LEGISLATION REQUIRED TO TRIGGER BREXIT

The Supreme Court has upheld the High Court's decision in *R (oao Miller) v DExEU* that the Government needs prior authorisation from Parliament to give the article 50 notice that will initiate the process leading to the UK's withdrawal from the EU. The Government must therefore secure the passage of legislation through Parliament before the process can begin, with the potential loss of control that this can bring.

To the surprise of no one who sat through the oral hearings last month, in *R (on the application of Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5 the Supreme Court has resoundingly rejected the Government's case that the Government has power on its own to give notice to the European Council under article 50 of the Treaty on European Union of the UK's decision to withdraw from the EU. By a majority of 8-3 (adding to the 3-0 first instance decision), the Supreme Court decided that legislation is required in order to authorise the Government to give the article 50 notice.

The Government must now engage fully with Parliament before the withdrawal process can begin, not, as it wanted, only after the departure trigger has already been pulled. The Government remains outwardly confident that it can get legislation through Parliament in time to start the withdrawal process by its target date of the end of March 2017, but there are inevitably uncertainties in the Parliamentary process - uncertainties that the Government has, through its appeal, shown itself anxious to avoid.

In this briefing we look at the Supreme Court's decision, where the Government must go next, the difficulties the Government might face, and the possible implications of other litigation for Brexit.

KEY ISSUES

- Supreme Court dismisses the Government's appeal in *Miller*
- An Act of Parliament is required before the UK can start the process of leaving the EU
- The Government may have the numbers in Parliament, but could face extensive skirmishing
- *Miller* might be over, but there could be other litigation in the UK, in Ireland and in the CJEU

The Supreme Court's decision

Article 50 of TEU provides that a member state may decide to withdraw from the EU in accordance with the member state's own constitutional requirements. Once that decision has been made, the member state is obliged to notify the European Council of its intention to withdraw from the EU, following which negotiations take place as to the arrangements for withdrawal. Withdrawal from the EU occurs on the date of entry into force of a withdrawal agreement between the EU and the departing state or, failing that, two years after the initial notice has been given, absent unanimous agreement to extend that period.

R (oao Miller) v DExEU concerned the UK's constitutional requirements for a decision to withdraw from the EU. The Government argued that this was a decision for it alone (to the extent not already taken by the people through the referendum of 23 June 2016), not for Parliament. The Supreme Court, like the High Court, disagreed. And, again like the High Court, the majority in the Supreme Court did not appear to find the decision difficult (despite the 45 pages their judgment covers).

"No-one suggests that the referendum by itself has the legal effect that a Government notice to leave the EU is made lawful."

The majority's starting point was that rights and obligations in UK law can only be changed by Parliament. The Government has power to conduct foreign relations, including entering into and withdrawing from treaties, but that is only

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because doing so does not change domestic law. If a treaty is to affect domestic law, legislation is required.

That is why the European Communities Act 1972 was passed. It operated as a partial transfer of law-making powers by Parliament to the EU, and gave effect in UK law to the laws made by the EU. Those EU laws conferred rights on UK citizens. The majority could not accept that, having brought about this major constitutional change, Parliament intended to leave the continued application of EU law and the rights it granted in the Government's hands alone. If Parliament wished to allow the Government to take away those rights, it had to say so clearly in an Act of Parliament. Neither the 1972 Act nor subsequent legislation had done so. Where fundamental rights were concerned, silence, implication or hints were not nearly enough.

The minority (Lords Reed, Carnwath and Hughes) considered that the European Communities Act 1972 only introduced EU law into UK domestic law on a conditional basis. That condition was the continued application to the UK of the EU's treaties. Treaty making and withdrawal fell within the Government's prerogative powers, so the Government controlled the condition.

"An inevitable consequences of withdrawing from the EU treaties will be the need for a large amount of domestic legislation. There is thus good pragmatic argument that such a burden should not be imposed on Parliament ... without prior Parliamentary authorisation"

Devolution issues

The case also raised issues as to the powers of the UK's devolved administrations in Scotland, Northern Ireland and Wales. On these issues, the Supreme Court was unanimous.

All the devolution legislation leaves foreign relations, including with the EU, in the hands of the UK Parliament. The devolution legislation assumed, but did not require, membership of the EU. It was for the UK Parliament to decide on membership.

The Sewel Convention provides that, although the UK Parliament can legislate in respect of devolved matters, it will not normally do so without the consent of the relevant devolved administration. The Scottish Government argued that legislating for the UK's withdrawal from the EU would affect devolved matters, and therefore required Scotland's consent under this Convention (now incorporated expressly into the Scotland Act 1998).

The Supreme Court regarded the Sewel Convention as a matter of politics, not law. It regulated the political conduct of the various administrations and of Westminster, but did not confer any legal rights.

"Judges are neither the parents nor the guardians of political conventions: they are merely observers."

Where now?

The court process in *Miller* is now exhausted. The Government has only one place to go: Parliament.

We discussed in greater detail the potential pitfalls within Parliament and the possible timescale in our briefing on the High Court's decision on *Miller* (*Brexit: Parliamentary approval required for UK to leave the EU*, November 2016) but, in summary, the possibilities are now broadly as follows:

- *Parliamentary success*. The Government may secure the passage of its legislation through both Houses of Parliament with ease and without delay. The loud mood music from the political press is that, at present, there is probably insufficient willingness amongst Parliamentarians to disregard the popular vote and, as a result, to challenge the Government's legislation in its entirety. If that is right, the Government will be able to secure the

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passage of its legislation through Parliament and to give notice to the Council of the EU by the end of March 2017, in accordance with its stated timetable. The UK will then be on track to leave the EU by March 2019 at the latest (unless the UK and all the other members of the EU agree to put back the departure date).

- *Failure in the House of Commons*. If the Government cannot get its legislation through the House of Commons, that is the end of the matter: no Brexit - subject to another referendum or to a general election. However, on 7 December 2016, the House of Commons passed a non-binding resolution by 448 votes to 75 in which the House "recognise[d] that this House should respect the wishes of the United Kingdom as expressed in the referendum on 23 June; and further call[ed] on the Government to invoke Article 50 by 31 March 2017". The principal opposition, the Labour Party, has said that it will not frustrate the process or delay the timetable of Brexit, and, indeed, many MPs seem fearful of the wrath of their constituents if they were to be perceived to have defied the public vote so soon after the referendum. The Liberal Democrats (most of them anyway - only five out of their nine MPs voted on 7 December) and the Scottish National party may vote against Brexit, but their votes, even if joined by some rebel Labour MPs defying their party's leadership, will be insufficient to block the legislation. Only one Conservative (former Chancellor of the Exchequer and veteran europhile, Kenneth Clarke) opposed the motion, but his constituency voted to remain in the EU and he is retiring at the next general election. The result of the Richmond Park by-election may have scared a few Members of Parliament, but a larger number may think that their constituencies will follow the more mundane pattern of the by-election in Sleaford and North Hykeham, though there is always another by-election on the way to sound the waters. Next, on 23 February 2017, come Copeland, a relatively marginal Labour-held constituency in the far north-west of England with the singular influence of domination by the nuclear industry, and Stoke-on-Trent, a safe traditionally Labour seat that voted heavily in favour of Brexit and which UKIP's new leader will contest.

  The Commons' motion of 7 December 2016 was only passed after a Government amendment (approved by 461 votes to 89) in which the House of Commons called "on the Prime Minister to commit to publishing the Government's plan for leaving the EU before Article 50 is invoked", something the Government had previously declined to offer ("no running commentary"). The Prime Minister's Lancaster House speech of 17 January 2017 has fulfilled this to a degree. The UK, she said, would not be a member of the single market, would not be part of the EU's common commercial policy and would not be bound by the EU's common external tariff, but the UK might seek an undefined species of customs agreement with the EU.

  There may be limited Commons' appetite to be seen to block Brexit altogether, but there could be a greater hunger to try to amend the Government's legislation in order to limit the Government's freedom of action. Amendments could concern the internal market, customs, the EEA, the status of EU citizens currently residing in the UK or something else altogether. The Labour Party's spokesman, Sir Keir Starmer QC MP, said in the House that, while Labour would not frustrate or delay Brexit, "it does intend to shape the debate and head off hard Brexit", but what Labour MPs might feel able actually to do is less clear. "If the Prime

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Minister achieves all she has set out to achieve, she will fall short of the hard Brexit that many in business and trade unions have feared," according to Sir Keir in response to the Prime Minister's speech.

Substantial debate on the Government's Brexit legislation, possibly amendments which have the effect (intentional or otherwise) of delaying the legislation, is therefore likely. The extent of the debate, as well as the outcome and the timing, could be influenced by the minutiae of Parliamentary procedure. The Government's bill is likely to be very short (the operative provision of a private member's bill to the same effect ran to 26 words), and amendments that are beyond the scope of a bill are not ordinarily permitted. A narrow interpretation by the Speaker of the House of Commons (not the courts) of the scope of a bill authorising the Government to give an article 50 notice could limit the scale of any skirmishing, while a wide interpretation could open the door to far-reaching modifications. Ultimately, however, members' anxiety about the response of their electorates (and corresponding concern for their jobs), coupled with the lack a unified and organised opposition, could ease the legislation's path through the Commons.

- *Failure in the House of Lords*. The Government may be able to secure the passage of its legislation through the House of Commons but not the House of Lords. Unlike defeat in the House of Commons, defeat for the Government in the House of Lords would not end Brexit but it could delay Brexit for at least a year (amendments to the bill passed by the House of Lords but rejected by the Commons could have the same delaying effect). The Parliament Acts 1911 and 1949 allow the House of Commons to override the House of Lords, but only after a gap of a year. That could potentially push Brexit back to mid 2020. What the members of the House of Lords will do is unclear. However, the hints from the Westminster press corps are again that the unelected chamber is unlikely to want to be seen to take on the electorate.

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An indicative timeline showing possibility scenarios for Brexit is set out at the end of this briefing.

More litigation in the UK

The end of the *Miller* case is not the end of the courts' involvement with Brexit. Another group (Wilding and Yalland) is already taking the Government to court again, this time regarding the UK's membership of the EEA and, with it, the EU's internal market (though the group's application for permission to bring judicial review proceedings was, it has been reported, initially refused on paper). The argument appears to be that the UK is a member of the EEA in its own right, that the UK's withdrawal from the EU does not automatically bring with it withdrawal from the EEA, and that the Government needs legislative authority to withdraw from the EEA in the same way that it needs legislative authority to withdraw from the EU.

We discussed this argument in our briefing entitled *Brexit: Will the UK remain in the EEA despite leaving the EU?* (December 2016). Suffice it to say that the fundamental premise - that withdrawal from the EU does not also bring with it substantive departure from the EEA - is decidedly questionable, as is the practical utility of English court proceedings. In any event, the Government could close off this avenue in its legislation regarding article 50, though doing so

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expressly may risk widening the scope of the legislation and thus allowing debate on a broader range of proposed amendments.

Litigation in Ireland

Yet another group, under the name of Jolyon Maugham QC and potentially a UK member of the European Parliament, with crowd-funding, is proposing to launch litigation in Dublin. The basis of this litigation is extensive (eg the draft Statement of Claim on the internet includes the assertion that the Prime Minister gave the UK's article 50 notice orally at a meeting of the European Council on 2 October 2016), but the litigation is essentially a contrivance to bring the issue of the revocability of an article 50 notice before the Court of Justice of the European Union under the guise of an argument that the rest of the EU is not correctly carrying out the steps required by article 50 of the TEU. It also raises the question of whether departure from the EU means departure from the EEA.

The revocability of an article 50 notice is a question of EU law, on which the CJEU is the ultimate decision-maker. The Supreme Court in *Miller* did not consider the issue of whether an article 50 notice is revocable because it accepted the parties' agreement that an article 50 notice is not revocable but, in any event, that revocability is not relevant to the Government's powers: if the Government does not have power to take the UK out of the EU, it does not have the power to start a process that could or will lead to the same result. The reason underlying this unanimity was that no one (at least, the Government, in whose interest it might have been to argue the point) was prepared to countenance a case on the UK's constitutional requirements for withdrawing from the EU being determined by the CJEU.

The threatened litigation in Ireland is essentially a contrivance to bring the issue of the revocability of an article 50 notice before the CJEU

If the litigation in Ireland does lead to the CJEU's deciding whether or not an article 50 notice is revocable, that will not in itself impose a legal impediment to the UK's withdrawal from the EU. In practice, any decision by the CJEU is likely to be well after an article 50 notice has been served by the UK - certainly after March 2017. The Government has also said that it does not intend to revoke an article 50 notice. But a decision on revocability will affect politics as the date for the UK's withdrawal from the EU nears.

The Prime Minister promised in her Lancaster House speech that the Government would put any final deal between the EU and the UK to a vote in both Houses of Parliament before it comes into force (she did not say what form this vote would take - the Government is in any event obliged to lay a treaty before Parliament: see our briefing entitled *Brexit: the Constitutional Endgame and the Need to Act Now*, September 2016). If the CJEU has, by the time a final deal comes before Parliament, decided that an article 50 notice is irrevocable, the choices available to Parliament will be limited: the Government's deal or no deal. If the CJEU were to decide that an article 50 notice is revocable, it opens up a third choice, namely revocation. Parliament and the electorate would then be able to make a concrete choice between the actual terms (or lack of terms) available to the UK outside the EU and those applicable if the UK were to remain a member of the EU. This first referendum could be treated as having decided the principle, but a second could be used to confirm the people's agreement to what withdrawal means in practice.

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The Court of Justice of the European Union

The Irish litigation could lead to a reference to the CJEU, but it is not the only way in which the CJEU could be involved. For example, two requests were made by the Commission to the CJEU for opinions on whether the EU was entitled to sign the EEA Agreement. Assuming that a withdrawal agreement can be reached between the UK and the EU, there could be scope for legal debate over numerous issues, including: whether all the agreement's contents are within the power of the EU to sign at all (the CJEU is particularly protective of its own role as the ultimate arbiter of EU law); whether its contents are entirely within the EU's powers or, instead, constitute a mixed agreement that each member state must also ratify in accordance with its own constitutional requirements (ratification is a slow process that, in itself, often takes at least two years); or whether all its contents require the majority and procedures set out in article 50 or whether other treaty provisions apply.

A reference to the CJEU could result in an effective reduction of the time for negotiation, already in practice cut down from the two year period set out in article 50 by the need, for example, for Parliamentary approval in the EU (and the UK too). And if the CJEU were to decide late in the day that the deal required the sanction of each member state, it could in substance scupper the deal, absent unanimous agreement to extend the two year deadline.

Conclusion

The Supreme Court has decided that Parliament, not the Government, is the decision-maker on whether the UK should start the formal process to leave the EU, which will bring with it uncertainties and potential delays that the Government had sought to avoid. But the end of the *Miller* case is not the end of court involvement in Brexit.

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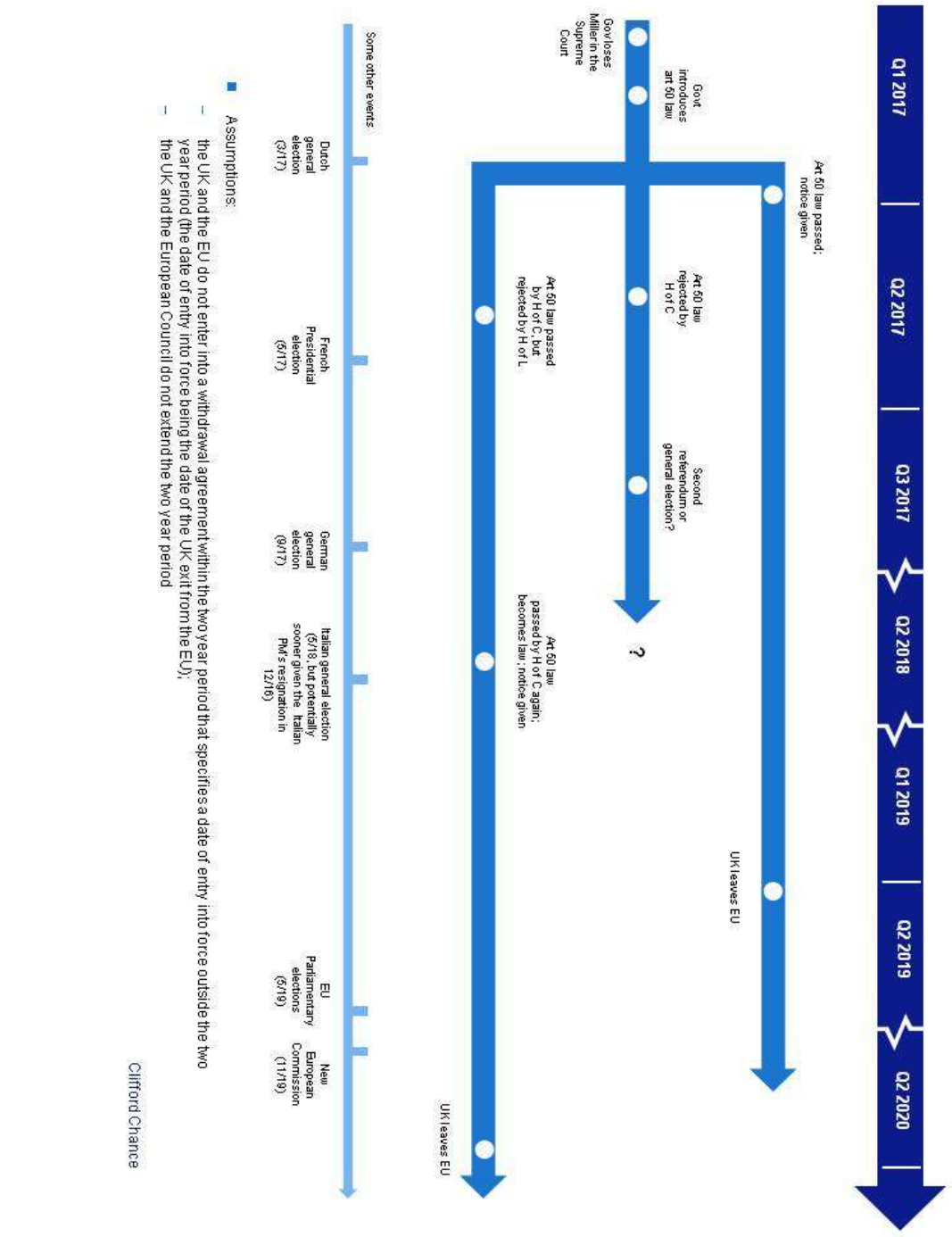

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CONTACTS

Simon James
Partner

T +44 20 7006 8405
E simon.james
@cliffordchance.com

Chris Bates
Partner

T +44 20 7006 1041
E chris.bates
@cliffordchance.com

Kate Gibbons
Partner

T +44 20 7006 2544
E kate.gibbons
@cliffordchance.com

Simon Gleeson
Partner

T +44 20 7006 4979
E simon.gleeson
@cliffordchance.com

Dan Neidle
Partner

T +44 20 7006 8811
E dan.neidle
@cliffordchance.com

Phillip Souta
Head of UK Public Policy

T +44 20 7006 1097
E phillip.souta
@cliffordchance.com

www.cliffordchance.com

Clifford Chance, 10 Upper Bank Street, London, E14 5JJ