

When surreal becomes real: Brexit begins

“Sad process, surrealistic times but at least a more realistic announcement on #Brexit”

Donald Tusk, European Council President

“We’re not leaving Europe, we’re disentangling ourselves from the treaties of the EU. We can remain powerfully committed to Europe with a new European partnership... whilst also going forward with an identity as Global Britain.” Boris Johnson, Foreign Secretary

“We welcome the level of detail provided in the PM’s speech and her commitment to providing certainty wherever possible. We now know that we will be leaving the single market, and while there will be firms who regret this, they will at least be able to plan on that basis.”

Allie Renison, Institute of Directors, Head of Trade and Europe Policy

Spring is not yet upon us and yet the seeds sown in 2016 are already bursting forth with life. (Even if no-one quite knows what the fruit will look like or how it will taste.) In the United States, a certain Donald J. Trump has assumed residency in the White House. In the United Kingdom, after much frenetic work behind the scenes, and much furious debate in the Supreme Court, the

judges have had their say and the wheels of Government are now cranking into gear. In the first of our Brexit Essentials briefings of 2017, we cover the key events of the past few weeks, including the Supreme Court’s *Miller* judgment today and Theresa May’s pivotal speech last week, and attempt to anticipate the coming months and years.

Miller judgment

“[Withdrawal] will constitute as significant a constitutional change as that which occurred when EU law was first incorporated... by the 1972 Act. ... We cannot accept that a major change to UK constitutional arrangements can be achieved by ministers alone; ... the bullet will have left the gun before Parliament has accorded the necessary leave for the trigger to be pulled.”

Lord Neuberger, President of the Supreme Court

In an upholding of Parliamentary sovereignty, and by a majority of 8-3, the Supreme Court today ruled as follows:

- The withdrawal of the UK from the EU, together with the consequent removal of existing domestic rights of UK residents, constitutes a fundamental change in UK domestic law.
- The only way recognised by the UK constitution to effect such a change in law is by way of Parliamentary legislation.
- As such, the Government cannot trigger the Article 50 Notice, so commencing the process of taking the UK out of the EU, without legislation from Parliament authorising it to do so.

The Government has confirmed that it will accept this ruling and will table an Article 50 Brexit Bill within days. Opponents may look to amend the Bill, but their ability to do so is likely to be constrained, at least to some extent. Substantive amendments regarding, for example, single market access are likely to be ruled out of order as subjective and potentially binding the Government’s hand in the negotiations. Any amendments seen to be frustrating the will of the people risk being politically toxic. For those reasons, most proposed amendments will probably focus on process, transparency and a meaningful final vote, rather than seeking to dictate the terms of exit.

The Supreme Court also unanimously concluded that the UK Government does not need to obtain the approval from the devolved governments of Scotland, Wales and Northern Ireland to pass

the Article 50 legislation. This is unlikely to deter the devolved governments from seeking significant influence over the process and the eventual outcome.

May's speech

“She proceeded with remarkable skill. Almost unnoticed, she accustomed the British to a total farewell of Brussels. Whether this is sufficient to lead the country into the uncertain post-Brexit era without social upheavals and without political setbacks will be assessed later.”

German newspaper, Allgemeine Zeitung

Theresa May has been consistently clear that she will not divulge any information that she regards as likely to hamper Britain's negotiating strategy. As a result, her speech was very much principles-based. It did, however, present a 12-point plan (see below) and articulated the following clear concepts:

- **Britain will leave the single market.** It was made clear that the Government's “red lines” of (1) controlling immigration and (2) rejecting the jurisdiction of the ECJ are incompatible with remaining within the single market, and that partial membership of the EU or “cherry picking” was not in Britain's interest. The Government will instead look to retain the greatest possible access to the single market through its own negotiated free trade agreement, with Britain re-establishing itself globally, rather than as a member of the EU.
- **Britain will establish its own trade tariffs.** Whilst this might mean a reduced form of membership of the customs union, rather than leaving the union entirely, the base line outlined in May's speech is that Britain wants to be free to establish its own tariff schedules with the World Trade Organisation, incompatible with full customs union membership.
- **No “cliff edge” for financial sector.** Whilst Britain would not generally look to establish a lengthy period of transitional arrangements, May stressed that it would look to negotiate a phased implementation of its Brexit strategy, giving the financial services sector in particular a period to prepare for inevitable changes to the regulatory landscape. A “special deal” for the City remains an option, though the status of the City's key issues (such as passporting, access to market infrastructure (e.g. clearing) and the applicability of EU regulations more generally) remains uncertain at this stage.

So Theresa May has articulated a clear high-level vision for Brexit. Of course, as she is acutely aware, that vision will be challenged at home and abroad, by, amongst others, political opponents in the UK, special interest groups, the “EU27” (who are “united and ready to negotiate”), the potentially harsh reality of trade negotiations with the US and others, and, if and when a deal with the EU is agreed, by Parliamentary scrutiny. Quite how the Government's vision will evolve (if at all) in the face of these challenges remains uncertain.

May's 12 point Brexit plan

1. **Certainty** - to be provided whenever possible throughout the process
2. **Control of Britain's laws** - i.e. no more ECJ jurisdiction
3. **Union within the UK** - work with the devolved governments and not establish new barriers
4. **Irish land-border** - maintain Common Travel Area with the Republic of Ireland
5. **Control of immigration** - "red line" for the UK, which precludes remaining within the single market
6. **Rights for EU nationals in Britain, and British nationals in the EU** - as early as possible, and must be reciprocated
7. **Protect workers' rights** - build on the values created by European legislation
8. **Bold and ambitious free trade agreement** - retain greatest possible access to single market whilst retaining independence of negotiation
9. **Britain to be a global trading nation** - with an open mind as to how to achieve a customs agreement with the EU
10. **Britain to be a focus for science and innovation** - continued collaboration with EU partners
11. **Co-operation in the fight against crime and terrorism** - close co-operation is intended post-Brexit
12. **Smooth, orderly Brexit** - phased implementation to avoid the "cliff edge"

What next?

With these concepts now laid down by the Government, and the certainty of a Parliamentary vote on the final Brexit deal, the next step for the Government is to table the Article 50 Brexit Bill and, assuming Parliamentary approval (the likelihood of which is bolstered by the overwhelming (if non-binding) vote of the House of Commons in December 2016), to serve the Article 50 Notice.

There remain possible impediments, both to the overall process and to the delivery of the Article 50 Notice. More legal challenges may appear on the horizon, but at the moment the following two cases are expected in the courts.

- **The Article 127 case:** The pro single market think tank **British Influence** is leading a fresh legal challenge in the High Court regarding the UK's membership of the EEA (by which the UK has access to the single market). The key argument in this case (refuted by the Government, which contends that the UK's departure from the EU will automatically result in an exit from the EEA) is that the UK's membership of the EU is separate from its membership of the EEA and, as such, that Article 127 of the EEA membership agreement must be triggered separately from Article 50, and with Parliamentary assent. This case is expected to be heard in the High Court in early February 2017.
- **A Brexit exit strategy?:** Another potential legal challenge waiting in the wings is being pursued by Jocelyn Maugham QC, whose strategy is to initiate a claim in the Irish courts concerning the UK's (mis-)treatment by other EU members since the referendum in June 2016, with the ultimate goal being a referral to the ECJ. The key question that Maugham then looks to discuss is whether Article 50 can be revoked once it has been triggered, with the aim of giving Parliament an exit strategy if the public mood were to be reversed. Legal proceedings are expected to commence in late January or February 2017.

May has made her timetable for exit clear and, in particular, has stressed that it will not be affected by a failed deal with the EU - no deal is better than a bad deal. The expectation is therefore that, come what may, Britain will cease to be a member of the EU by March 2019. This timetable will inevitably come under considerable pressure

from many sources. Below shows the Government's indicative timetable for certain key actions and events, alongside certain other considerations which could have an impact. But Brexit is now gathering inexorable pace; time will tell if the winter of our populist discontent is made glorious summer in Europe and beyond.

Timing	Action / Event	Other considerations
Pre-March 2017	<ul style="list-style-type: none"> A50 Brexit Bill: draft, submit to both Houses of Parliament, deal with amendments Trade discussions (formal negotiations not possible while Britain remains a member of the EU) 	<ul style="list-style-type: none"> Opponents/pressure groups may seek to amend Brexit Bill to reflect specific demands (e.g. for single market access) Involvement of UK's devolved governments in the Brexit Bill to be determined Current court cases (re. Article 127 and Article 50 - see above) Possible additional legal challenges to efficacy and/or content of A50 Brexit Bill? Banks and other relevant regulated entities may prepare contingencies e.g. setting up EU subsidiaries; obtaining licences; relocating employees
March 2017	<ul style="list-style-type: none"> Parliamentary approval of A50 Brexit Bill Serve A50 Notice Commence negotiations with EU Commence / continue trade discussions with others 	<ul style="list-style-type: none"> May be further legal challenges following service of the A50 Notice Capacity constraints - what can be run in parallel?
Autumn 2018	<ul style="list-style-type: none"> Agree free trade agreement (FTA) with EU (practical deadline so as to enable deal to be effective by March 2019) 	<ul style="list-style-type: none"> Likely to be "mixed" agreement - will need approval by all Member States (and relevant regions)
March 2019	<ul style="list-style-type: none"> Parliamentary approval of FTA / terms of Brexit FTA becomes effective Phased implementation for financial services and other relevant sectors begins? Formal negotiation of other trade deals commences 	<ul style="list-style-type: none"> Approval by European Parliament and Member States / regions to have been obtained Possible implementation of further contingency planning for banks and regulated entities
March 2021	<ul style="list-style-type: none"> End of two year phased implementation? Some key non-EU trade deals finalised? 	