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

Introduction

This Guide has been produced for The People's Challenge 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 are also the points at which challenges might arise if the UK or the EU institutions are not proceeding lawfully. Inevitably things will change as the UK/EU negotiations progress; some possible challenges will fall away and others will arise. The Guide is not a substitute for specialist legal advice on possible or actual litigation.

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 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/

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 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.

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 first challenged in a domestic court and, 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 unsuccessful in challenging this. For example, 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: UK's Referendum on future EU membership

Legally, this was an advisory, non-binding referendum.

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 Referendum are ongoing.

Legal Milestones 2 and 3: referendum spending laws

There could be prosecutions or civil action taken against individuals or organisations that have broken spending controls (or even action against the Electoral Commission for deciding not to prosecute in a clear cut case), but it is inconceivable that this would invalidate the Referendum and, even if it did, the effect of that on Brexit would be more political than legal, because such a prosecution would bring to the fore the fact that the Referendum was advisory only.

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 involved as an interested party thanks to crowdfunding at both the Divisional Court and Supreme Court stages.

7 December 2016: Commons Resolution calling on ministers to give Article 50 Notice by 31 March 2017

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.

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 competences 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: Prime Minister's Lancaster House speech setting out UK Government's Brexit objectives

The Prime Minister sets out 12 principles guiding the UK in the 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.

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: Supreme Court Judgment in *Miller*

The UK Supreme Court holds that an Act of Parliament (i.e. primary legislation passed through both the House of Commons and the House of Lords with subsequent Royal assent) 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 a 'veto' on the UK's decision to withdraw from the EU.

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: Welsh Government White Paper, Securing Wales' Future

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.

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 citizens.

2 February 2017: UK Government White Paper, The UK's exit from and new partnership with the European Union

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

3 February 2017: permission for judicial review is refused in *R (Yalland and others) v Secretary of State for Exiting the European Union*

The Divisional Court (Lloyd Jones LJ and Lewis J) declines 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.

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. Article 127 requires 12 months' notice meaning that this separate constitutional challenge is likely to need settling by the UK courts before March 2018.

10 February 2017: the Three Knights Opinion is published

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, provided a written legal opinion 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.

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).

16 March 2017: European Union (Notification of Withdrawal) Act 2017 becomes law

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 to notify the European Council of the UK's intention to leave the EU.

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 none 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

This notice triggered the start of the two-year Brexit process. It is important to note that the UK remains a full EU Member State in the interim. This means that all EU law continues to apply within the UK and also to UK citizens living in the EU. For example, 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 for more information on the rights that citizens enjoy as a matter of EU law). This means that any policies on immigration (e.g. quotas, or policies designed to deter the exercise of free movement rights or the right to apply for residency) are unlawful. Affected citizens can bring actions in domestic courts and/or ask the Commission to commence infringement proceedings.

30 March 2017: UK Government publishes Legislating for the United Kingdom's withdrawal from the European Union, the Repeal Bill White Paper

This White Paper sets out the Government's proposals for introducing legislation – most importantly the 'Great Repeal Bill' – which would: (1) repeal the European Communities Act 1972; (2) convert existing EU law (except the EU Charter of Fundamental Rights) into domestic law; and (3) give Ministers delegated powers to amend provisions. The terms of the proposed Bill were not published; it is expected the Bill will be published in Summer 2017 and, if it is passed, will apply from the date at the end of the two year negotiation period when the EU Treaties cease to apply. Note, the prefix 'Great' is dropped in the Queen's Speech.

The White Paper explains that the intention behind the Repeal Bill is to 'transpose' EU law into UK law on the date on which the EU Treaties will cease to apply to the UK. The Act that the Bill becomes will repeal the European Communities Act 1972 and all (or almost all) subsequent EU law implementing legislation.

There is likely to be domestic litigation concerning the Repeal Bill on two main issues.

Legal Milestones 11 and 12: impediments to stripping away rights using the Repeal Bill or delegated legislation

First, there will be questions of interpretation of the Repeal 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?

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?

There is likely to be a plethora of other legal questions concerning the provisions of the Repeal Act which will need to be settled by domestic courts (e.g. how successfully it incorporates EU law into domestic law and the significance of past and future EU case law). These issues will become clearer once the terms of the Bill and the Act are known.

5 April 2017: European Parliament resolution on Brexit

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.

Legal Milestone 13: 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: European Council Negotiating Guidelines published

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 that will arise during the actual negotiations.

22 May 2017: EU Commission mandate, negotiating directives and transparency policy agreed

Michel Barnier is confirmed as the Commission's chief negotiator.

The first planned phase of negotiations will tackle three main areas: (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.

In preparation for the first meeting between the EU and UK negotiators, the Commission will share draft negotiating documents with the EU27 Member States. These documents will cover the following areas: citizens' rights, Euratom, issues related to goods placed on the market before the UK's withdrawal, on-going judicial and administrative procedures, the governance of the Article 50 agreement, and the financial settlement. Commission negotiating documents which are shared with EU Member States, the European Council, the European Parliament, the Council, national parliaments, and the UK are published here including, very importantly, the EU Position Paper on Essential Principles on Citizens' Rights.

8 June 2017: UK General Election

The General Election results in a hung Parliament with a minority Conservative Government seeking the support of the Democratic Unionist Party which has a strongly pro-Brexit position.

The Conservative, Labour, Liberal Democrats, SNP and Plaid Cymru manifesto commitments are significantly different in relation to the Brexit negotiations and the process for concluding any proposed agreement (the 'Final Deal') which may result between the EU 27 and the UK (see below). 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. 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.

Given 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 substantive legal issues will arise during this period, each of which may end up being litigated.

Legal Milestone 14: 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. For example, to what extent do the EU institutions' and Member States' actions in the negotiations comply with the principles of sincere co-operation, process rights, and fundamental rights jurisprudence? Litigation in respect of these matters can be brought by affected citizens both in domestic courts and the CJEU in Luxembourg. 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, such as pensions. But EU citizenship rights are far broader, as the Annex document prepared for the Supreme Court by The People's Challenge shows: they include those related to ownership of property, or exercise of EU freedoms by self-employed people, sole-traders or proprietors of SMEs. It is also unclear to what extent past enjoyment of rights will lead to their preservation for future use.

Legal Milestone 15: withdrawal agreement first?

Secondly, does Article 50 require the EU to negotiate and conclude a 'new relationship' deal alongside a withdrawal agreement (as the UK has argued) or do exit negotiations need to be concluded, or at least reach in principle agreement on key issues such as citizens' rights and the Brexit bill, before discussions on a future relationship begin? Absent agreement, this EU law question could be litigated before the CJEU by a Member State or EU institution, though it appears the UK is now grudgingly accepting the EU position.

Legal Milestone 16: the 'Brexit 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. Ultimately, the UK's liabilities are a legal question that may be litigated by the UK or the EU institutions if there is no agreement.

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 [Repeal] 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 Parliament's authority for actual withdrawal may be needed (see Legal Milestone 7). 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 is reached between the Conservative Party and DUP

The DUP agrees to support the Government on a number of specific topics during the current Parliamnet (or until the agreemnt 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 agreement with the Good Friday Agreement faces legal challenges, however, and political questions arise about the willingness of the House of Lords to implement Government legislative policy under the Salisbury Convention.

26 June 2017: The Government publishes its 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.

'Qualifying' EU citizens resident in the UK before withdrawal can seek settled status ('indefinite leave to remain' in UK immigration law), subject to an application process. 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.

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.

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.

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. All EU Citizens will be required to hold a residence document showing they have permission to stay and the terms.

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 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'.

These proposals are highly controversial and legally questionable. Besides the issues that will arise in individual cases around proving entitlement, there are huge ambiguities around the acquired 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. 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 even if the proposals are enacted in their current form: see Legal Milestones 10, 11, 12 14 along with 17 and 22 below.

29 June 2017: following six days of debate, the Queen's Speech approval motion is passed

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 by MPs John McDonnell (on behalf of Labour) and Chuka Umunna (independently) along with an amendment opposing austerity measures. 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.

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

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).

If there is a Final Deal, the Commission plans to propose its adoption to the Council and the European Parliament, taking into account 'the framework of the future relationship of the UK with the EU' (at present the Commission does not envisage a deal on that future relationship being reached by October/November 2018). The European Parliament must give its consent, by a vote of simple majority, including Members of the European Parliament from the UK. The Council will conclude the agreement, by a qualified majority vote.

There are likely to be two main legal issues that arise at EU level about the terms of any deal.

Legal Milestone 17: have fundamental rights been compromised?

The first issue is linked to Legal Milestone 14. It is arguable that as a matter of EU law, 'acquired' citizens' rights cannot lawfully be negotiated away as part of any withdrawal agreement or future relationship deal. Validity and competence disputes may 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 propose to sign with the UK. Such disputes are subject to the jurisdiction of the CJEU. 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 much stronger, though novel, route for legal redress, meaning some rights, especially those which have been exercised, may be retained.

Legal Milestone 18: who authorises the 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. In these circumstances, 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 in the CJEU unless a Member State, the European Parliament, the Council or the Commission asks for an Opinion from the Court as to whether the Final Deal (whether a withdrawal agreement alone, or also a future relationship deal) is/are compatible with the EU Treaties. Where the Opinion of the Court is that 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

A number of difficult constitutional/legal issues will 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. There is also an open legal question about whether it must, i.e.: (1) whether UK constitutional law already requires MPs and the Lords to have a vote on the Final Deal; (2) what form this vote must take as a matter of UK constitutional law (i.e. whether an Act of Parliament is required); and (3) what effect a rejection vote 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 – in the form of the European Union Act 2011 – already requires an additional referendum (unless it is subsequently repealed). This is a domestic law question for the UK courts as to whether any withdrawal agreement and/or future relationship deal "amends or replaces" the Treaties for the purposes of the UK.

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 if 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?

Legal Milestone 22: human rights safety nets

Regardless of the terms of any withdrawal agreement, European Convention on Human Rights Articles 8 (right to family life) and 14 (non discrimination) 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. The UN Rights of the Child Convention will also continue to apply.

Legal Milestone 23: 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 24: 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 this.

29 March 2019 Unless the two year period is extended, the Article 50 Notice is withdrawn or there is a transitional arrangement, the provisions of the Repeal Act and related legislation will apply the European Communities Act 1972 will be repealed and the EU Treaties will no longer bind the UK.
