coherent policy on Brexit around which all, or even a substantial number, of their candidates could unite? The referendum was called to overcome rancorous splits in one of the parties: those splits have not gone away.

If the House of Commons did vote for a general election in the light of its rejection of the Government's article 50 Bill, the election would have to be conducted in such a way as to resolve the question of the UK's membership of the EU. It is possible that the two largest parties may have the same or sufficiently similar policies regarding the EU that a general election - which would inevitably include debate of any number of issues in addition to the EU - could not be interpreted as providing an answer to the question of the UK's membership of the EU. If, say, the Liberal Democrats and the SNP were to secure sufficient MPs to form a government, that would answer the question - but it would also represent an extraordinary revolution in UK politics and government.

The second, and perhaps easiest, solution to a failure to secure the passage through the House of Commons of article 50 legislation might therefore be to call a second referendum. This again requires legislation, but this time the legislation would surely specify expressly what was to happen if the electorate voted again in favour of Brexit rather than leaving the constitutional uncertainty that resulted in *Miller*.

DEFEAT IN THE HOUSE OF LORDS: WHAT NEXT?

If the Government can secure the passage of article 50 legislation through the House of Commons, it must also get the legislation through the House of Lords or, if it cannot do so, use the procedures that allow the House of Lords to be disregarded.

The House of Lords almost certainly also contains a majority against Brexit (though it is more difficult to be sure). The members of the House of Lords are appointed rather than elected, and they will be conscious of their lack of democratic legitimacy. For example, the so-called Salisbury Convention provides that the House of Lords will not oppose legislation passed by the House of Commons that was included in the governing party's election manifesto.

Leaving the EU was not in the Conservatives' manifesto for the 2015 general election - the only pledge was to hold a referendum on EU membership. Nevertheless, some in the House of Lords may feel that defying the House of Commons, the electorate and the implicit election promise (relied on heavily in *Miller*) to implement the referendum result is beyond the legitimate role of an unelected, revising chamber. Some peers may, however, feel that the article

50 notice should only be given after the UK's position post-Brexit has been clarified or feel sufficiently strongly on the issue to override other considerations.

If the House of Lords refuses to approve article 50 legislation that has been passed by the House of Commons, the Parliament Acts 1911 and 1949 allow the elected chamber to override the House of Lords (this has only been done seven times in more than a century, and one of those then fell due to the outbreak of the First World War). Under section 2 of these Acts, legislation will become law even though it has not been passed by the House of Lords provided that: it has been passed by the House of Commons in two successive sessions of Parliament; it has been sent to the House of Lords at least one month before the end of each of those sessions and rejected by the House of Lords; and at least one year has elapsed between the second reading in the House of Commons in the first of those sessions and the date on which the legislation is passed by the House of Commons in the second of those sessions.

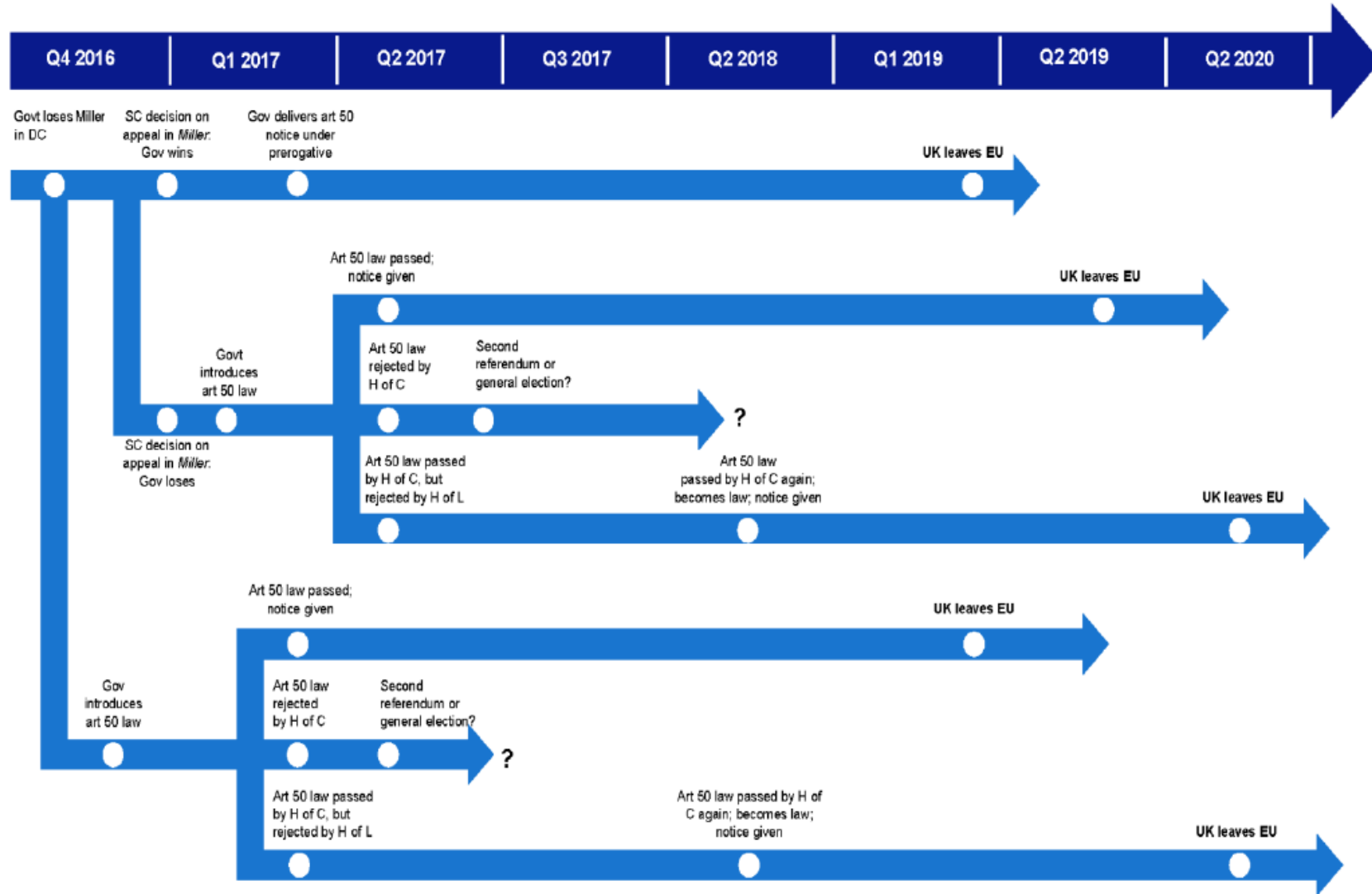
In practice, it may be that the House of Lords would concede defeat if the House of Commons passed article 50 legislation twice. If the House of Lords were to press the issue, its power is limited to delaying the legislation for around one year, giving - indeed forcing on - the House of Commons the opportunity to have second thoughts about the legislation. To take advantage of the Parliament Acts, the Government would need to ensure that its article 50 legislation passed the House of Commons at least one month before the end of the current Parliamentary session, which is expected around April or May 2017. Passing the legislation through the House of Commons by, say, mid-March would allow ample time for debate in the House of Commons. There must then be a gap of at least a year between the second reading of the Bill in the House of Commons the first time around and the third (and final) reading in the House of Commons the second time around.

In practice, this may mean that the Parliament Acts could not be invoked until the spring of 2018, with the result that no notice under article 50 of the TEU could be given until that time. The UK's departure from the EU would then probably take place in the spring of 2020, a year or so later than if the Government wins the appeal to the Supreme Court in Miller or if, following defeat in the Supreme Court, Parliament had passed the legislation without delay. This would also be around the time that the next general election is due in the UK (and a year after the next elections to the European Parliament are scheduled to take place), which may add further political complications.

CONCLUSION

The Divisional Court's decision in Miller has thrown a considerable spanner into the Government's works. The Government did not want Parliament to have a say in whether or when the article 50 notice is given, but the Court has said that prior Parliamentary involvement is a constitutional requirement for the UK. Unless the Supreme Court overturns the Divisional Court's decision, the Government has no choice but to go to Parliament. That risks, at the least, delaying the UK's withdrawal from the EU, and the consequences could extend further than that.

Brexit Timeline



Assumptions:

- * the UK and the EU do not enter into a withdrawal agreement within the two year period that specifies a date of entry into force outside the two year period (the date of entry into force being the date of the UK exit from the EU);
- * the UK and the European Council do not extend the two year period

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