

Legal Milestones on the Road to Brexit: The People's Challenge Guide

Introduction

[The People's Challenge](#) has commissioned this Guide with a view to identifying some of the main 'legal milestones' that the UK and the EU institutions will need to pass to achieve Brexit. These milestones also mark some of the points at which challenges might arise if the UK or the EU institutions do not act lawfully. The hyperlinks provide more detailed information.

Using this Guide

Members of [The People's Challenge](#) have fundraised to produce the Guide and make it publicly available. Our solicitor, [John Halford](#) at [Bindmans LLP](#) and barristers at [Monckton](#) and [Matrix](#) chambers have also contributed significant amounts of time pro bono. We hold the copyright and all rights are reserved, though the Guide may be shared, quoted from or summarised as long as [The People's Challenge](#) is clearly identified as the source. We would also appreciate being told about any plans to take legal action based on the ideas discussed below. We can be contacted at <https://thepeopleschallenge.org/contact/>. Please also note that the Guide was updated in December 2017, but things will change as the UK/EU negotiations progress or stall; some possible challenges will fall away and others will arise. Specialist legal advice should always be sought on possible or actual litigation and timing issues.

What are the main forms of legal challenge relevant to Brexit?

In principle, the consequences of Brexit and what happens at particular stages of the process can be checked - and challenged – both politically and through various forms of legal action. However, in practice, the courts are unlikely to be interested in any challenge that is not brought responsibly by those who are either:

- directly affected in some clear, identifiable way by what they are challenging; and/or
- able to demonstrate a clear public interest in the courts determining the question/s put to them for determination.

The courts will also expect legal challenges to be brought in a timely way (so specialist legal advice should always be sought on the timing of any contemplated challenge). The courts will not entertain cases brought to make a political point, or obviously weak cases.

In domestic courts (i.e. in the courts of particular member states, such as the UK's High Court) there may be challenges by:

- individuals who are affected by immigration decisions that are subject to a right of appeal (e.g. to refuse permanent residence status) to a court or specialist tribunal;
- individuals, organisations or governmental bodies (e.g. the Governments of Gibraltar, Scotland, Wales or Northern Ireland) which are directly affected by a decision, action or failure by a UK public body (including the Secretary of State for Exiting the European Union) that is unlawful, procedurally unfair or irrational and is not subject to a right of appeal or other effective remedy. This type of challenge is known as judicial review and must normally be brought both promptly and within three months of the grounds for the legal challenge arising.

Throughout the process, the Government may be challenged under freedom of information law for withholding of information from the public and MPs, e.g. its [legal advice](#) or the [economic impact assessments](#) (which are [to be released in a redacted form](#)).

In the [Court of Justice of the European Union](#) ('CJEU') there may also be challenges:

- by individuals, organisations or governmental bodies affected by an alleged breach of EU law which is being challenged in a domestic court but, for a central legal issue to be resolved, needs to be referred to the CJEU for a preliminary ruling;
- by individuals and organisations whose interests are so directly affected by the actions of an EU institution that they have sufficient standing to bring a case direct to the General Court (part of the CJEU);
- by any EU Member State (e.g. the UK while it remains a Member State, the Republic of Ireland or Spain) which believes EU legislation (e.g. a proposed future treaty with the UK) conflicts with the [EU treaties](#) or the [EU Charter of Fundamental Rights](#);
- by the European Commission in 'infringement proceedings' (i.e. where the European Commission believes a member state such as the UK is not following EU law, it can take it to the CJEU for a declaration that EU law has not been complied with and/or seek a fine if the breach continues); or
- by EU institutions if they disagree between themselves (e.g. if the European Commission or the European Parliament believed a Council decision on Brexit was unlawful, it could be challenged in the CJEU).

Note, infringement proceedings are sometimes initiated by the Commission because it has received a [complaint from individuals or organisations](#) that a Member State is breaching EU law. There also may be some limited scope for 'maladministration' complaints by individuals about UK and EU actions related to Brexit, either to the UK's [Parliamentary Ombudsman](#) or to the [EU Ombudsman](#) (though neither has the power to make a ruling on an issue of law).

In the [European Court of Human Rights](#) (which is not an EU body, but the Court of the Council of Europe, and which determines claims of breaches of the [European Convention for the Protection of Human Rights and Fundamental Freedoms](#) ('ECHR')) there may be challenges:

- by individuals or organisations whose human rights under the ECHR have been breached by a decision, action or failure of a state (whether the UK or another signatory) and any domestic legal remedies (such as a claim under the UK's [Human Rights Act 1998](#)) have been used to challenge this but unsuccessfully. E.g. there may be cases brought by people who lose residence rights after Brexit and face deportation unless they can establish it would be a human rights breach to oblige them to leave.

Timeline and Legal Milestones

23 June 2016: Legally, this was an advisory, non-binding referendum.
UK's Referendum on future EU membership

Legal Milestone 1: voting rights

The '15 year restriction' on voting rights in the Referendum was challenged in [Shindler & Anor v Chancellor of the Duchy of Lancaster](#) [2016] EWCA Civ 469, but unsuccessfully.

Electoral Commission [investigations into spending and conduct in the EU Referendum](#) have been launched.

Legal Milestones 2 and 3: referendum spending laws

There could be prosecutions or civil action taken against individuals or organisations that have broken statutory spending controls, but it is unlikely that the outcome would invalidate the Referendum result and, even if it did, the effect of that on Brexit would be more political than legal, because of the Referendum's non-binding nature.

July 2016: the Government confirms it plans to trigger [Article 50](#) without Parliamentary authority

Legal Milestone 4: need for Parliament's authority to invoke Article 50

The government's intentions are challenged in *R (Miller & Anor) v Secretary of State for Exiting the European Union & Ors* [2017] UKSC 5 (*Miller*). The [People's Challenge](#) group is an interested party thanks to crowdfunding at both the [Divisional Court](#) and [Supreme Court](#) stages (and the challenge succeeds - see below).

7 December 2016: Commons Resolution calling on ministers to give Article 50 notice

This is a significant political step but, as the Supreme Court held in *Miller*, resolutions are not lawfully binding or capable of overriding Acts of Parliament. This therefore had no legal implications and unsurprisingly was not challenged.

20 December 2016: Scottish Government White Paper, [Scotland's place in Europe](#)

The Scottish Government takes the position that it would be in Scotland's interests to remain in the EU as an independent state (and will press for another independence referendum), but that if Scotland remains in the UK, the UK as a whole should remain in the single market or, failing that, Scotland should do so alone.

Legal Milestone 5: repatriation of powers and the future competence of devolved governments in the UK

These are primarily political issues, but it is possible that there will be litigation concerning the devolved legislatures' and governments' roles in the Brexit process, and the impact upon the devolved nations and citizens. For example, the repatriation of EU powers has the ability to affect significantly the competencies of the devolved legislatures and their governments, raising questions of the extent to which the proposed repatriation of powers is compatible with the current devolution legislation (unless and until it is changed).

17 January 2017: The Prime Minister sets out 12 guiding 'principles' for the UK's negotiations with the EU: (1) certainty and clarity; (2) taking control of own laws; (3) strengthening the UK Union; (4) protecting ties with Ireland and maintaining the Common Travel Area; (5) controlling immigration; (6) securing rights for EU nationals in UK and UK nationals in EU; (7) protecting workers' rights; (8) ensuring free trade with European markets; (9) securing new trade agreements with other countries; (10) ensuring the UK remains the best place for science and innovation; (11) cooperation in the fight against crime and terrorism; and (12) a smooth exit from the EU. Remaining in the single market is not an objective, however.

Prime Minister's
[Lancaster House speech](#) setting out
UK Government's
Brexit objectives

These high level, aspirational objectives are unlikely to be challengeable in themselves. However, in future questions will arise about the impact of what is negotiated on individual rights, such as whether any agreement (or the absence of one) that deprives individuals of existing rights is compatible with EU law; whether it needs Parliamentary authority and, if so, in what form; and whether human rights are breached (see further below).

24 January 2017: The UK Supreme Court holds that an Act of Parliament is required to authorise the triggering of the Brexit process (i.e. before any UK Minister could send the Article 50 Notice to the European Council). The Court also holds that the devolved legislatures do not have any form of 'veto' over the UK's decision to withdraw from the EU.

[Supreme Court Judgment in Miller](#)

The Supreme Court does not decide whether or not Article 50 notification is revocable, once given, and this remains a live issue, as does the question of whether further Parliamentary authority is needed for actual withdrawal of the UK from the EU (see further below).

23 January 2017: The Welsh Government argues for the protection of its devolution settlement post-Brexit and that full and unfettered access to the Single Market for goods, services and capital – including its key agricultural and food products – is vital for the future interests of Wales and the UK as a whole.

Welsh
Government White
Paper, [Securing
Wales' Future](#)

As with Scotland and Northern Ireland, it is possible that there will be litigation concerning the devolved legislatures' and governments' roles in the Brexit process, and the impact upon the devolved nations and their citizens.

2 February 2017: This policy document gives further (yet brief) detail regarding the Prime Minister's 12 principles outlined in her 17 January 2017 Lancaster House speech (above).

UK Government
White Paper, [The
UK's exit from and
new partnership
with the European
Union](#)

3 February 2017: The Divisional Court (Lloyd Jones LJ and Lewis J) refuses permission for judicial review in a challenge to the Government's intention to take the UK out of the European Economic Area ('EEA') without Parliamentary authority. They consider the challenge is premature given the European Union (Notification of Withdrawal) Bill has yet to become an Act and the terms of the Repeal Bill are unknown.

[R \(Yalland and others\) v Secretary of State for Exiting the European Union](#)

Legal Milestone 6: need for authority to give notice to withdraw from the EEA

Although found to be premature, the issues raised by this case are unresolved and may be litigated in future because the European Union (Notification of Withdrawal) Act 2017 makes no mention of the EEA i.e. the single market. This is significant because it remains arguable, under UK domestic law, that prior statutory authorisation is also required before a UK Minister can notify the EEA states under Article 127 of the [EEA Agreement](#) of the UK's intention to leave the EEA. It is unclear whether the EU (Withdrawal) Bill (see below) will give that authority. Article 127 requires 12 months' notice, so any further constitutional challenge would need to be brought soon.

10 February 2017: The UK's most senior EU law experts, Sir David Edward (former judge of the European Court of Justice in Luxembourg), Sir Francis Jacobs (that Court's former Advocate General) and distinguished EU lawyer Sir Jeremy Lever, provide a written legal opinion with QCs Helen Mountfield and Gerry Facenna on the constitutional role of Parliament in future decision-making on Brexit and the linked question of whether an Article 50 Notice can be withdrawn after it has been given. They conclude: (1) that an Act of Parliament is required to authorise the Final Deal once the terms of that deal are known (see below); and (2) it is very likely that an Article 50 Notice can be unilaterally withdrawn (i.e. that Brexit can be reversed if the UK changes its mind without having to get the consent of the other 27 Member States), but this would need to be determined conclusively by the CJEU in the event of a dispute.

[The Three Knights Opinion](#) is published by [The People's Challenge](#)

Legal Milestones 7 and 8: need for an Act of Parliament to authorise actual withdrawal and revocability of an Article 50 Notice

The issues raised by the [Three Knights Opinion](#) may be litigated in future, if an individual, organisation or public body can demonstrate they are bringing one or both of them to the courts at the appropriate time and there is a sufficient public interest in their determination (see further below). [Proceedings are currently proposed in Scotland.](#)

16 March 2017: This was the Act of Parliament passed to satisfy the UK's constitutional requirement litigated in [Miller](#). This Act gave the Prime Minister the statutory power needed to notify the European Council of the UK's intention to leave the EU.

[European Union \(Notification of Withdrawal\) Act 2017](#) becomes law

29 March 2017 UK's [Article 50 Notice](#) is sent by the UK in letter form and received by European Council

The Prime Minister exercises her power under the 2017 Act to inform the European Council of the UK's intention to leave the EU. The negotiations on withdrawal must be completed within a period of two years from the moment Article 50 is triggered unless: (1) the negotiation period is extended by agreement with all other member states; or (2) the notification is withdrawn with their agreement or unilaterally (assuming this is permissible). If neither of these things happen, the EU Treaties will cease to apply to the UK and it will automatically leave at midnight on 28 March 2019.

The Article 50 Notice letter states that the UK hopes to conclude a satisfactory agreement for a future relationship with the EU but adds that it will leave without any deal if that cannot be done. No mention is made of the possibility of withdrawal of the notification, discussed in the [Three Knights Opinion](#) (see above – Legal Milestone 8).

Legal Milestones 9 and 10: enforceability of UK and other EU nationals' rights during the negotiating period

The notice triggered the start of the two-year Brexit process, but the UK remains an EU Member State in the interim. EU law remains effective and enforceable until withdrawal. The UK and the 27 other Member States cannot discriminate on the basis of nationality or act so as to frustrate or abrogate the exercise of EU law rights (see the [People's Challenge fundamental rights booklet](#) and [Annex to its submissions in Miller](#) for more information on the rights that citizens enjoy as a matter of EU law). This means that any policies on immigration or systemic practices (e.g. quotas or policies designed to deter the exercise of free movement rights or the right to apply for residency before withdrawal) are unlawful, whether directed at EU nationals here or UK citizens in the EU. Affected citizens can bring actions in domestic courts and/or ask the Commission to commence infringement proceedings. It is [currently investigating Home Office deportation and detention decisions](#).

It will also remain unlawful for private bodies, such as employers or landlords, to single UK citizens or other EU nationals out for less advantageous treatment on grounds of nationality. Disturbingly, [this is becoming more common](#).

30 March 2017: UK Government publishes the White Paper [Legislating for the United Kingdom's withdrawal from the European Union](#)

This White Paper sets out the Government's proposals for introducing legislation – most importantly a 'Great Repeal Bill' – to: (1) repeal the [European Communities Act 1972](#) and all (or almost all) subsequent EU law implementing legislation; (2) 'transpose' EU law (except the [EU Charter of Fundamental Rights](#)) into UK law on the date on which the EU Treaties will cease to apply to the UK; (3) give Ministers delegated powers to amend provisions; and (4) give effect to these changes from the date at the end of the two-year negotiation period when the EU Treaties cease to apply to the UK.

Note, the prefix 'Great' is dropped in the Queen's Speech and the Bill is renamed the [EU \(Withdrawal\) Bill](#) when published in July 2017 (see below).

5 April 2017: Amongst other things, the European Parliament reminds the UK that it would be contrary to EU law for the UK to begin, in advance of its withdrawal, negotiations on possible trade agreements with third countries as such an action would be in contradiction with the principle of sincere cooperation.

[European Parliament resolution on Brexit](#)

Legal Milestone 11: constraints on UK negotiations with other non-EU countries

Depending on what happens during this period, infringement proceedings may be brought against the UK by the EU institutions.

29 April 2017: An extraordinary European Council meeting is convened by the President of the Council, Donald Tusk. The European Council adopts a set of guidelines on 'the orderly withdrawal of the United Kingdom from the European Union'. These guidelines define the overall principles that the EU will pursue during the negotiations based on the common interest of the European Union and of its Member States. In summary, the Guidelines state that (1) non-membership cannot entail the same benefits as membership; (2) the EU will seek to preserve the integrity of the Single Market meaning that there is to be no sector-by-sector cherry picking; (3) the EU will first seek resolution on citizens' rights and the UK's obligations under current commitments (especially the 'Brexit bill'); and (4) a withdrawal agreement must be completed prior to any future relationship deal. See below for the legal issues arising during the actual negotiations.

[European Council Negotiating Guidelines published](#)

22 May 2017: Michel Barnier is confirmed as the Commission's chief negotiator. He is mandated to tackle three main areas in the first planned phase of negotiations: (1) safeguarding the status and rights of citizens – EU27 citizens in the UK and UK citizens in the EU27 – and their families; (2) reaching an agreement on the principles of the financial settlement of the UK's obligations as an EU member; (3) providing for the new external borders of the EU, including the protection of the [Good Friday Agreement](#), and finding imaginative solutions in order to avoid a hard border on the island of Ireland. Other issues include arrangements regarding dispute settlement and the governance of the withdrawal agreement.

[EU Commission mandate, negotiating directives and transparency policy agreed](#)

In preparation for the first meeting between the EU and UK negotiators, the Commission shares draft negotiating documents with the EU27 Member States. These documents cover the following areas: (1) citizens' rights; (2) Euratom; (3) issues related to goods placed on the market before the UK's withdrawal, (4) on-going judicial and administrative procedures; (5) the governance of the Article 50 agreement; and (6) the financial settlement. The final documents are later sent to EU Member States, the European Council, the European Parliament, the Council, national parliaments, and the UK and published [here](#) including, very importantly, the [EU Position Paper on Essential Principles on Citizens' Rights](#).

8 June 2017: The [Conservative](#), [DUP](#), [Labour](#), [Liberal Democrats](#), [SNP](#) and [Plaid Cymru](#) manifesto commitments differ significantly in relation to the UK General Election results in a hung Parliament with a minority Conservative Government seeking the support of the Democratic Unionist Party

All the parties' positions remain important, given the General Election result. There are also groups within most of the main parties with positions that differ from the main party lines. E.g. some members of the Conservative Party have suggested that MPs and the Lords will have a vote on the proposed Final Deal (though have not committed to a form these votes will take). The Liberal Democrats have the firmest commitment – a second referendum on the Final Deal on accepting the Final Deal or remaining in the EU.

Since the Election did not leave the Government with the unequivocal Brexit mandate it sought, questions arise about Parliament's ability to choose not to follow through with Brexit when the terms of any deal are known. The answer depends in part on a question of EU law which only the CJEU can conclusively settle: is the Article 50 process unilaterally reversible as matter of EU law? It is universally accepted that if all other 27 Member States agree, then the UK can reverse its intention to leave the EU; however, whether the UK can unilaterally reverse this is presently unknown. The [Three Knights Opinion](#) concludes that the better interpretation of EU law is that an Article 50 Notice can unilaterally be withdrawn (see Legal Milestone 8 above).

June 2017: [Formal UK-EU negotiations begin](#) Three significant legal issues will arise during the negotiations.

Legal Milestone 12: restrictions on negotiating away fundamental rights

The first issue is the extent to which EU institutions and Member States act in conformity with the [EU Treaties](#) and the [EU Charter of Fundamental Rights](#): to what extent will the EU institutions' and Member States' actions in the negotiations comply with the principles of sincere co-operation, process rights, non-discrimination between EU nationals and fundamental rights jurisprudence? There are also concerns about the scope of the rights the Commission will seek to protect in negotiations. The [negotiating guidelines](#) and [EU Position Paper on Essential Principles on Citizens' Rights](#) identify the 'priority' as agreeing reciprocal guarantees to protect the rights of EU27 citizens, UK nationals and their family members who, at the date of entry into force of any withdrawal agreement, 'have enjoyed rights relating to free movement under Union law, as well as rights which are in the process of being obtained' and certain future rights, e.g. pensions. But EU citizenship rights are far broader, as [The People's Challenge Annex](#) document shows: they include those related to ownership of property and exercise of EU freedoms by self-employed people, sole-traders or SME proprietors. It is also unclear to what extent past enjoyment of rights will lead to their preservation for future use.

Legal Milestone 13: withdrawal agreement first?

Secondly, does Article 50 require the EU to negotiate and conclude a 'new relationship' deal alongside a withdrawal agreement or, as the EU has argued, must there be at least an in principle agreement on key issues such as citizens' rights and the Brexit bill, before discussions on a future trade relationship begin? Absent agreement, these sequencing issues could be litigated before the CJEU by a Member State or EU institution, though that is now unlikely as the UK has [grudgingly accepted the EU position](#).

Legal Milestone 14: the 'Brexit divorce bill'

Thirdly, as a matter of EU and/or international law, what will be the UK's debts to the EU on withdrawal? As the [EU Position Paper Essential Principles on Financial Settlement](#) shows, this extends beyond the question of the UK's share of the debits/credits; it includes the UK's proportion of the budget and the Multiannual Financial Frameworks for the current financial period, 2014-2020. Though the details remain unclear, an in principle agreement [has recently been reported](#).

21 June 2017: [Queen's Speech](#) This begins by affirming ministers' commitment 'to working with Parliament, the devolved administrations, business and others to build the widest possible consensus on the country's future outside the European Union'. Key proposals include eight Brexit-related bills to 'repeal the European Communities Act', establish 'new national policies on immigration, international sanctions, nuclear safeguards, agriculture, and fisheries' along with 'bills on trade and customs [intended to] help to implement an independent trade policy'.

The [briefing notes](#) indicate '[t]he [EU (Withdrawal)] Bill does not put any constraints on the withdrawal agreement we will make with the EU and further legislation will be introduced to support such an agreement if and when required', suggesting the Government anticipates further Parliamentary authority may be needed for actual withdrawal (see Legal Milestone 7 above), a question it has evaded to date. The Customs Bill proposals rule out EEA and customs union membership, however, promising instead a 'standalone UK customs regime on exit'. The proposed Immigration Bill envisages all EU immigration law being repealed, making the 'migration of EU nationals and their family members subject to UK law once the UK has left the EU'.

26 June 2017: [Confidence and Supply Agreement](#) The DUP agrees to support the Government on a number of specific topics during the current Parliament (or until the agreement is reviewed by mutual consent) including all motions of confidence, the Queen's Speech and all legislation pertaining to the United Kingdom's exit from the European Union.

The compatibility of the Confidence and Supply Agreement with the [Good Friday Agreement](#) was [unsuccessfully challenged](#) but [political questions arise](#) under the [Salisbury Convention](#) about the willingness of the House of Lords to implement Government policy.

26 June 2017:
the Government
publishes its
immigration
proposals
document,
[Safeguarding the
position of EU
citizens in the UK
and UK nationals
in the EU](#)

It is envisaged that the Common Travel Area between the UK and the Republic of Ireland (which predates the EU) will be preserved, but in most other respects, these proposals are highly controversial and legally questionable.

Overall, the aim is to 'level down' by bringing EU nationals who have been resident in the UK for some time into the immigration system for non-EU nationals. 'Qualifying' EU citizens resident in the UK before withdrawal can apply for settled status ('indefinite leave to remain' in UK immigration law). To qualify, they must have been resident in the UK before the 'specified date' (29 March 2017 or a later date before withdrawal – the date has yet to be fixed), must have completed a period of five years' continuous residence and must pass an assessment of 'conduct and criminality, including not being considered a threat to the UK'. The UK's requirement that that economically inactive EU citizens needed to have previously held 'comprehensive sickness insurance' in order to be considered continuously resident will no longer apply, however. Family dependants who have joined a qualifying EU resident in the UK before the UK's exit will be able to apply for settled status after five years (including where the five years falls after withdrawal), irrespective of the specified date. Those joining later will be subject to the same rules as those joining British Citizens at present (including the minimum income threshold) or alternatively to the post-exit immigration arrangements for EU citizens who arrive after the specified date.

EU residents who do not have five years' residence before withdrawal 'will be able to apply for temporary status in order to remain resident in the UK until they have accumulated the necessary five years. However, arrival date may be very significant: EU citizens who arrive after the specified date 'will be allowed to remain in the UK for at least a temporary period and may become eligible to settle permanently, depending on their circumstances'. They are told in the document that they can have 'no expectation' of such a status. It is intended that EU citizens without settled status can access pensions, healthcare, economic and other rights on terms broadly the same as now and, once they are settled, will be treated in the same way as British Citizens. Current EU students and those starting courses at a university or FE institution in the 2017/18 and 2018/19 academic years, will continue to be eligible for student support and home fee status for the duration of their course and a 'right to remain' in the meantime (but not necessarily afterwards).

All EU Citizens will be required to hold a residence document showing they have permission to stay and the terms. All rights will be enforceable by EU Citizens in UK law only; the CJEU will have no future role The Government adds that it is 'carefully considering a range of options as to how EU migration will work for new arrivals post-exit and will publish proposals as soon as possible, allowing businesses and individuals enough time to plan and prepare'.

Besides the issues that will arise in individual cases around proving entitlement, there are huge ambiguities around the rights of those who lack or cannot show the necessary residence, the concept of 'continuity' (e.g. in the case of seasonal workers) and the position of non-EU national family members of EU nationals. Even if the proposals are enacted in their current form, there will inevitably be disputes about the form the legislation takes, the EU's ability to agree to any deal that cuts down rights in the manner proposed, particularly while the UK remains a member, and the preservation of EU rights.

29 June 2017: Besides the general debates, there are specific ones on Brexit and Foreign Affairs in both [the Commons](#) and [the House of Lords](#). In the Commons, amendments regretting elements of the Government's plans for Brexit were proposed, but all [were defeated](#). In the Lords, Lord Adonis proposed an amendment regretting that the Queen's Speech contained no proposal for the government to seek continued membership of the European single market and customs union, but [this was also defeated](#). Brexit-related amendments were also proposed by Baroness Hayter and Lord Armstrong, but neither were moved so no changes to the approval motion were made.

13 July 2017: The [Bill](#) passes the second reading in the House of Commons. Amendments to clauses in the [Bill](#) will be debated and voted on in Committee ([which began in November and are continuing](#)). If the Bill as amended – over 300 changes are proposed - then passes, it will go before the House of Lords.

the [EU \(Withdrawal\) Bill](#) is published and, on 11 September 2017, has its [second reading in the House of Commons](#)

Legal Milestones 15 and 16: impediments to stripping away rights using the Repeal Bill or delegated legislation

First, assuming the Bill is passed, there will be questions of interpretation of the EU (Withdrawal) Act, particularly concerning the principle of legality which demands that Acts of Parliament are clear and unambiguous if removing rights: to what extent are particular rights encompassed or lost, including those in the [EU Charter of Fundamental Rights](#) (which the Bill [controversially proposes](#) should have no future effect) and arising from potential or ongoing *Francovich* claims ([which may be extinguished on 'exit day' unless issued before then](#))?

Secondly, there will be questions concerning the nature and scope of delegation and '[Henry VIII powers](#)' (i.e. clauses in Acts of Parliament allowing Ministers to amend Acts without going through the full parliamentary process): to what extent has Parliament intended to give wide ranging powers to the executive to, say, alter or remove rights and have such powers been used in accordance with their presumed purposes?

The Bill raises other difficult questions around the meaning of 'retained EU law' and the future significance of CJEU case law.

Between September 2017-October 2017 It is anticipated that negotiations will end by this point. The terms of a 'Final Deal' may have been reached , at least on withdrawal (though this is not guaranteed, as the [House of Commons Foreign Affairs Committee](#) and [Sir David Edward](#), one of the authors of the [Three Knights Opinion](#) have warned). The Prime Minister has [acknowledged this possibility and indicated contingency plans are being made](#).

Between October/November 2018 and January 2019: any Final Deal that is agreed in principle will be put to the European Parliament and Council

The Commission plans to propose adoption of any Final Deal to the Council and the European Parliament, taking into account 'the framework of the future relationship of the UK with the EU' (the Commission does not envisage a future relationship deal being reached by October/November 2018). The European Parliament must consent by a vote of simple majority including UK MEPs. The Council will then need to approve the agreement by a qualified majority vote.

There are likely to be two main legal issues that arise at EU level.

Legal Milestone 17: will UK citizens retain EU citizenship rights post Brexit, notwithstanding any withdrawal agreement?

This issue is linked to Legal Milestone 12. In international law, 'acquired rights' arguments are particularly difficult to make for the benefit of individuals, but the special nature of EU citizenship arguably provides a stronger, though novel, route for legal redress. It is arguable that as a matter of EU law, certain fundamental citizens' rights cannot be negotiated away by the EU institutions as part of any withdrawal agreement or future relationship deal e.g. it would clearly be unlawful for a UK/EU withdrawal agreement to protect the future residence of some EU nationals in the UK, but deny like protection to others on the basis of country of nationality. Validity and competence disputes may also arise as to what the EU institutions and member states are able to do during the negotiations and, ultimately, the legal validity of any international agreement which the EU and its member states proposes to sign with the UK, may be tested in the CJEU.

Legal Milestone 18: who may authorise a future relationship?

Article 50 states that the withdrawal agreement 'shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament'. It is arguable that this covers only the terms of withdrawal, and not the terms of any future relationship deal which may be agreed at the same time. There may be an EU law dispute as to whether the agreement falls within the exclusive competence of the member states or is shared with the member states – if the latter, then each of the member states' regional Parliaments would also need to vote in favour of the agreement. Article 50 does not expressly state that the withdrawal agreement must be ratified by each Member State as well as the Council, but it is possible that some member states may argue for this requirement.

It is not obvious how these EU law questions can be litigated unless a Member State, the European Parliament, the Council or the Commission asks for an Opinion from the CJEU as to whether the Final Deal (whether a withdrawal agreement alone, or also a future relationship deal) is/are compatible with the EU Treaties e.g. under [Article 218\(11\) of the TFEU](#). If the Court concludes such a deal is not compatible with the Treaties, the agreement envisaged may not enter into force unless it is amended or the Treaties are revised.

Between October 2018 and March 2019: consideration of any Final Deal by the UK Parliament, or a confronting the lack of one

A number of difficult constitutional issues could arise at this point.

Legal Milestone 19: what must Parliament do when negotiations are concluded?

There are different political positions about whether Parliament should have a vote before a final deal is struck (and an amendment to the Withdrawal Bill proposed by Dominic Grieve QC MP has considerable support). This issue also raises legal questions i.e.: (1) whether UK constitutional law already requires MPs and the Lords to have a vote on any Final Deal or what to do if none has been agreed; (2) what form this vote must take as a matter of UK constitutional law (i.e. whether an Act of Parliament is required to press ahead with withdrawal); and (3) what effect a vote rejecting an agreement, or withdrawal without one, would have as a matter of EU law (i.e. whether the effect is that the UK leaves the EU without any deal, or whether an Article 50 Notice can be revoked unilaterally). These matters are addressed in the [Three Knights Opinion](#). The first two are questions for the UK courts; the third is for the CJEU.

Legal Milestone 20: must there be another referendum?

There is also legal debate as to whether current UK law – the [European Union Act 2011](#) – requires an additional referendum (unless it is subsequently repealed). This turns on whether any deal ‘amends or replaces’ the EU Treaties.

Legal Milestone 21: further devolution issues

Besides the devolution issues for Scotland and Wales (see Legal Milestone 5 above), two particular difficulties for Northern Ireland are likely to be: (1) the compatibility of the withdrawal agreement/future relationship agreement with the [Good Friday Agreement](#); and (2) the maintenance of the Common Travel Area - to what extent are any border controls (etc.) between Northern Ireland and the Republic of Ireland compatible with EU law? Further, though it had no effect in the Article 50 Brexit case, what is the nature and scope of the [Sewel Convention](#) in relation to the Repeal Bill [given the Welsh Assembly and Scottish Government's indications they may not consent to the EU \(Withdrawal\) Bill?](#)

29 March 2019 Unless the two year period is extended, the Article 50 Notice is withdrawn or there is a 'transitional arrangement' of the kind the Prime Minister proposed in her [Florence speech](#), the provisions of the EU (Withdrawal) Act and related legislation will apply the [European Communities Act 1972](#) will be repealed and the EU Treaties will no longer bind the UK.

All UK nationals are overwhelmingly likely to lose their EU Citizenship at the point of withdrawal, whether there is an agreement or not. Absent a withdrawal agreement, EU national residents' position in the UK will be determined by domestic immigration law as modified by the proposed Immigration Bill (see above). UK national residents' position in the EU will be determined by the EU's common immigration policy (save where they are resident in Ireland or Denmark, which opted out). The policy – a series of EU Directives on how non-EU nationals are to be dealt with - would put UK nationals who have not taken citizenship of the member state where they reside at a [huge disadvantage](#) as compared to their former situation as EU Citizens.

In the aftermath of withdrawal (and during any agreed transitional period) multiple legal issues will arise. The most significant for individuals are as follows.

Legal Milestones 22 and 23: enforcement of agreements with the EU

The default position is that any withdrawal or future trade agreement the UK forms with the EU will be an international treaty, not a directly effective EU measure enforceable in the UK courts by individuals or businesses. Unless Parliament legislates to make it enforceable, disputes will arise about whether, and if so to what extent, its terms can be enforced against the Government.

The UK and EU are also fundamentally at odds about the jurisdiction of the CJEU over past and future disputes over EU law as it affects the UK, its citizens and EU residents in the UK. For the EU, it is critical that the CJEU will continue to have jurisdiction. The Government is fundamentally opposed to this.

Legal Milestone 24: human rights safety nets

Regardless of the terms of any withdrawal agreement, [European Convention on Human Rights](#) Articles 8 (right to family life), 14 (non discrimination) and property/possessions Protocol 1, Article 1 will remain in effect. Litigation is likely, particularly as to EU nationals' future residency rights here, those of British Citizens in the EU and those of family members who are told they do not have the right to remain or have restrictions imposed e.g. on the right to work or family member immigration. The [UN Rights of the Child Convention](#) will also continue to apply.

Legal Milestone 25: external agreements

There is legal debate as to whether the UK would continue to benefit from the EU's current free trade agreements with non-EU countries (so-called third countries). The position is likely to differ as between agreements concluded under the EU's exclusive competence (which will not benefit an independent UK) and those mixed agreements concluded under shared competence of the UK and EU. There is likely to be legal debate as to how provisions of existing agreements are classified and dealt with in future as a matter of EU and international law. As for mixed agreements, there is likely to be debate as to the extent an independent UK could benefit from provisions as they are usually written as applying to the EU.

Legal Milestone 26: bilateral investment and other treaties

UK nationals may benefit from limited commercial investment rights set out in the UK's existing [bilateral investment treaties with other EU states](#). These are not concerned with free movement or residence rights, however, and the EU Commission has argued they are automatically overridden by EU law. Enforcement proceedings are also very expensive.

There may also be some limited scope for enforcing long standing treaties with EU27 countries that have been largely irrelevant during the UK's membership of the EU e.g. the [1953 European Convention on Social and Medical Assistance](#).

Legal Milestone 27: authority to withdraw from other treaties

The [Miller judgment](#) may have further consequences outside of the EU law sphere for the use of the prerogative power generally. Some Conservative Party politicians have suggested that the UK should withdraw from the European Convention on Human Rights. This is a separate international agreement with a separate court, in Strasbourg. Following the Article 50 Brexit case, it is arguable that as a matter of UK constitutional law, the UK cannot withdraw from the ECHR or any other treaty conferring rights in UK law by use of a Minister's prerogative power, but instead that there would have to be an authorising Act of Parliament.
