masotti&berger

memorandum

To: Clients of M&B

From: Julian Berger, Masotti & Berger, Milan

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Matter: **The UK has voted for Brexit. Why the hold up?**

Five months on from the UK's Brexit referendum and the process seems to have ground to a halt. Yet Prime Minister Theresa May insists she is on track to trigger Article 50 in March 2017 and claims that her government has powerful arguments to win in its appeal to the UK's Supreme Court, which will be heard on 5 December. But how confident can she really be?

Referendums across the entire UK take place only rarely. Notable exceptions include the referendum in June 1975, shortly after the UK joined the EEC, as it was then known, to give people a say over whether joining was the right thing to have done, a referendum in May 2011 on whether to change the voting system for MPs and the Brexit referendum itself in June 2016. The referendum in September 2014 on independence for Scotland, for example, was limited to Scotland only.

In the UK, a referendum requires primary legislation to set the terms of the question and the franchise to be used. In the case of Brexit, the European Union Referendum Act 2015 became the law passed by Parliament for holding the referendum on whether the UK should remain a member of the EU. The Act set out the question to be voted on but contained no provisions at all as regards what the outcome of a vote would to leave the EU would be. Unlike Italy, the UK does not have constitutional provisions that require the results of a referendum to be implemented. The Brexit referendum last June was therefore only 'advisory' and 'consultative' in its effect (House of Commons Briefing Paper No. 07212). The advisory nature of the referendum was common ground between the parties at the hearing in the High Court in October.

The trigger mechanism for leaving the EU, Article 50 of Treaty on European Union, which came into force by an amendment made by the Lisbon Treaty of 2007, provides that "Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements". And here lies the problem that has led many European-based politicians and commentators to express deep frustration at the slow progress over Brexit: the UK does not have a written constitution. This does not mean that the UK does not have a constitution at all, but rather that the UK has its own form of constitution. Some of it is written in the form of statutes, and some of it is made up of fundamental

rules of law that are recognised by both Parliament and the Courts. At issue before the High Court was therefore the question of what constitutional requirements need to be respected before Article 50 is triggered. In other words, consideration of the question of Parliamentary sovereignty, and in particular the supreme right of the Crown with the consent of Parliament to change the law by primary legislation in any way it chooses.

The Government sought to argue that the Crown, acting by executive authority through its government, has residual prerogative powers (often called the royal prerogative) delineated by UK constitutional law, to make or unmake treaties. Accordingly, so the Government argued, it could trigger Article 50 without the need to obtain approval from Parliament to implement primary legislation in order to change the 1972 European Communities Act, by which the UK had acceded to the EEC and conferred precedence on EU law in the first place.

It was surely no surprise that the three senior High Court judges who heard the case were not persuaded by the Government's arguments. The UK became a member of the EU as a result of primary legislation by Parliament, and in their judgment it will require a new Act of Parliament to change the law. The matter was a question of law to do with legal process and not policy. The High Court ruled that the Government would therefore have to seek the approval of Parliament before triggering a process that both sides in the case accepted, without any legal discussion or argument is irrevocable.

The furore that followed in certain quarters of the UK national press, in particular a 'Daily Mail' headline above photos of the judges: "Enemies of the People", amounted to a chilling attempt to subvert popular opinion. To make matters worse, Government ministers were shamefully slow to speak up in support of the independence of the judiciary, for which the UK is internationally respected. How strange it was to hear the Brexiteers, who had campaigned for the UK to "take back control" from Brussels and reassert sovereignty over its laws, rage at the idea that only their democratically elected representatives should be allowed to change the law by Parliamentary process.

So where are we now?

Well, in spite of grandstanding from some quarters urging the Government to get a move on and trigger Article 50 anyway, the Court's ruling is where the law now stands and the Government would be in contempt of court if it sought to ignore it. The Supreme Court will hear the appeal in December, with judgment expected to be given early in the new year. Many legal commentators believe that the Supreme Court will confirm the High Court's decision, leading many to argue that the Government should scrap the appeal and get on with drafting the necessary legislation.

But there could well be more surprises yet to come. In the irony of all ironies, the possibility looms of a referral by the Supreme Court to the European Court of Justice on a question of European rather than English law. This is because no one knows whether the two year process for exit, once an Article 50 notification is made, is in fact irrevocable or

not. The question could become an issue of vital importance, and legal clarification from the European Court could be critical. Imagine the scenario if we fast forward to September 2018: even assuming Article 50 had been triggered in March 2017, with only six months left at that point before exit takes effect the mood of the country could have changed. The exit negotiations will be difficult and it could easily become apparent that the decision to depart the EU – for 'Destination Unknown' – is not to the land of milk and honey. Should it be possible, the Government could well wish, or feel obliged, to put the question back to the British people and revoke the Article 50 notification.

Meanwhile, Theresa May and her core Brexit team, David Davies at the Department for Exiting the EU and Liam Fox at the Department for International Trade, have steadfastly refused to share their objectives for a post-Brexit Britain with the country at large, arguing that it does not make sense to reveal the UK's hand before negotiations commence. Having taken over as Prime Minister from David Cameron without a popular mandate, Theresa May's repeated, circular explanation that "Brexit means Brexit", without further detail, together with her unwillingness to allow her proposals to be subjected to democratic process by Parliamentary scrutiny, have led many to conclude, after a brief honeymoon period, that she lacks vision, is parochial and that the Government is devoid of ideas.

Was Brexit a vote to impose controls on unlimited immigration, a call to end rule by grey men in Brussels or, more generally, a protest from the ranks of white, 'middle Britain' who feel they have been left behind by globalisation and cling to a nostalgic notion of sovereignty based on Great Britain's imperial past. Can the country really thrive on its own, outside a single market comprising the world's largest trading block? Whatever the truth, the delay has bought Ministers some precious time while they grapple with the complexity of the issues at hand. They are going to need it.