



## BRIEFING PAPER

Number 7763, 14 November 2016

# Brexit: Article 50 TEU and the EU Court

By Vaughne Miller,  
Arabella Lang, Jack  
Simson-Caird

### Contents:

1. An 'appeal' to the EU Court?
2. CJEU preliminary rulings
3. To refer or not to refer?



# Contents

<b>Summary</b>	<b>3</b>
<b>1. An 'appeal' to the EU Court?</b>	<b>5</b>
<b>2. CJEU preliminary rulings</b>	<b>6</b>
2.1 Article 267 TFEU	6
2.2 The 'acte clair' doctrine	6
2.3 Damages for not referring	7
<b>3. To refer or not to refer?</b>	<b>8</b>
3.1 Experts disagree	8
3.2 The irrevocability assertion	9
3.3 Revocability and the <i>Miller</i> judgment	10
3.4 Arguments supporting revocability	10
The Vienna Convention on the Law of Treaties	10
Legal and political views	11

# Summary

## EU Treaty provisions

Article 50 (1) of the Treaty on European Union (TEU) states: "Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements". Article 50 (2) TEU states: "A Member State which decides to withdraw shall notify the European Council of its intention".

## Referral to the Court of Justice of the EU?

After the High Court [judgment](#) in *Miller* on 3 November 2016 on whether the Government could trigger the start of the EU exit process under Article 50 TEU using Prerogative powers, some media reports suggested that the Court of Justice of the European Union (CJEU) would have the last word on the use of the Royal Prerogative.

The interpretation of Article 50 TEU, if one were needed, would be a matter of EU, not UK, law. Under Article 267 of the *Treaty on the Functioning of the European Union* (TFEU) there could be a role for the CJEU in determining whether an Article 50(2) notice can be withdrawn if a Member State which has served notice of an intention to withdraw changes its mind.

But are questions about the decision to trigger Article 50 under national constitutional arrangements relevant to the CJEU?

## The 'acte clair' doctrine

If a court of last instance has some uncertainty as to the correct interpretation of EU law, it *must* refer a question on the interpretation of EU law or the EU Treaties to the CJEU, but not if the national court decides something is clear "beyond reasonable doubt". This is known as the 'acte clair' doctrine, and it has been established in the case law of the CJEU (largely in [CILFIT](#)).

## The case of Gina Miller at the High Court

In *Miller* the Court recorded it as common ground that the Article 50(2) notice is irrevocable and therefore the High Court did not rule on this point. It ruled that the UK Government could not trigger Article 50 TEU without parliamentary involvement. The irrevocability of Article 50 was an important underlying factor, even though the Court did not rule on this point.

The Government has appealed the decision to the Supreme Court. Its skeleton [grounds for appeal](#) do not mention irrevocability.

## The question of whether a notice of withdrawal can be revoked

There is a general principle of international law, set out in Article 68 of the [Vienna Convention on the Law of Treaties](#), that a notification of intention to withdraw from a treaty "may be revoked at any time before it takes effect". This provision does not override any specific arrangements in a treaty.

#### 4 Brexit: Article 50 TEU and the EU Court

The EU Treaty is silent on this matter, and although the parties to the *Miller* case assumed that notice of withdrawal is irrevocable, there are possible arguments, and a preponderance of academic opinion, to the contrary.

If the CJEU were to rule on the revocability question, it would interpret purposively and not according to academic opinion. While academic views are non-determinative, the CJEU might “take account of” what the Vienna Convention says.

# 1. An 'appeal' to the EU Court?

Following the High Court [judgment](#) of 3 November 2016<sup>1</sup> on whether the Government could trigger Article 50 of the *Treaty on European Union* (TEU) using prerogative powers, several press reports maintained that the Court of Justice of the European Union (CJEU) would have the final word in this matter.

The Express [headline](#), for example, was 'NEXT STOP BRUSSELS: EU could have FINAL SAY on Article 50 terms after High Court ruling'. In the body of the text the report went on: "Unaccountable officials at the European Court of Justice may be called in to rule on the nature of Britain's divorce talks with Brussels".

The Mail on 4 November [referred to](#) "a potential further appeal to the European Court of Justice in Luxembourg". The Mail's [headline](#) on 7 November was that "Gina Miller says she WON'T appeal her Brexit case at the European court if she loses in the Supreme Court".

This briefing explains how the CJEU might be involved in interpreting the process for withdrawal from the EU, explains that the question that could potentially be referred to it is about whether Article 50 TEU notification could be revoked, and looks at why that question is important to the judgment.

---

<sup>1</sup> For all High Court transcripts, see [Santos and M -v- Secretary of State for Exiting The European Union: transcripts](#).

## 2. CJEU preliminary rulings

### 2.1 Article 267 TFEU

There is no 'appeal' as such from a national court to the Court of Justice of the European Union (CJEU). Article 267 of the *Treaty on the Functioning of the European Union* (TFEU) provides a mechanism whereby a national court refers a question of the interpretation of EU law or Treaties to the CJEU. In these cases the national court suspends proceedings, and once the CJEU has given its ruling, the national court resumes its proceedings and gives judgment in the light of the EU Court's preliminary ruling. The process usually takes around 16 months.

[Article 267](#) states:

The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:

- (a) the interpretation of the Treaties;
- (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.

If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay.

### 2.2 The 'acte clair' doctrine

The Supreme Court must refer to the EU Court if it has doubts as to a point of interpretation of EU law. The *acte clair* doctrine determines when national courts of last instance are free from an obligation to refer a question to the CJEU.

In a judgment of 6 October 1982, [CILFIT](#) on former Article 177 (now 267), the EU Court narrowed the scope of the principle by specifying that the matter had to be equally clear to the courts of the other Member States, in order to avoid inconsistencies across the EU:

The third paragraph of Article 177 of the EEC Treaty is to be interpreted as meaning that a court or tribunal against whose decisions there is no judicial remedy under national law is required, where a question of Community law is raised before it, to comply with its obligation to bring the matter before the Court of Justice, unless it has established that the correct application of Community law is so obvious as to leave no scope for any reasonable doubt. The existence of such a possibility must be assessed in the light of the specific characteristics of Community law, the particular difficulties to which its interpretation gives rise

and the risk of divergences in judicial decisions within the Community.<sup>2</sup>

## 2.3 Damages for not referring

The EU Court's judgment in [Köbler](#), September 2003, established that applicants can claim damages from the supreme court of a Member State for not referring a question when it was obliged to do so. In [Ferreira da Silva](#), September 2015, when the Portuguese Supreme Court refused to refer a question to the EU Court, arguing that its interpretation of "transfer of a business" was beyond reasonable doubt, the applicants started a new case, claiming damages from the Supreme Court for failing to refer a question when it was obliged to do so.

---

<sup>2</sup> Summary, *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health*. Reference for a preliminary ruling: Corte suprema di Cassazione, Italy. Obligation to request a preliminary ruling. Case 283/81.

## 3. To refer or not to refer?

### 3.1 Experts disagree

Opinions among academics and constitutional lawyers differ on whether the Supreme Court would be obliged to refer a question to the CJEU in connection with Article 50 TEU. A reference to the CJEU arises only when the answer to a question on a point of EU law is necessary to decide the case. If a decision on a case can be made without resolving the point of EU law, the national court must do that.

Questions currently being discussed concern the revocability or not of Article 50 TEU and the phrase in Article 50(1) that a decision to withdraw from the EU should be in accordance with a Member State's "own constitutional requirements". Neither of these points was argued in *Miller*.

Albert Sánchez Graells, Senior Lecturer in Law at the University of Bristol Law School, writes that referral to the CJEU is "legally unavoidable" and "not doing so triggers a risk of infringement of EU law by the UK due to the acts (or omission, in this case) of its highest court".<sup>3</sup> On the other hand, Mikolaj Barczentewicz, University of Oxford, argues that the Supreme Court should not refer to the CJEU:

... it is at the very least arguable that Parliament did not intend for EU rules, like the duty to make references to the EU Court, to have any effect in UK law in matters of withdrawal from the EU. This would mean that, in UK law, the Supreme Court would have neither duty, nor even a power to make the reference. The reference would not be an option. It would be for the Supreme Court to interpret Article 50 TEU alone and with final authority, just like domestic courts routinely interpret international law.<sup>4</sup>

Article 50(1) states that a Member State may decide to leave the EU "in accordance with its own constitutional arrangements". Although this was not argued in *Miller*, some commentators thought this might make the national process for serving an Article 50 notice a matter of EU law. But the recent case of *Shindler* indicates otherwise.<sup>5</sup>

Oliver Garner, European University Institute, says the decision to notify is an internal constitutional requirement, which "does not yet fall within the scope of the Court of Justice's interpretative authority because the relevant EU law – Article 50 – has not yet been activated".<sup>6</sup> On the other hand, Garner continues, if the UK triggered Article 50 TEU and

<sup>3</sup> *How to crack a nut* [blog](#), 3 November 2016.

<sup>4</sup> Mikolaj Barczentewicz, [The Supreme Court Should Not Refer to the EU Court of Justice on Article 50](#), Constitutional Law Association blog, 11 November 2016.

<sup>5</sup> Here the Court of Appeal suggested that the legislative choice made by Parliament in enacting the ECA was only to make provision for the effect of EU law to the extent the UK remains a Member of the EU. For comment on *Shindler*, see Mikolaj Barczentewicz, [Does EU Law Bind Parliament as to Withdrawal from the EU? British Expats and Their Right to Vote \(Shindler\)](#), Constitutional Law Association, 16 June 2016.

<sup>6</sup> Oliver Garner, [Referring Brexit to the Court of Justice of the European Union: why revoking an Article 50 Notice should be left to the United Kingdom](#), European Law blog, 4 November 2016.



then attempted unilaterally to revoke this notice by Prerogative powers which were challenged in the UK courts, the UK courts would be under an obligation to refer to the CJEU under Article 267 TFEU.

### 3.2 The irrevocability assertion

The main contestable question on the interpretation of the EU Treaties before the High Court was whether the Article 50 notice of intention to withdraw was revocable.

In a blog shortly after the EU referendum, constitutional lawyers Barber, Hickman and King argued that the Article 50 process was irreversible: “there is no turning back once Article 50 has been invoked” and the UK “could not safely assume that it is able to withdraw notification on the basis of the terms of Article 50”.<sup>7</sup>

The Brexit Secretary, David Davis, was asked on 7 November 2016 why the Government had accepted that Article 50 could not be withdrawn, to which he [replied](#): “The reason was not really a point of law so much as a point of constitutional and political reality. I did not see it as possible that we could reverse the decision of the British people”.

Lord Pannick QC said on the [first day](#) of the *Miller* hearing on 13 October that “notification is the pulling of the trigger. And once you have pulled the trigger, the consequence follows. The bullet hits the target [...] on the date specified in Article 50(3)”.

The Court seemed to acknowledge that the assertion that Article 50(2) is irreversible was “central to the arguments”, that it was “absolutely essential for the Court to decide that it was irrevocable rather than “proceed on an assumption”.

Piet Eeckhout, Professor of EU law, University College London, concludes that the revocability question is not relevant to the *Miller* case and that there is therefore no need for a reference to the CJEU:

1. It is no answer to say that, if the notification is revocable, Parliament can always force the Government to stop Brexit. This the Parliament can do on any understanding of the scope of the royal prerogative.
2. It is no answer to say that the withdrawal agreement will be put before Parliament. There may simply not be such an agreement, and Parliament could do nothing about that. If there is an agreement, and Parliament rejects it, that does not stop Brexit from happening.
3. It is no answer to say that the withdrawal agreement could provide that Brexit is conditional on the UK Parliament's approval. This would need to be negotiated by the Government, and agreed by the EU. It is not in Parliament's control.<sup>8</sup>

The [judgment](#) of 3 November stated that it was common ground between the parties that the Article 50 notice was irrevocable (para 10).

“... we do not argue that an Article 50 notice can be revoked, and we invite the court to proceed in this case on the basis that a notification under Article 50(2) is irrevocable. We do not in any event accept that this question is central to the arguments before the court”.

Attorney General,  
High Court of Justice,  
[Santos and Miller](#), 17  
October 2016.

<sup>7</sup> UK Constitutional Law blog, 27 June 2016. Nick Barber, Tom Hickman and Jeff King: [Pulling the Article 50 'Trigger': Parliament's Indispensable Role](#).

<sup>8</sup> Piet Eeckhout, London-Brussels One-Way or Return, [Miller and the Art 50 notification: revocability is irrelevant](#), 14 November 2016.

As a consequence, the Court did not, strictly, rule on this point. The Government's [skeleton argument](#) for its appeal to the Supreme Court does not say anything about irrevocability.

### 3.3 Revocability and the *Miller* judgment

It is difficult to know how the revocability question affected the High Court's judgment in *Miller*. In paragraph 51 the Court states that the effect of triggering Article 50 would be to deny the rights in section 2 (1) of the ECA, which enshrines Treaty rights and other directly applicable EU law into UK law. Article 50 notification, according to the Court, would strip the provision "of any practical effect". Paragraphs 54-67 expand on this point and indicate that the Court accepted the claimant's submission that it is the Article 50 notification, and the UK's subsequent withdrawal from the EU, that would deprive the rights provided by the ECA of their effect.

Putting aside the question of whether the ECA actually contains any domestic legal rights, a point debated extensively by constitutional lawyers, it is debatable how the revocability question would have altered the High Court's reasoning had it been contested by either the Government or the claimants. On the one hand, if Article 50 notification is revocable then it is at least *legally* possible that the act of notification would not have the effect of depriving EU law rights. On the other hand, even if the notice was *legally* revocable, the notice could still have the domestic legal effect identified by the High Court.

### 3.4 Arguments supporting revocability

#### The Vienna Convention on the Law of Treaties

There is a general principle of international law, set out in Article 68 of the [Vienna Convention on the Law of Treaties](#), that a notification of intention to withdraw from a treaty "may be revoked at any time before it takes effect".

However, this provision does not override any specific arrangements in a treaty, and treaties vary widely on this point.<sup>9</sup>

Article 50 itself does not state whether or not a withdrawal notification could be revoked. Because Article 50 has specific provisions on when the Treaties cease to apply, and how a former Member State could re-join, it could be read as implying that notification could not be withdrawn. It specifies (a) that the EU Treaties cease to apply two years after notification in the absence of a withdrawal agreement or an extension of the negotiating period, and (b) that from that point the state that has withdrawn can re-join only through the normal application procedure.

---

<sup>9</sup> See Article 5 of the Vienna Convention. Also Laurence R Helfer, '[Exiting Treaties](#)', *Virginia Law Review*, Vol 91, 2005, p1579 at p1597.

Jake Rylatt, of Wolfson College, Cambridge, has argued that Article 50 would exclude the customary international law on withdrawing from treaties.<sup>10</sup> But many have argued that it can be revoked.

## Legal and political views

The European Council President, Donald Tusk, has said that revoking an Article 50 notification would be “formally, legally” possible.<sup>11</sup> Jean-Claude Piris, former director-general of the EU Council’s Legal Service, also believes “there is no legal obstacle to the UK changing its mind, in accordance with its constitutional requirements”.<sup>12</sup> Lord Kerr, who as the UK’s Permanent Representative to the EU helped draft the EU exit clause in the Constitutional Treaty which preceded the Lisbon Treaty, told the BBC: “It is not irrevocable - you can change your mind while the process is going on”.<sup>13</sup>

In evidence to the Lords EU Committee in March 2016, Professor Derrick Wyatt argued that there is nothing in the wording of Article 50 TEU to say that a country can’t change its mind:

It is in accord with the general aims of the treaties that people stay in rather than rush out of the exit door. There is also the specific provision in Article 50 to the effect that, if a state withdraws, it has to apply to rejoin de novo. That only applies once you have left. If you could not change your mind after a year of thinking about it, but before you had withdrawn, you would then have to wait another year, withdraw and then apply to join again. That just does not make sense. Analysis of the text suggests that you are entitled to change your mind, but the politics of it would be completely different.<sup>14</sup>

But he also said “the politics of the referendum result would be likely to rule out that option”.<sup>15</sup>

Sir David Edward, former Judge of the EU Court of Justice, said it was “absolutely clear that you cannot be forced to go through with it if you do not want to: for example, if there is a change of Government”. But he too speculated about the politics of the situation, and thought the other Member States might only allow the UK not to withdraw after notification if it went “back to zero”; there would be “no new opt-outs”.<sup>16</sup>

Paul Craig, Professor of English Law University of Oxford, believes Article 50 is revocable because of the relevant principles of international law and for practical political reasons.<sup>17</sup>

---

<sup>10</sup> UK Constitutional Law blog, [The Irrevocability of an Article 50 Notification: Lex Specialis and the Irrelevance of the Purported Customary Right to Unilaterally Revoke](#), Jake Rylatt, 27 July 2016.

<sup>11</sup> See also Donald Tusk, [Speech](#) by President Donald Tusk at the European Policy Centre conference, EU Council press release, 13 October 2016.

<sup>12</sup> Jean-Claude Piris, [Article 50 is not for ever and the UK could change its mind](#), Financial Times, 1 September 2016.

<sup>13</sup> [BBC News, 3 November 2016](#).

<sup>14</sup> [Revised transcript of evidence. Lords EU Committee, 8 March 2016](#).

<sup>15</sup> Ibid

<sup>16</sup> Ibid

<sup>17</sup> Oxford Human Rights Hub, [Brexit: Foundational Constitutional and Interpretive Principles: II](#), 28 October 2016.

## 12 Brexit: Article 50 TEU and the EU Court

Alan Renwick, Deputy Director of The Constitution Unit, thought political reality might take over, and the other 27 Member States would allow the UK to change its mind if they wanted the UK to stay in the EU. But, he cautioned:

... that would again require unanimity – either to amend Article 50 (and we know how much effort is required to change an EU treaty) or, in effect, to extend permanently the two-year negotiation window. Hence, any member state could drive a hard bargain, potentially one detrimental to the UK.<sup>18</sup>

The former Liberal Democrat MEP, Andrew Duff, also regarded revocability as a political as well as a legal issue:

That Article 50 is silent on the matter of revocation does not mean that a change of direction would be illegal under EU law (as long as the CJEU were convinced that the switch was constitutional). The EU is well practised in the art of the stopped clock. Given the collateral damage done to the remaining EU by Brexit, a notification that London had changed its mind would be met with very great, if somewhat exasperated relief.<sup>19</sup>

---

<sup>18</sup> [An EU Referendum horror: why you need to know about Article 50. The clause the public don't know about](#), 10 December 2015.

<sup>19</sup> Verfassungsblog, [Everything you need to know about Article 50 \(but were afraid to ask\)](#), Andrew Duff, 4 July 2016.

### About the Library

The House of Commons Library research service provides MPs and their staff with the impartial briefing and evidence base they need to do their work in scrutinising Government, proposing legislation, and supporting constituents.

As well as providing MPs with a confidential service we publish open briefing papers, which are available on the Parliament website.

Every effort is made to ensure that the information contained in these publicly available research briefings is correct at the time of publication. Readers should be aware however that briefings are not necessarily updated or otherwise amended to reflect subsequent changes.

If you have any comments on our briefings please email [papers@parliament.uk](mailto:papers@parliament.uk). Authors are available to discuss the content of this briefing only with Members and their staff.

If you have any general questions about the work of the House of Commons you can email [hcenquiries@parliament.uk](mailto:hcenquiries@parliament.uk).

### Disclaimer

This information is provided to Members of Parliament in support of their parliamentary duties. It is a general briefing only and should not be relied on as a substitute for specific advice. The House of Commons or the author(s) shall not be liable for any errors or omissions, or for any loss or damage of any kind arising from its use, and may remove, vary or amend any information at any time without prior notice.

The House of Commons accepts no responsibility for any references or links to, or the content of, information maintained by third parties. This information is provided subject to the [conditions of the Open Parliament Licence](#).