

By judgment of 24 January 2017, the Supreme Court has dismissed the government's appeal against the Divisional Court's ruling in *R (on the application of Miller & Dos Santos) v Secretary of State for Exiting the European Union*. The court has held that parliamentary authority in the form of an Act of Parliament is required for the government to serve notice, under Article 50(2) of the Treaty on the European Union, of the UK's intention to begin its withdrawal from the EU. In spite of the defeat, the government remains committed to serving the notice by the end of March. This was the first time since the Supreme Court was formed in 2009 that a hearing has involved all 11 justices and the majority of them emphatically rejected the government's case, although three out of the 11 judges did find in its favour.

## What Was the Question Before the Court?

The issue before the Supreme Court was whether, as a matter of UK constitutional law, the government retains the Crown Prerogative power to serve the Article 50 notice of the UK's intention to withdraw from the EU without authorization by Parliament. At the same time, the court addressed appeals against cases from Northern Ireland in which it was held that the provisions of the Northern Ireland Act and the Good Friday Agreement on the governance of Northern Ireland did not prevent service of the Article 50 notice without Parliamentary approval. The court also considered interventions from the Scottish and Welsh governments contending that devolution legislation for Scotland and Wales and the associated "Sewel Convention" preclude the use of Crown Prerogative to invoke Article 50.

## What Did the Court Decide?

The court dismissed the government's arguments that it retained a prerogative power to serve notice of withdrawal from the EU without Parliamentary approval. Specifically, it found that:

- The European Communities Act 1972 requires that the rights and remedies etc. from time to time under the EU Treaties have the force of law in the UK. Although, subject to the requirements of the European Union Act 2011 and the Constitutional Reform and Governance Act 2010, the government may exercise the Crown Prerogative to change the terms of the EU Treaties and EU legislation made under them, it may not exercise the prerogative so as to nullify the provisions of the 1972 Act by withdrawing from the treaties themselves. EU Law, however it changes, is an independent source of UK law until Parliament decides otherwise.

- The High Court had been correct in holding that Parliament is sovereign and the Crown cannot exercise its prerogative powers to override rights laid down by Parliament. As a consequence, Parliamentary approval is required for notice to be served under Article 50.
- Accordingly, there is no prerogative power to issue the Article 50 notice which is capable of being constrained by the Good Friday Agreement, devolution legislation or the Sewell Convention.

The court also decided that any decision by Parliament to leave the EU is not subject to approval by any of the devolved legislatures of Scotland, Northern Ireland or Wales.

As the Supreme Court's name implies, there is no possibility of further appeals against its decision.

The Supreme Court did not decide on the question whether any Article 50 notice can be withdrawn and, since the Supreme Court held that this issue was not relevant for the case, it did not defer that question to the European Court of Justice pursuant to Article 267 of the Treaty on the Functioning of the European Union.

The [full decision](#) can be viewed on the Supreme Court website.

## What Happens Next?

As with so much else concerning Brexit, the government has not been entirely clear as to what it would do if its appeal was dismissed. The court has made it clear that an Act of Parliament will be required in order for the government to serve notice of the UK's intention to leave the EU, although it is not yet clear exactly what form that act should take.

Prime Minister Theresa May has given personal assurances to her European counterparts that even if the government lost its appeal the Article 50 notice would still be served by her end of March deadline. The BBC has reported that government sources have indicated a short form bill has been prepared for introduction to Parliament in the event that the government lost its appeal. At present, the signs are that the government may well be able to steer the legislation through both Houses of Parliament in time for March. The official position of both the government and the opposition is to proceed with Brexit and, whatever their personal views, few MPs appear to be willing to be seen as frustrating the "will of the people" as expressed through the referendum result. It is unlikely that the House of Lords, composed as it is of unelected peers, will feel it has the democratic legitimacy to do so.

Despite the legal uncertainty as to whether an Article 50 notice can be unilaterally withdrawn (N.B. only a reference to the Court of Justice of the European Union can determine the matter – something we have discussed in detail in [our Brexit Legal blog](#)), for all practical purposes it would appear inevitable that, once Article 50 is triggered, Brexit will take place in some shape or form two years after service of the notice, unless there is an agreement to the contrary between the UK and all other EU member states. It remains to be seen just how much scope there is under the EU treaties for smoothing the UK's transition from EU membership to its new trading relationship with the EU.

## What Are the Government's Brexit Plans?

On 17 January 2017, Prime Minister Theresa May set out the government's Brexit plans with a little more clarity in [a speech at Lancaster House](#) in London. She confirmed that the UK will be leaving the EU single market, the EU's common commercial policy and that the country would no longer be a full member of the EU Customs Union. The Prime Minister also stated that the government will aim to conclude a bespoke trade deal with the EU reflecting the "freest possible trade in goods and services between Britain and the EU".

What this means in practice is not yet entirely clear. At the outset, a long and complex formal process will now begin at the WTO, in which the UK government will work "smoothly" to separate the UK's schedules of commitment from the EU's. The government has not yet launched any formal process in the WTO and plans to reflect on the feedback it will get from other WTO members, the UK parliament, and all other stakeholders involved in the next coming weeks,

## How Can We Help You?

The result of the referendum on 23 June 2016 has created legal, political and trade uncertainty which is now being addressed as the UK government formulates its Brexit legislative positions.

We have been providing clients with Brexit-related support since the beginning of the referendum campaign – through analysing the potential impact that the UK withdrawal from the EU will have on our clients and the industries in which they operate.

Since the vote, we have developed tailored Brexit services to help our clients stay abreast of the policy and legal challenges that are arising. Thanks to a team composed of lawyers, international trade experts and senior level policy advisors with direct access to both the UK and the EU negotiating teams, we are ideally positioned to monitor and analyse the reality of the negotiations and keep our clients informed about relevant developments, including those which do not necessarily hit the press.

For further information, please contact your usual Squire Patton Boggs lawyers or one of those listed.

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