

Brexit: Recent Developments

February 6, 2017

The first few weeks of 2017 have seen the United Kingdom take a number of significant steps along the path to Brexit. This memorandum provides a brief update on the following four key developments:

- **January 17, 2017:** Prime Minister Theresa May’s keynote speech on Brexit, delivered at Lancaster House, London.
- **January 24, 2017:** The Supreme Court’s decision in *R (on the application of Miller and another) v Secretary of State for Exiting the European Union*.
- **January 26, 2017:** The publication of the European Union (Notification of Withdrawal) Bill.
- **February 2, 2017:** The publication of the UK Government’s White Paper on Brexit (“The United Kingdom’s exit from and new partnership with the European Union”).

Key takeaways

In summary, the impact of these developments is as follows:

- The UK Government responded quickly to the Supreme Court’s determination in *R (on the application of Miller and another) v Secretary of State for Exiting the European Union* that a Parliamentary vote was required before the UK Government may serve notice under Article 50. The European Union (Notification of Withdrawal) Bill is expected to receive Royal Assent in time to permit Article 50 to be triggered by the end of March 2017.
- The White Paper purports to expand on the 12 principles set out in the Prime Minister’s speech of January 17, 2017 which will guide and inform the UK Government’s negotiating position. However, in reality, the White Paper, while seeking to provide some reassurance on process issues, provides little substance in relation to how the UK Government proposes to achieve its objectives with regard to the UK’s future relationship with the EU..
- The White Paper has indicated that it will seek to agree a phased process of implementing Brexit, including appropriate and time limited transitional arrangements, in order to avoid a cliff-edge for businesses, immediately following Brexit.
- A second White Paper will be published in relation to the UK Government’s proposed Great Repeal Bill, which will set out the manner in which existing EU law will be converted into domestic law.
- The final deal that is agreed between the UK and the EU will be put to a vote in both Houses of Parliament.

At the time of writing, it seems inevitable that the UK will serve the Article 50 notice in March 2017, so commencing the two year period in which the terms of the UK’s leaving the EU will be negotiated. What remains entirely unclear is whether a new agreement, or even the principles of a new agreement, that would govern the UK’s future relationship with the EU can be negotiated in that period.



1. Prime Minister Theresa May's keynote speech on Brexit

On January 17, 2017, the Prime Minister, Theresa May MP delivered a [keynote speech](#) on Brexit in which she set out 12 principles that would guide the UK Government's preliminary negotiating position on Brexit.

In particular, the Prime Minister announced that:

- The UK would leave the Single Market and the Customs Union, and would seek a new free trade agreement and customs agreement with the EU 27 that will provide “*the greatest possible access*” to the Single Market and Customs Union. The new free trade agreement could include “*elements of current single market arrangements in certain areas*”, such as the freedom for the City of London to provide financial services across national borders;
- The UK should not continue to be subject to the jurisdiction of the European Court of Justice (the “ECJ”);
- The UK would have full control over legislation in relation to inward migration;
- A “Great Repeal Bill” would be introduced to preserve EU law in domestic law as it stands at the moment the UK leaves the EU. Subsequently, the UK will then decide which elements of that law to keep, amend or repeal. The Bill would enable changes to be made by secondary legislation to the laws that would otherwise not function sensibly once the UK has left the EU; and
- The UK Government will seek to agree a phased process of implementation and time limited transitional arrangements that would enable businesses to plan and prepare for those new arrangements.

2. The Supreme Court's decision in *R (on the application of Miller and another) v Secretary of State for Exiting the European Union*

On January 24, 2017, the Supreme Court [ruled](#), by a majority of eight to three, that:

- Parliament must authorise the Government to serve notice pursuant to Article 50 of the Treaty on the European Union (“**Article 50**”), formally triggering the UK's withdrawal from the EU; and
- The additional consent of the devolved legislatures (i.e., the Scottish Parliament and Welsh and Northern Irish assemblies) is not required in order for Article 50 to be triggered.

The basis of the Supreme Court's conclusions were, respectively:

- The terms of the European Communities Act 1972, which allow for the Government to make variations to domestic law resulting from changes in EU law, do not extend to the exercise by the Government of the power to withdraw from the EU treaties, because withdrawal would effect “*a fundamental change by cutting off the source of EU law, as well as changing legal rights*”; and
- Relations with the EU and other foreign affairs matters are reserved to Government and Parliament, and not to the regional devolved legislatures.

Following the Supreme Court decision, the Prime Minister confirmed that she would introduce a bill for approval by Parliament empowering the Prime Minister to serve notice to trigger Article 50.

3. Publication of the European Union (Notification of Withdrawal) Bill

In response to the Supreme Court's decision in *R (on the application of Miller and another) v Secretary of State for Exiting the European Union*, the [European Union \(Notification of Withdrawal\) Bill](#) (the “**Bill**”) was published on January 26, 2017.

As expected, the Bill was extremely brief, and consisted of a single operative provision:

“*The Prime Minister may notify, under Article 50(2) of the Treaty on European Union, the United Kingdom's intention to withdraw from the EU.*”

The Bill must pass through both its House of Commons and House of Lords stages, prior to the grant of Royal Assent and enactment. It is possible that the Bill will be amended during the course of its

passage. It is expected that the Bill will become law by the end of March 2017.

The Government has indicated that it intends that the Parliamentary process should be complete by March 7, 2017. Were that deadline to be met, it is possible that the UK Government will make the Article 50 notification as early as March 9, the date of the European Council summit in Malta.

4. White Paper on Brexit

On 2 February 2017, the Government published its [White Paper](#) setting out in greater detail its objectives, as set out in the 12 principles announced by the Prime Minister on January 17, 2017:

1. Providing certainty and clarity;
2. Taking control of our own laws;
3. Strengthening the Union;
4. Protecting our strong historic ties with Ireland and maintaining the Common Travel Area;
5. Controlling immigration;
6. Securing rights for EU nationals in the UK and UK nationals in the 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. Cooperating in the fight against crime and terrorism; and
12. Delivering a smooth, orderly exit from the EU.

These 12 principles have been used to structure the content of the White Paper, which contains little of substance additional to that set out in the Prime Minister's keynote speech.

The White Paper provides certain further details in relation to the UK's negotiating position in the following key areas:

- **Providing certainty and clarity.** The UK Government will introduce the previously announced Great Repeal Bill, which will initially

convert the “*acquis*” into domestic law, and enable changes to be made to laws which would otherwise not function properly once the UK has left the EU. However, it is unclear from the White Paper whether the “*acquis*” will extend to case law of the ECJ, in addition to EU law. A second White Paper will be published, setting out the Government's approach in greater detail.

- **Taking control of our own laws.** The White Paper makes it clear that the ECJ's authority will end when the UK leaves the EU. It is recognised that a replacement dispute resolution mechanism will need to be introduced in its place. Although various examples of such mechanisms are provided, the UK Government's favoured mechanism is not indicated.
- **Strengthening the Union.** The White Paper gives consideration to the engagement of the devolved administrations of the constituent parts of the United Kingdom in the Brexit process through the Joint Ministerial Committee on EU Negotiations.
- **Controlling immigration.** The White Paper makes it clear that free movement of persons will end when the UK leaves the EU. The description of the UK Government's future position on EU immigration is short and no further details of substance in relation to the desired outcome are provided.
- **Securing rights for EU nationals in the UK, and UK nationals in the EU.** As expected, the UK Government has again made it clear that the position of EU and UK expatriates is an issue of particular importance. The UK Government is expected to seek reciprocal treatment of such persons.
- **Protecting workers' rights.** The UK Government's position is that existing UK employment protection goes beyond that which is required by EU law, and notes that an independent review of “*employment practices in the modern economy*” is currently taking place. There is no specific discussion of how the position in the UK might change, if at all, following Brexit. The UK Government stresses

that it is “committed to maintaining our status as a global leader on workers’ rights”.

– **Ensuring free trade with European markets.**

The Government confirms that the UK will not seek membership of the Single Market nor remain a member of the Customs Unions, but instead will pursue a “*new strategic partnership with the EU, including an ambitious and comprehensive Free Trade Agreement and a new customs agreement*”. There is a section addressing free trade and financial services. That section sets out no concrete proposals, but emphasises that:

- The UK will aim for the freest possible trade in financial services between the UK and EU Member States.
- There is a legitimate interest in mutual cooperation arrangements that recognise the interconnectedness of financial markets.
- The UK will seek to establish strong cooperative oversight arrangements with the EU and will continue to support and implement international standards.
- The UK will discuss its future status and arrangements with a variety of EU agencies, including the European Supervisory Authorities.

– **Delivering a smooth, orderly exit from the EU.** The White Paper sets out the UK Government’s position in relation to a transitional deal. The UK Government acknowledges the importance of the financial service passport for both incoming EEA and UK firms. In particular, the UK Government:

- Seeks to avoid a cliff-edge for business or a threat to stability.
- Favours a phased process of implementation, in which the UK, EU institutions and Member States prepare for the new arrangements that will exist post-Brexit. That phased process may cover a range of matters, including “*the future legal and regulatory framework for business*”.
- Will not seek a form of unlimited transitional status.

If you have any questions concerning the UK’s vote to leave the EU, please reach out to your regular firm contact or the following authors, Simon Jay (+44 20 7614 2316; sjay@cgsh.com), David Toubé (+44 20 7614 2384; dtoubé@cgsh.com), or Lauren Briggs (+44 20 7614 2315; lbriggs@cgsh.com) in our London office.

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