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BRIEFING PAPER

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European Union (Notification of Withdrawal) Bill

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Contents:

Contents

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Summary

The European Union (Notification of Withdrawal) Bill was published on 26 January 2017 and will be debated in the House of Commons from 31 January to 8 February 2017. This House of Commons Library briefing paper analyses the Bill and its context; the current version includes new information on Euratom and on the proposed amendments.

What does the Bill do?

The Bill offers Parliament its first opportunity to give legal effect to the result of the 23 June 2016 referendum, in which 52% of those who voted called for the UK to leave the EU.

The Bill is very short: its one operative clause would provide the UK Government with the legal authority to issue notice to the European Council, under Article 50 of the Treaty on European Union (TEU), that the UK has decided to withdraw from the EU.

But it would start a process that would require the UK to enact much more legislation for when the EU Treaties no longer apply to the UK.

The Government considers that the Bill would also allow the Prime Minister to trigger withdrawal from the European Atomic Energy Community (Euratom), although whether that would happen automatically at the same time as EU withdrawal is unclear.

The Government is hoping that the Bill will become law in time for it to meet its deadline of 31 March 2017 for triggering Article 50, and so it has fast-tracked the Bill.

Is it "bombproof"?

The Government has drafted the Bill very tightly, which makes it hard for changes to be made that might, for instance, delay or subvert the Government's plans for Brexit.

But there has nevertheless been much discussion about possible amendments. Several have already been tabled, for instance to require the Government to provide information to Parliament on the negotiations, and to require Parliament's approval before the Government concludes a withdrawal agreement. Some Members are seeking to prevent the Bill from even passing its second reading, on various grounds.

Why is the Bill needed?

The Bill is the Government's response to the Supreme Court's judgment in the case of *Miller*, given on 24 January 2017. The Supreme Court ruled, by a majority of 8 to 3, that it would not be legal for the Government to use prerogative powers to issue the Article 50 notice: instead, primary legislation was required.

The central reason for the ruling was that giving notice inevitably triggers major changes to domestic law at the end of the two-year exit negotiation period stipulated by Article 50. This is because the EU Treaties would then no longer apply in the UK, whatever legislation was enacted in Parliament. Such a momentous change to the UK's constitutional arrangements, the Court decided, could not be brought about "by ministerial action alone". The authority of primary legislation is required before the Government can take that action.

This Bill, if it is passed, will represent Parliament's authorisation for the UK to leave the European Union. The majority judgment outlined that the form of the legislation is "entirely a matter for Parliament". The joint view of the eight justices of the Court was

the length of the statute bears no relevance to its constitutional importance, and that the decision to opt for a very short Bill, would not "undermine its momentous significance".

The majority added that the European Referendum Act 2015 did not provide the legislative authority for the Government to give effect to the decision to leave the EU taken in the June 2016 referendum.

How else could Parliament be involved?

There are many other opportunities for Parliamentary involvement in Brexit, with varying implications, at different stages – before triggering Article 50; whilst amending domestic law for when the EU Treaties no longer apply; when scrutinising the withdrawal negotiations; and on conclusion of a withdrawal agreement:

- The Government has agreed to publish a White Paper on its negotiating strategy, although when and what it will contain are not clear, as well as to hold a number of Parliamentary debates before triggering Article 50.
- This Bill represents the first of many changes to the statute book that will need to be made in order to give legal effect to the decision to leave the EU. Legislating for Brexit, through both primary and secondary legislation, is likely to be a multi-stage project. The next stage will be The Great Repeal Bill, which may also be followed by further consequential primary and secondary legislation. This activity will all need to be coordinated with the process of negotiating the terms of the UK's withdrawal with the EU under Article 50. Both of those processes can only begin once this Bill is passed and the notification of the decision to leave is provided.
- The Secretary of State for Exiting the EU, David Davis, has committed to ensuring that Members of Parliament are "at least as well informed as the European Parliament (EP) as negotiations progress". It is not yet clear how well-informed the EP will be, but under an inter-institutional agreement with the European Commission, it has for instance been granted access to the "consolidated negotiating texts" of the Trans-Atlantic Trade and Investment Partnership (TTIP) negotiations.
- The Government has also agreed to put the final withdrawal agreement to a vote in both Houses of Parliament before it comes into force. However, the implications of a 'no' vote are unclear, and Parliament is unlikely to be able to recommend changes to the agreement at that point.

By way of comparison, the UK's three bids to join the then European Economic Community (EEC) in the 1960s and early 1970s gave rise to six Government Papers on the legal, constitutional, historic, political, social and economic aspects of EEC membership. There were several days of debate on the principle of joining the Community, as well as debates on White Papers and the European Communities Bill itself.

Could the Article 50 notice be revoked?

The UK Courts have not ruled on whether notice given under Article 50 can be revoked.

If notice is irrevocable, authorising the Government to issue it would effectively commit Parliament to approving the final withdrawal agreement, seeking a renegotiation if practicable, or leaving the EU without any agreement.

A case in the Irish High Court might lead to a reference to the Court of Justice of the EU on whether Article 50 notice can be revoked. There is still the possibility of the UK courts making such a referral.

What about withdrawing from the EEA?

When withdrawing from the EU, the Government also intends to withdraw from the single market and the European Economic Area. But questions have been raised about how this might be done.

Another legal case is seeking to determine whether legislation similar to this Bill is also needed to leave the EEA, which has its own withdrawal process.

Devolution issues

The Supreme Court decided unanimously in the Miller case that the devolved legislatures do not have a legal power to block the Government from triggering Article 50.

The Government has said the current Bill does not require a legislative consent motion. But Scotland's First Minister, Nicola Sturgeon, has said that her government would nevertheless table one, in order to give the Scottish Parliament a symbolic vote on triggering Article 50.

The Secretary of State for Scotland has suggested that a legislative consent motion would be sought for the Great Repeal Bill.

1. The Bill

1.1 A short Bill of "momentous significance"

The European Union (Notification of Withdrawal) Bill has the following long title:

> A Bill to confer power on the Prime Minister to notify, under Article 50(2) of the Treaty on European Union, the United Kingdom's intention to withdraw from the EU.

The Bill has only one operative clause:

> **1. Power to notify withdrawal from the EU**
>
> (1) 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.
>
> (2) This section has effect despite any provision made by or under the European Communities Act 1972 or any other enactment.

The Secretary of State for Exiting the European Union has emphasised that this drafting is designed to ensure that it is "the most straightforward bill possible".[1] It reflects the Government's intention to comply with the Supreme Court's judgment and to keep to the Government's commitment to trigger Article 50 by the end of March 2017.

As the majority of the Supreme Court noted in its *Miller* judgment, the length of a Bill has no bearing on its constitutional significance – and this is a Bill of "momentous significance".[2]

The Bill, once enacted, essentially represents Parliament's authorisation for the UK to begin the process of leaving the EU, and is the first of many changes to the statute book that will be required to reflect the outcome of the June 2016 referendum.

It sets in train enormous constitutional, legal, political, social and economic changes. The fact that it is a major change to the UK constitution is clear from the Bill's reference to the European Communities Act 1972, another highly significant piece of constitutional legislation.

What the Bill does not do

There are many things the Bill as drafted would not do, including:

- reversing the outcome of the referendum
- giving Parliament itself the power to trigger Article 50
- imposing any conditions for triggering Article 50
- amending any EU-related UK legislation

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1 HC Deb 24 January 2017

2 R (on the application of Miller and another) v Secretary of State for Exiting the European Union [2017] UKSC 5, para 122

- determining the UK's negotiating position
- giving Parliament any rights in the negotiations or in concluding the withdrawal agreement
- addressing any devolution issues

1.2 The Bill and Article 50 (Treaty on European Union)

Clause 1(1) grants the Prime Minister directly the legal power to notify the EU of the United Kingdom's decision to withdraw from the EU.

The power in Clause 1(1) represents the legal basis for giving effect to the result of the referendum held on the 23 June 2016, whereby a majority of those voting voted for the UK to leave the EU.

Clause 1(1) makes references to the requirements of Article 50 of the Treaty on European Union (TEU), which states:

> 1. Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.
>
> 2. A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union.
>
> 3. The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.
>
> 4. For the purposes of paragraphs 2 and 3, the member of the European Council or of the Council representing the withdrawing Member State shall not participate in the discussions of the European Council or Council or in decisions concerning it.
>
> A qualified majority shall be defined in accordance with Article 238(3)(b) of the Treaty on the Functioning of the European Union.
>
> 5. If a State which has withdrawn from the Union asks to rejoin, its request shall be subject to the procedure referred to in Article 49.

Once notification is given, paragraph 3 of Article 50 provides that the EU Treaties will cease to apply on either the date of entry into force of a withdrawal agreement or two years after the withdrawal is given, unless all Member States agree to extend the two-year period.

This feature of Article 50 has a direct bearing on the effect of this Bill. If notification cannot be revoked (see below), giving notice will automatically result in the UK leaving the EU after two years, whether or not an agreement is reached on the terms for doing so – unless the other EU Member States unanimously agree to extend the negotiating period:

> As Lord Pannick QC put it for Mrs Miller, when ministers give Notice they will be "pulling … the trigger which causes the bullet

> to be fired, with the consequence that the bullet will hit the target and the Treaties will cease to apply".[3]

1.3 The Bill and the European Communities Act 1972

As the judgments of both the High Court and the Supreme Court point out, the two year limit from the date that the notice is given means that the notice itself, and therefore this Bill, will lead to a direct impact on the European Communities Act 1972 (ECA).

Section 2(1) of the ECA makes all directly applicable EU law, namely the Treaties and regulations, part of UK domestic law. The High Court explained the impact of withdrawing from the EU Treaties upon this provision:

> If the United Kingdom withdraws from the Treaties pursuant to a notice given under Article 50 of the TEU, there will no longer be any enforceable EU rights in relation to which this provision will have any application. Section 2(1) would be stripped of any practical effect.[4]

The Government has already announced its intention to repeal the ECA through the Great Repeal Bill, due be introduced after May 2017.[5] The proposed repeal would come into effect on the day the UK leaves the EU. The Government's legal team in *Miller* suggested that the Great Repeal Bill was evidence that Parliament would authorise the withdrawal from the EU. The majority of the Supreme Court rejected this argument for reasons that are worth quoting in full:

> If ministers give Notice without Parliament having first authorised them to do so, the die will be cast before Parliament has become formally involved. To adapt Lord Pannick's metaphor, the bullet will have left the gun before Parliament has accorded the necessary leave for the trigger to be pulled. The very fact that Parliament will have to pass legislation once the Notice is served and hits the target highlights the point that the giving of the Notice will change domestic law: otherwise there would be no need for new legislation.[6]

This Bill is of critical importance as it supplies the legal authority necessary for the Government to be able to begin a process that will inevitably require Parliament to enact a significant amount of primary and secondary legislation in order to prepare for the day when the EU treaties no longer apply.

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3 R (on the application of Miller and another) v Secretary of State for Exiting the European Union [2017] UKSC 5, para 36
4 *Miller v Secretary of State for Leaving the EU* [2016] EWHC 2768 (Admin) Para 51
5 Gov.uk, Government announces end of European Communities Act, 2 October 2016
6 R (on the application of Miller and another) v Secretary of State for Exiting the European Union [2017] UKSC 5, para 94

Clause 1(2)

The words in Clause 1(2) "despite any provision made by or under the European Communities Act 1972 or any other enactment" appear to be designed to limit the possibility of a judicial review challenge to the use of the power in clause 1(1).

Parliamentary sovereignty means that later statutes take priority over earlier ones. As such, it is not normally necessary to state that a statutory power, such as this one, takes precedence over earlier enactments.

Clause 1(2) would prevent a court reading any statutory restrictions into the Prime Minister's power to give the notice.

The direct reference to the ECA is probably to avoid any doubt over Parliament's intention in relation to any rights stemming from the ECA.

Singling out the ECA could be because the ECA has been accorded the status of a "constitutional statute" by the courts, notably in the case of *Thoburn*.[7] This status means that the normal rule of implied repeal (that in the event of a conflict between two statutes, the later statute repeals an earlier one) does not apply to the ECA. Further, the majority of the Supreme Court noted that EU law rights under the ECA cannot be "implicitly displaced by mere enactment of legislation which is inconsistent with it".[8] As a consequence, the Government may have thought that reliance on general words such as "any other enactment" may not be sufficiently precise.

In any event, the majority of the Supreme Court indicated that neither of these would apply to a Bill of this type:

> Legislation which alters the domestic constitutional status of EU institutions or of EU law is not constrained by the need to be consistent with EU law. In the case of such legislation, there is no question of EU law having primacy, so that such legislation will have domestic effect even if it infringes EU law (and that would be true whether or not the 1972 Act remained in force). That is because of the principle of Parliamentary sovereignty which is, as explained above, fundamental to the United Kingdom's constitutional arrangements, and EU law can only enjoy a status in domestic law which that principle allows. It will therefore have that status only for as long as the 1972 Act continues to apply, and that, of course, can only be a matter for Parliament.[9]

This Bill squarely confronts the fact that the power granted would enable the Government to take action that will result in major changes to domestic law, including to the ECA.

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7 Jeff King, 'What Next? Legislative Authority for Triggering Article 50' UK Constitutional Law blog, 8 November 2016

8 R (on the application of Miller and another) v Secretary of State for Exiting the European Union [2017] UKSC 5 para 66

9 R (on the application of Miller and another) v Secretary of State for Exiting the European Union [2017] UKSC 5 para 67

1.4 The Bill and Euratom

The Government's Explanatory Notes say that the power to withdraw from the EU, in clause 1(1) of the Bill, also implies a power to withdraw from the European Atomic Energy Community (Euratom).

The explanation given is that Article 3(2) of the European Union (Amendment) Act 2008 states (emphasis added):

> A reference to the EU in an Act or an instrument made under an Act includes, **if and in so far as the context permits or requires,** a reference to the European Atomic Energy Community.

What is Euratom?

Euratom regulates the civil nuclear industry, including safeguards for nuclear materials and technology, disposal of nuclear waste, ownership of nuclear fuel, and research and development (for instance its major nuclear fusion projects).

Euratom is a separate legal entity from the EU, under the 1957 Euratom Treaty, but it is governed by the EU's institutions (including the Court of Justice of the EU).

Remaining in Euratom after leaving the EU "would entail partial membership of EU institutions and would leave significant areas of UK law subject to directives and regulations made in Brussels and (ultimately) interpreted in Luxembourg".[10]

Tom Greatrex, chief executive of the Nuclear Industry Association, is quoted as calling for transitional arrangements if the UK leaves Euratom:

> … if the UK ceases to be part of Euratom, then it is vital the government agree transitional arrangements, to give the UK time to negotiate and complete new agreements with EU member states and third countries including the US, Japan and Canada who have nuclear co-operation agreements within the Euratom framework.[11]

How does withdrawal from the Euratom Treaty work?

The Euratom Treaty does not have its own provisions on withdrawal. However, it has been amended to state that Article 50 TEU applies to the Euratom Treaty, with the substitution of the words Euratom and Euratom Treaty where appropriate. This now appears as Article 106a of the Euratom Treaty:

> **Article 106a**
>
> 1. Article 7, Articles 13 to 19, Article 48(2) to (5), and Articles 49 and 50 of the Treaty on European Union, and Article 15, Articles

[10] Jonathan Leech and Rupert Cowen, 'Brexit and Euratom: No rush to exit?', World Nuclear News, 20 January 2017

[11] Isabella Kaminski, 'UK confirms plan to leave Euratom nuclear treaty', ENDS Report, 27 January 2017 [subscription only]

> 223 to 236, Articles 237 to 244, Article 245, Articles 246 to 270, Article 272, 273 and 274, Articles 277 to 281, Articles 285 to 304, Articles 310 to 320, Articles 322 to 325 and Articles 336, 342 and 344 of the Treaty on the Functioning of the European Union, and the Protocol on Transitional Provisions, shall apply to this Treaty.
>
> 2. Within the framework of this Treaty, the references to the Union, to the 'Treaty on European Union', to the 'Treaty on the Functioning of the European Union' or to the 'Treaties' in the provisions referred to in paragraph 1 and those in the protocols annexed both to those Treaties and to this Treaty shall be taken, respectively, as references to the European Atomic Energy Community and to this Treaty.
>
> 3. The provisions of the Treaty on European Union and of the Treaty on the Functioning of the European Union shall not derogate from the provisions of this Treaty.

A September 2016 report from the European Economic and Social Committee (EESC – a consultative body to the EU) stated that this provision appeared to mean that the reference to the "Union" in Article 50 TEU would also include Euratom:

> current legal opinion suggests that leaving the EU also means leaving Euratom. This has major strategic implications, not least for 2030 energy targets, but also for research, regulatory, supply chain and safety cooperation. This issue therefore needs to be recognised by this draft proposal, even though anticipating specific outcomes at this stage is problematic.[12]

In reaching this conclusion the Committee reportedly consulted the European Commission.[13]

However, several nuclear energy lawyers disagree. For example, a recent article argues that Article 106a creates a "similar but separate" exit process for Euratom that does not need to be triggered at the same time as leaving the EU:

> The point turns on the meaning of Article 106a of the Euratom Treaty, which states that (amongst other things) Article 50 of the Treaty on European Union "shall apply to this Treaty". Article 106a then goes on to explain how Article 50 is to work in context of Euratom – inserting references to Euratom and the Euratom Treaty in place of references to the EU and EU Treaties. Re-writing Article 50 in this way creates a similar but separate exit process.
>
> If Euratom was to be included in a single Article 50 process then Article 106a of the Euratom Treaty would simply have added references to Euratom into Article 50, retaining references to the EU. It does not do this. Triggering exit from the EU therefore has no legal effect on the UK's membership of Euratom.

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12 European Economic and Social Committee (Rapporteur: Mr Brian Curtis), Opinion on a Communication from the Commission - Nuclear Illustrative Programme presented under Article 40 of the Euratom Treaty for the opinion of the European Economic and Social Committee [COM(2016) 177 final], TEN/596, September 2016, para 5.5

13 See 'Brexit 'could trigger' UK departure from nuclear energy treaty', Guardian, 27 September 2016

> There is no legal need for the UK to trigger a Euratom exit at the same time as leaving the EU, or at all.[14]

It is hard to envisage how the UK could continue as a Member of Euratom, even for a transitional period, once it has left the EU. Because Euratom uses the EU institutions, the UK would have to find a way to remain part of those institutions where Euratom was concerned. And also the Euratom Treaty states that it applies only on the territory of the EU Member States (Article 198).

1.5 A "minimalist" Bill?

This Bill is very specific in what it seeks to do. It gives legal authority for the Prime Minister to begin the process of leaving the European Union. This is in accordance with the outcome of the referendum held on 23 June 2016.

Jeff King, Professor of Law at University College London, has argued that this Bill represents the "minimalist option".[15]

A strength of this option is that a more complicated scheme could risk delaying the Government's Brexit timetable, by both extending the parliamentary timetable for the passage of the Bill, and by adding unnecessary legal complexity into the relationship between Parliament and Government.

As the House of Lords Constitution Committee acknowledged in their inquiry on Article 50, if a Bill were to be over-prescriptive it could risk "hobbling the Government's ability to negotiate".[16]

In addition, Parliamentary accountability in the United Kingdom does not normally rely on primary legislation. It is more usual to rely on ordinary parliamentary procedures. The minimalist option is therefore arguably more in keeping with the UK's constitutional tradition of parliamentary accountability.

An alternative approach to the "minimalist option", Professor King argues, would be the "conditions option", and he suggests the following principles for imposing conditions in primary legislation:

- First, Parliament must be given clear rights to notice, to comment on key negotiating positions and draft agreement text, and to a response from the Government to its comments.
- Second, the devolved governments and legislatures should enjoy formal participation in the consultation process in rough parity with the Westminster Parliament.

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14 Jonathan Leech and Rupert Cowen, 'Brexit and Euratom: No rush to exit?', World Nuclear News, 20 January 2017. See also Vincent Zabielski, 'Ensuring a 'soft Brexit' for the UK's nuclear industry', World Nuclear News, 24 November 2016

15 Jeff King, 'What Next? Legislative Authority for Triggering Article 50' UK Constitutional Law blog, 8 November 2016

16 Select Committee on the Constitution, The Invoking of Article 50, 13 September 2016, HL 44-I 2016-17 p 15

- Third, the Government's stated notice deadline of 31 March 2017 should be respected (assuming it is not itself to blame for further delay through bullish behaviour).
- Fourth, there should be no attempt to load the bill with a variety of veto points that would have the effect of destroying the possibility of Brexit during negotiations on the exit agreement.[17]

Professor King argues that imposing legal conditions setting out the extent and type of parliamentary involvement is desirable, as "expecting the proper scheme of consultation to follow from executive grace is pious at best, foolish at worst".[18]

1.6 Parliamentary stages

Completed by 31 March?

The Government is seeking to get the Bill through the House of Commons in two weeks, and has allocated it five days of debates in the Chamber.

The Government's aim is for the Bill to be passed in time for it to meet its goal of triggering Article 50 by 31 March 2017:

> We will work with colleagues in both Houses to ensure that this Bill is passed in good time for us to invoke article 50 by the end of March this year, as my right hon. Friend the Prime Minister has set out. That timetable has already been supported by this House.[19]

In December 2016, the Commons passed a resolution in favour of the 31 March 2017 deadline for triggering Article 50.

The Government confirmed in the Bill's Explanatory Notes its intention to "ask Parliament to expedite the parliamentary progress" of the current Bill. It argued that fast-tracking was necessary to ensure that the Government could give notification under Article 50 of the TEU by the end of March 2017. The Government acknowledged that it has not given relevant parliamentary committees the opportunity to scrutinise the legislation, given the need to introduce it "as quickly as possible". It added that the Bill does not include a sunset clause, nor are mechanisms for post-legislative review in place because the Bill's impact is "clear and limited". [20]

Commons second reading: two days

Unusually, the initial Commons debate on the Bill (on second reading) is timetabled to take place over two days, on 31 January and 1 February 2017. Usually, second reading takes place on just one allotted day.

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17 Jeff King, 'What Next? Legislative Authority for Triggering Article 50' UK Constitutional Law blog, 8 November 2016
18 Ibid
19 David Davis, HC Deb 24 January 2017 c161
20 European Union (Notification of Withdrawal) Bill, Explanatory Notes, paras 10-16

The last Bill to have been given time to be debated over two days at second reading was the House of Lords Reform Bill 2012-13.[21] On introduction, that Bill contained 60 clauses and 11 schedules. It was withdrawn later in the session.

Committee stage, Report and third reading: three days

After second reading, the Bill is then expected to be considered in a Committee of the whole House the following week, on 6-8 February 2017. The remaining stages are also due to take place on 8 February. There will only be a Report stage if amendments are made in Committee.

The Fixed-term Parliaments Bill 2010-12 had a similar amount of time in Committee of the whole House in November and December 2010 (16 and 24 November and 1 December), although a whole day (18 January 2011) was provided for the remaining stages. On introduction, that Bill contained five clauses and a schedule (the provisions were set out in seven pages).

House of Lords

After the Commons, the Bill will then go to the House of Lords, probably after the February recess (which is 10-17 February). The Government has much less control over the timetables in the House of Lords.

If the Lords amended the Bill, it would then return to the House of Commons.

Fast-tracking: background

The Government's undertaking to provide an explanation of the reasons for using a fast-track procedure to secure the passage of legislation[22] was set out in December 2009, in response to a House of Lords Constitution Committee report on *Fast-track Legislation: Constitutional Implications and Safeguards*.[23]

As a result, when legislation is introduced that the Government intends to fast-track, it addresses a number of questions outlined by the Lords Constitution Committee (see Box 1 overleaf). The Government's responses to these questions are set out in a written statement in the House of Lords and in the Explanatory Notes in the House of Commons.

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21 HC Deb 9 July 2012 cc24-132; 10 July 2012 cc188-278

22 Select Committee on the Constitution, Government Response to Fast-track Legislation: Constitutional Implications and Safeguards, 7 December 2009, HL 11 2009-10; HC Deb 10 November 2009 c748

23 Select Committee on the Constitution, Fast-track Legislation: Constitutional Implications and Safeguards, 7 July 2009, HL 116-I 2008-09

Box 1: Lords Constitution Committee recommendations on the content of a ministerial statement on the reasons for fast-tracking

In the light of the evidence we have received about the potential problems and issues pertaining to the use of fast-track legislation, we recommend that the Ministerial Statement should be required to address the following principles:

(a) Why is fast-tracking necessary?

(b) What is the justification for fast-tracking each element of the bill?

(c) What efforts have been made to ensure the amount of time made available for parliamentary scrutiny has been maximised?

(d) To what extent have interested parties and outside groups been given an opportunity to influence the policy proposal?

(e) Does the bill include a sunset clause (as well as any appropriate renewal procedure)? If not, why do the Government judge that their inclusion is not appropriate?

(f) Are mechanisms for effective post-legislative scrutiny and review in place? If not, why do the Government judge that their inclusion is not appropriate?

(g) Has an assessment been made as to whether existing legislation is sufficient to deal with any or all of the issues in question?

(h) Have relevant parliamentary committees been given the opportunity to scrutinise the legislation?

Source: House of Lords Select Committee on the Constitution, Fast-track Legislation: Constitutional Implications and Safeguards, 7 July 2009, HL 116-I 2008-09

2. Voting and amendments

This Bill provides Parliament's first opportunity for a binding vote on Brexit since the referendum result – and its last opportunity before the process is (perhaps irrevocably) set in train. Many Members will be seeking to introduce amendments at this stage.

2.1 Voting intentions

Labour will reportedly be under a three-line whip to vote in favour of the Bill.[24]

SNP Members will be voting against it.

Tim Farron, leader of the Liberal Democrats, said that 'The Liberal Democrats are clear, we demand a vote of the people on the final deal and without that we will not vote for Article 50'.[25]

When the Commons passed a resolution in December 2016 for the Government to invoke Article 50 by 31 March 2017, there was a clear majority of 461 to 89 votes.

2.2 Is the Bill "bombproof"?

Early reports about the drafting of the Bill, in November 2016, suggested that the Government wanted to draft a short bill that was "'bombproof' to amendments".[26] However, at Business Questions on 1 December 2016, David Lidington, the Leader of the House, said that "I have never come across a Bill, long or short, that has been incapable of being amended".[27]

David Davis said, when responding to the House on the Miller judgment, that the Bill had been very tightly drafted:

> It will be the most straightforward Bill possible to give effect to the decision of the people and respect the Supreme Court's judgment. The purpose of the Bill is simply to give the Government the power to invoke article 50 and begin the process of leaving the European Union. That is what the British people voted for, and it is what they would expect. Parliament will rightly scrutinise and debate this legislation, but I trust that no one will seek to make it a vehicle for attempts to thwart the will of the people or to frustrate or delay the process of our exit from the European Union.[28]

But there has nevertheless been considerable discussion about possible amendments.

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24 'Brexit: Article 50 legislation published', BBC news online, 26 January 2017
25 'Brexit latest: Lib Dems say they will oppose Article 50 unless there's a second EU referendum', Independent, 24 January 2017
26 Rob Merrick, "Brexit: Theresa May creates 'bombproof' Article 50 bill to prevent MPs holding it up", *Independent*, 15 November 2016
27 HC Deb 1 December 2016 c1674
28 David Davis, HC Deb 24 January 2017 c162

Labour has said that it will seek to lay amendments 'to ensure proper scrutiny and accountability throughout the process':

> That starts with a White Paper or plan—a speech is not a White Paper or plan. We need something on which to hold the Government to account throughout the process. We cannot have a speech as the only basis for accountability for two years or more. That is the first step. There needs to be a reporting-back procedure and a meaningful vote at the end of the exercise. The Government should welcome such scrutiny, and not try to resist it, because the end result will be better if scrutinised than it would otherwise be.[29]

The SNP are seeking to reject the whole Bill, and to table 50 amendments to it including a requirement for the unanimous agreement of the devolved governments before the Prime Minister triggers Article 50:

> Following the publication of the UK Government's Article 50 Bill, our MPs have introduced an amendment that would reject the bill based on the fact that it fails to deliver on effective consultation with devolved administrations; does not guarantee the position of EU nationals and still leaves far too many questions about the full implications of withdrawal from the single market unanswered.
>
> The SNP MPs will introduce another 50 amendments to this legislation. The 50 amendments include a requirement that the UK government publishes a White Paper setting out its Brexit plan and to seek the unanimous agreement of the devolved governments before triggering Article 50. We will also seek to ensure that, in the event that Theresa May walks away without any deal, the UK falls back to the status quo - membership of the European Union.[30]

The Liberal Democrats have said that they will not vote for the Bill unless there is a referendum on the final Brexit deal.[31]

The House of Lords Constitution Committee's September report on *The invoking of Article 50* made the following observation on a potential Bill authorising the Government to trigger Article 50:

> Legislation would clearly take some time to pass through both Houses of Parliament. The time taken, and the difficulty of a Bill's passage, would depend to some extent on the content and purpose of the legislation. Yet, given how controversial the subject matter will be, keeping the scope of a Bill contained during its passage through Parliament might well present significant challenges to the business managers of both Houses. It is possible—even likely—that a narrow Bill focused on the issue of the triggering of Article 50 might find itself the focal point of wider debates about the role Parliament should play in the negotiation process more generally. Some may regard this as a good thing, others a disadvantage, but we note that the likely

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29 Keir Starmer, HC Deb 24 January 2017 c163
30 Liam Furby, 'The Brexit court case: what it means', SNP, 24 January 2017
31 Brexit latest: Lib Dems say they will oppose Article 50 unless there's a second EU referendum', Independent, 24 January 2017

> result is that it could be difficult for a Bill to pass through both Houses in a relatively short timeframe.[32]

The report also concluded that Parliament should consider whether any Article 50 Bill should include any preconditions, for example:

- a duty to report to Parliament during the negotiations
- requirement for parliamentary consent at particular stages, and
- a requirement for Parliament to ratify the withdrawal.[33]

2.3 When are amendments "in order"?

House of Commons Standing Order No. 65 states that all committees to which bills are committed have the power to amend the bill

> as they shall think fit, provided they be relevant to the subject matter of the bill: but if any such amendments shall not be within the long title of the bill, they shall amend the long title accordingly, and report the same specially to the House.[34]

In the *Handbook of House of Commons Procedure*, Paul Evans describes the effect of the Standing Order and relates it to how the Chair determines whether amendments are in order:

> "all committees to which bills are committed [have the power] to make amendments"

(When a Bill is considered by a Committee of the Whole House – as this Bill is scheduled to be – the Chair is the Chairman of Ways and Means, who is currently Lindsay Hoyle MP).

However, amendments have to be relevant to the subject matter of the bill, as indicated by the long title of the Bill:

> [SO No 65] restricts them to making only those amendments that are relevant to the subject matter of the bill. This concept of "relevance" is usually referred to as the "scope of the bill". In deciding whether or not a proposed amendment falls within the scope of the bill, where the case is not obvious one way or the other, the Chair will rely on precedent and his or her own judgement. The long title of a bill indicates but does not define its scope, since under the same standing order, it may be amended as a consequence of amendments which are made to the bill.

If a Chair decides that an amendment is outside the scope of the bill then it cannot be moved.

If a bill has just one purpose, it cannot have other purposes added to it:

> A bill which has only one purpose (a very rare creature) cannot have any other purposes added to it. But where it has two or more purposes, amendments to enlarge the number of things it

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32 Constitution Committee, The invoking of Article 50, 13 September 2016, HL 44 2016-17 p11
33 Ibid p15
34 House of Commons, *Standing Orders of the House of Commons – Public Business, 2016*, February 2016, HC 2 2015-16, , SO No. 65

> does are admissible, as long as they relate to the original purpose of the bill.

Paul Evans also provided a list of other grounds on which amendments might be ruled out of order:

> Other grounds on which amendments might be ruled out order are: that they are contrary in sense to the purpose of the bill or of a particular clause; that they are incomplete without paving or consequential amendments; that they are unintelligible or grossly ungrammatical; that they are vague, trifling or just plain silly; or that they seek to do something which would nullify the whole purpose of the bill. Being out of order (unless a gross case) is, however, no bar to an amendment being printed.[35]

2.4 Amendments tabled so far

Members can seek to prevent the Bill passing its second reading in the Commons. Five amendments have been tabled to the motion for second reading, on grounds including:

- no money resolution on the Bill (the Explanatory Notes state "The Bill is not expected to have any financial implications")
- no white paper
- no protection for individual rights
- no provisions on membership of the EEA or customs union
- no provision for a referendum on the terms of the final withdrawal agreement

It is up to the Speaker to decide whether any or all of these "reasoned amendments" is considered.

Furthermore, in view of the tight timetable, amendments to the Bill itself can be tabled even before second reading.

The day after the Bill was published, 11 new clauses were printed in the Notices of Amendments up to and including 26 January 2017. These covered:

- The contents of the White Paper on the Government's negotiating strategy, including impact assessments, and a requirement for Parliament to approve the White Paper before the Bill can come into effect.
- Requiring the Joint Ministerial Committee on EU negotiations to agree objectives for the negotiations before the Prime Minister can trigger Article 50.
- Providing Parliament with periodic reports and other information on the negotiations.
- Requiring the Government to consult the devolved governments when negotiating and concluding any Brexit agreements.

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35 Paul Evans, *Handbook of House of Commons Procedure*, Seventh Edition, 2011/12, para 11.9.14

- Requiring Parliament's approval before the Government concludes a withdrawal agreement.
- Requiring Parliament's approval for ratifying any new treaty with the EU.

Harriet Harman QC, chair of the Joint Committee on Human Rights (JCHR), has also tabled an amendment that seeks to protect the residence rights of EU nationals in the UK.

3. Why is the Bill needed?

3.1 Introduction: the *Miller* case

This Bill is the Government's response to the Supreme Court judgment in the case of Miller that it would not be legal for the Government to use prerogative powers to trigger Article 50: instead primary legislation was required.

The Government had considered that it could trigger Article 50 without any further Parliamentary involvement. On 2 October 2016, the Prime Minister, Theresa May stated, during her speech to the Conservative Party Conference:

> It is not up to the House of Commons to invoke Article 50, and it is not up to the House of Lords. It is up to the Government to trigger Article 50 and the Government alone.[36]

But Gina Miller, an investment manager and philanthropist, brought judicial review proceedings to challenge the legality of this approach.

Gina Miller's legal argument

The central argument of her case was that the act of giving Article 50 notification would inevitably lead to major changes to UK law, and that such changes could only be made with the authority of primary legislation rather than through the prerogative.

The notification, rather than any subsequent repeal of the ECA, would lead to the EU Treaties no longer applying in domestic law, which would cause statutory rights, ascribed by Parliament, to be lost.

Prerogative powers could not be used to change domestic legal rights conferred by Parliament. Issuing the notice would effectively pre-empt the ability of Parliament to decide on whether statutory rights should be changed.

The Government's legal argument

In response the Government argued that the ECA did not alter or restrict the Government's ability to use the prerogative to conduct foreign affairs.

Further, the Government argued that it could use the prerogative to trigger Article 50, even if the use of the power would result in a change to statutory rights. If Parliament had wished to remove the Government's ability to use the prerogative to withdraw from the EU treaties it would have done so expressly. Parliament had multiple opportunities to legislate in such a way, but had not done so.

The Courts' rulings

Both the High Court of England and Wales and the Supreme Court of the United Kingdom have now ruled that the Government's position on

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[36] Theresa May speech to Conservative Party Conference, 2 October 2016.

the use of the prerogative was not in accordance with requirements of the UK's unwritten constitution. Parliamentary sovereignty necessitates that changes of major constitutional significance to the statute book are subject to parliamentary authorisation.

This section provides a brief summary of the judicial proceedings that led to the introduction of this Bill.

3.2 *Miller* in the High Court

On 3 November 2016, the High Court gave its judgment in *R (Gina Miller & Dos Santos) v Secretary of State for Exiting the European Union*.[37]

The High Court found in favour of the claimants. It ruled that the Government cannot, according to the United Kingdom's constitutional law, use prerogative powers to give the notice required by Article 50 TEU to withdraw from the European Union.

The Government appealed the High Court's decision and was granted permission to "leapfrog" the Court of Appeal and go directly to the Supreme Court.

What reasons did the High Court give for its decision?

The High Court rejected the Government's argument that the European Communities Act 1972 (ECA) enabled the Government to modify domestic legal rights through the use of the prerogative. This meant that the Court disagreed with the Government's claim that it retained, after the passing of the ECA, the power under the prerogative to provide the notice under Article 50 to enable the UK to leave the EU.

The Court added that the Government's approach was "flawed" as it failed to acknowledge the constitutional principle that "unless Parliament expressly legislates to the contrary, the Crown should not have power to vary the law of the land by the exercise of its prerogative powers".[38]

The judgment outlined that the historical evolution of the constitution, and in particular the outcome of the war between the Crown and Parliament in the seventeenth century, meant that it would be "surprising" if Parliament had intended to leave domestic legislative rights, as enacted by the ECA, subject to the Crown's prerogative powers.[39]

The judgment placed particular emphasis on the ECA's status as a statute of "special constitutional significance".[40] This meant that it was particularly unlikely that Parliament would have allowed the legal

37 [2016] EWHC 2768 (Admin).
38 Ibid para 83-85
39 Ibid para 66
40 Ibid para 82-88

changes effected by the ECA to be subject to the Crown's prerogative powers. By enacting such a momentous change, enabling the direct effect of what was then EC law in the UK, it would "not be plausible", the judgment explained, for the ECA to enable the Government to undo those legal changes via the prerogative.[41]

The High Court accepted the claimant's submission that if the ECA is the source of domestic legal rights, then the triggering of Article 50 and the withdrawal from the European Union would deprive those rights of their effect. The Court did not accept the Government's argument that any loss of these rights could be minimised by yet-to-be-enacted primary legislation. The exercise of the prerogative, so said the Court, would still deprive those rights of effect.

The High Court set out that the Government had overstated the extent to which the courts would not interfere with the Crown's use of the prerogative in the conduct of international relations. The courts would be able to interfere where the exercise of prerogative in the conduct of international relations would "bring about major changes in domestic law".[42]

The High Court's central conclusion was that as result of Parliament enacting the ECA, and in the light of relevant constitutional principles, the Crown "has no prerogative power to effect a withdrawal" from the EU by giving notice under Article 50.[43]

3.3 *Miller* in the Supreme Court

On 24 January 2017, the Supreme Court rejected (by a majority of 8 to 3) the Government's appeal against the November 2016 High Court ruling, and stated that Ministers "require the authority of primary legislation" in order to give the Article 50 notice.[44]

On the devolution questions raised, the Court unanimously held that the UK Parliament is not legally required to seek consent from other devolved legislatures.[45] The devolution issues are considered in detail in Section 5.

The majority's judgment on the principal issue

The majority main conclusion on the need for the authority of primary legislation for the Government to issue the Article 50 notice was based on a number of elements, each of which is set out below.

The main strand running through each is the following constitutional analysis:

41 Ibid para 87
42 Ibid para 89
43 Ibid para 111
44 R (on the application of Miller and another) v Secretary of State for Exiting the European Union [2017] UKSC 5
45 The Scottish and Welsh Governments had intervened in order to raise matters relating to the impact of triggering Article 50 upon the devolved settlement.

> We cannot accept that a major change to UK constitutional arrangements can be achieved by ministers alone; it must be effected in the only way that the UK constitution recognises, namely by Parliamentary legislation.[46]

The majority judgment stressed that the form of such legislation is "entirely a matter for Parliament". The judgment is solely concerned with the question of the legality of the Government's proposed use of the prerogative. The Article 50 notice "can only be lawfully be carried out with the sanction of primary legislation enacted by the Queen in Parliament".[47] A resolution of the House of Commons alone, without legislation, would not be sufficient.[48]

The Government can make and withdraw from treaties, but this cannot change domestic law

The majority described the UK's position as a 'dualist' state, which means that treaties and domestic law are seen as two separate systems. Treaties are governed by international law only and have no effect within domestic law. The UK Government has the general prerogative power to make or withdraw from treaties; but whenever treaty changes require a change to domestic law, the Government must always "seek the sanction of Parliament". The judgment said that this system "exists to protect Parliament not ministers".[49]

Applying the principle to this case, the judgment held that the UK Government could withdraw from the EU Treaties only if Parliament "positively created" the power for ministers to do so.[50] This was because the EU Treaties are a source of domestic law and domestic rights that ministers cannot alter using the prerogative alone.

The European Communities Act 1972 [ECA] made EU law into domestic law

The Government had argued that the ECA was not the source of domestic legal rights. Instead the Act was a conduit for rights and obligations that were "contingent" on the Government's exercise of the prerogative in conducting foreign affairs.

The majority judgment disagreed. The justices accepted that the ECA acts as a "conduit pipe" by which EU law was "grafted onto" UK law, and that the ECA is not *the originating* source of EU law. However, the Supreme Court also judged that the effect of the ECA was to constitute EU law as an "independent and overriding source of domestic law".[51]

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46 R (on the application of Miller and another) v Secretary of State for Exiting the European Union [2017] UKSC para 82
47 Ibid para 122
48 Ibid para 123
49 Ibid para 57
50 Ibid para 86
51 Ibid para 65

Irrespective of whether Parliament repeals the ECA, triggering Article 50 would mean EU law is no longer a source of domestic law after Brexit. This amounts to a major constitutional change. For such a change to be brought about by ministerial decision alone, the judgment explained, would be inconsistent with the ordinary application of "basic concepts of constitutional law",[52] namely Parliamentary sovereignty:

> ...the continued existence of the conduit pipe, as opposed to the contents which flow through it, can be changed only if Parliament changes the law.[53]

If Parliament had intended to enable ministers to use the prerogative to remove a source of domestic law, it would have had to be clearly included in the ECA so that Parliament would have "squarely confronted" the idea.[54] General words would not be sufficient.

The European Referendum Act 2015 did not enable ministers to trigger Article 50 without legislation

The majority pointed out that the European Referendum Act 2015, unlike for example the Parliamentary Voting System and Constituencies Act 2011 (which led to the AV Referendum), did not make provision for any legal consequences of either possible outcome. If a referendum result necessitates changes to the law in order to be implemented, the UK constitution requires that the change be made through parliamentary legislation.[55]

52 Ibid para 82
53 Ibid para 84
54 Ibid para 87
55 Ibid para 121

4. Other opportunities for Parliamentary involvement

4.1 Introduction

This Bill is one of many opportunities, albeit a decisive one, for Parliamentary involvement in aspects of Brexit, which will have varying implications.

Several Parliamentary Committee reports have set out how Parliament will or should be involved at different stages in the process, including:

- House of Commons Exiting the European Union Committee, The process for exiting the European Union and the Government's negotiating objectives, 14 January 2017
- House of Lords European Union Committee, Brexit: parliamentary scrutiny, 20 October 2016
- House of Lords Constitution Committee, The invoking of Article 50, 13 September 2016

There have already been many debates in both the Commons and Lords on Brexit since the referendum. The Appendix provides a list. Parliamentary Committees have also published a large number of reports on Brexit, and more inquiries are ongoing.

4.2 Forthcoming White Paper

During Prime Minister's Questions on 25 January 2017, Theresa May announced that she would publish a White Paper setting out the Government's negotiating strategy.[56]

It is not clear whether the White Paper will be published before the current Bill completes its Parliamentary stages,[57] nor how extensive it will be. There are no rules about what a White Paper contains, as Jill Rutter of the Institute for Government explains:

> A white paper would give the Government more space to set out its assessment of the various options it has considered, and the reasons it had chosen the approach it had. An accompanying impact assessment would enable the Government to lay out what it thought were the implications of the approach it was choosing, including costs and benefits.
>
> It would, in short, be an opportunity for the Government to share the analysis ministers have been poring over for months and help the public better understand why it had chosen the approach it had. And it is good practice to show the Government's workings in any area of policy.
>
> But there is no reason to think that a white paper would do any of this. There are no rules about what a white paper contains, other than a command number. The white paper the Government

[56] HC Deb 25 January 2017 c286
[57] See HC Deb 25 January 2017 cc286-7

> produced setting out its negotiating position on the Lisbon Treaty in 2007 simply explained the provisions and then had a brief comment on the line the Government proposed to take, and was only 12 pages long (other than prefaces and annexes).
>
> A more general analysis of government documents show that while some go into helpful detail on the rationale behind policy, set out the evidence basis, assess alternative options, many simply assert objectives and the way forward.[58]

The Government had previously been against having a pre-negotiation White Paper, but repeated calls from Parliamentarians – including the Exiting the EU Committee[59] – led to this commitment.

There is no requirement for Parliament to debate or vote on White Papers. But the Exiting the EU Committee has said it will call the Secretary of State to give evidence on it, and other Select Committees are likely to scrutinise it in their subject areas.

The Government has pledged to hold a series of debates in the House of Commons in the run-up to triggering Article 50. The Exiting the EU Committee has called for the Government to publish a timetable of the further debates that it will be scheduling.[60]

4.3 Great Repeal Bill and related legislation

Great Repeal Bill due in the spring

On 2 October 2016, the Prime Minister announced plans to introduce a "Great Repeal Bill" in the next Queen's Speech. It would repeal the *European Communities Act 1972* (the ECA) and incorporate (transpose) European Union law (the 'acquis') into domestic law, "wherever practical".[61] The Government has indicated that these legal changes within the Bill would take effect on "Brexit Day": the day the UK officially leaves the European Union (EU).

On 17 January 2017, the Prime Minister reaffirmed that "the same rules and laws will apply on the day after Brexit as they did the day before".[62] In the same speech she emphasised that the Government would seek a "phased process of implementation".[63] As such the aim of the Great Repeal Bill will be to begin the process of preparing the statute book for leaving the EU.

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58 Jill Rutter, A Brexit white paper is not a silver bullet, Institute for Government, 25 January 2017

59 House of Commons Exiting the European Union Committee, The process for exiting the European Union and the Government's negotiating objectives, 13 January 2017, para 38

60 House of Commons Exiting the European Union Committee, The process for exiting the European Union and the Government's negotiating objectives, 13 January 2017, para 39

61 HC Deb 10 October 2016 c40

62 Theresa May Speech, The government's negotiating objectives for exiting the EU: PM speech, Lancaster House, 17 January 2017

63 Ibid.

The Secretary of State for Exiting the European Union, David Davis, has emphasised the difference between the Article 50 process and the Great Repeal Bill:

> The great repeal Bill is not what will take us out of the EU, but what will ensure the UK statute book is fit for purpose after we have left. It will put the elected politicians in this country fully in control of determining the laws that affect its people's lives—something that does not apply today. […][64]

In evidence to the Exiting the European Union Committee in December 2016, Mr Davis outlined that the Great Repeal Bill would be "simple", and that any major or "material changes" to the law would be done through primary legislation, and not through statutory instruments.[65] Mr Davis added that after the Great Repeal Bill is enacted, there will need to be consequential primary legislation before "the conclusion of the negotiation".[66] He cited the examples of migration, fisheries and agriculture, where Bills might be required.

During the same evidence session Mr Davis gave some indication of where the Great Repeal Bill would fit within the Government's broader strategy in legislating for Brexit. He explained that the Bill would convert the acquis "pretty much—not quite—untouched" into British law.[67] This, he implied, would mean that the enactment of the Great Repeal Bill would only be the start of the process. Further primary and secondary legislation would then need to follow:

> …there will be consequential legislation. Some of that will be primary legislation and, therefore, we will need time to go through before the conclusion of the negotiation, or before the ratification of the negotiation anyway. That will take some time.
>
> There will also be some secondary legislation to go through and I expect that to be quite technical. It will not be at all contentious but it will still require time, and there is a fair amount of it. We have been in the Union for 40-something years and we have got a lot of law—many thousands of pages of statutes—that depends on it and much of it is coined in ways that relate to European institutions or guidances that will no longer be there, so we will have to do that as well. Some of that is very technical and will take time. We have to ensure we have the time to do that.[68]

Mr Davis emphasised that the scale of the task meant that time was scarce, and he refused to commit to publishing the Bill in draft so that it could be subject to pre-legislative scrutiny.[69]

Article 50 and the Great Repeal Bill

One of the constitutional conundrums raised in *Miller* was whether the Great Repeal Bill would provide sufficient legislative authority for the

64 HC Deb 10 October 2016 c41
65 Exiting the European Union Oral evidence: The UK's negotiating objectives for its withdrawal from EU, HC 815, 14 December 2016
66 Ibid
67 Ibid
68 Ibid
69 Ibid

domestic legal changes that would flow from the Government providing the Article 50 notice.

The majority of the Supreme Court indicated that the Great Repeal Bill was not sufficient because it will be introduced after the Article 50 notice is given:

> The very fact that Parliament will have to pass legislation once the Notice is served and hits the target highlights the point that the giving of the Notice will change domestic law: otherwise there would be no need for new legislation.[70]

In constitutional terms therefore, the significance of the current Bill is that it enables the Government to initiate a process that will lead, as the Government has indicated, to a significant amount of primary and secondary legislation to prepare the statute book for the day that the UK leaves the EU. The Prime Minister has indicated that the process of transposition will ensure that there is no "cliff edge" on Brexit day.[71] Preparing for and implementing any "interim arrangements" will require parliamentary legislation. Parliament remains free to legislate as it wishes, but the reality is that once the Article 50 process begins, Parliament will be asked to legislate so as to prepare the statute book for both the interim arrangements and the outcome of negotiations with the EU. This is why the Supreme Court emphasised that parliamentary authorisation should **precede** the Government's issuing of the Article 50 notice.

For more detail on the Great Repeal Bill see the Library Briefing Legislating for Brexit: the Great Repeal Bill, CBP 7793, November 2016.

Transposing EU law

On 25 October 2016, Andrea Leadsom, Secretary of State, Department for Environment, Food and Rural Affairs gave the following update on the work of her department in preparing for the Great Repeal Bill:

> There is a work stream in my Department that is looking at how exactly you do that; what are the consequentials of doing that; how much of that can be brought forward… We think that in the region of about two-thirds of the legislation that we are intending to bring into UK law will be able to be rolled forward with just some technical changes, so roughly a third won't, which means that obviously there will be work to do to ensure that we can make those measures continue to work once we leave the EU.[72]

A significant body of EU law, namely certain provisions of the Treaties and EU Regulations, currently take effect in the United Kingdom via section 2(1) of the ECA. This body of EU law is directly applicable, meaning it is effective and in force through the ECA without any further

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70 *R (on the application of Miller and another) v Secretary of State for Exiting the European Union* [2017] UKSC 5, para 94

71 Theresa May Speech, The government's negotiating objectives for exiting the EU: PM speech, Lancaster House, 17 January 2017

72 Environmental Audit Committee Oral evidence: The Future of the Natural Environment after the EU Referendum, HC 599, 25 October 2016

enactment. For example, Article 157 of the Treaty on the Functioning of the EU (TFEU) provides for equal pay for equal work between men and women and Regulation (EC) No 78/2009 concerns the protection of pedestrians and other vulnerable road users.[73]

If these provisions are not converted to UK law, then unless they are covered by existing legislation, they will no longer be law after Brexit day. This could risk the creation of legal 'black holes'. The Government's stated aim behind the Great Repeal Bill is to avoid the creation of black holes. This explains the intention to transpose, *wholesale*, all of the directly applicable EU law that applies in the UK on Brexit day.

David Davis's evidence to the Exiting the EU Committee, on 14 December, set out that the Bill will convert the entire body of EU law currently in force "pretty much – not quite – untouched into British law".[74] This implies that the Bill may not itself identify or select particular laws to be transposed. Instead transposition in the Great Repeal Bill could be wholesale, and then will be followed by "consequential legislation", some of which Mr Davis indicated would be primary.

Areas where simple transposition may not be possible might therefore need separate Acts of Parliament to be passed before the UK leaves the EU. This point was reinforced by David Davis's indication, during his evidence, that any powers in the Bill would only be used to make "technical" changes rather major policy decisions.[75] This would indicate that the Great Repeal Bill's role in the transposition process might be limited to ensuring that all of the EU law which is currently applies in the UK works effectively on the day after the UK leaves the EU.

Delegated powers

In evidence to the Exiting the European Union Committee on 14 December 2016, Mr Davis outlined that the Great Repeal Bill would be "simple", and that any major or "material changes" to the law would be done through primary legislation, and not through statutory instruments.[76] He added "I don't foresee major changes by SI".[77] This would imply that the Bill might rely less heavily on delegated powers than was assumed when the intention to introduce the Bill was first announced. Even if the powers are framed so that they can only be used by Ministers to make EU-related legislation operate effectively, the

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73 Regulation (EC) No 78/2009 of the European Parliament and of the Council of 14 January 2009 on the type-approval of motor vehicles with regard to the protection of pedestrians and other vulnerable road users

74 Exiting the European Union Oral evidence: The UK's negotiating objectives for its withdrawal from EU, HC 815, 14 December 2016

75 Ibid

76 Exiting the European Union Oral evidence: The UK's negotiating objectives for its withdrawal from EU, HC 815, 14 December 2016

77 Ibid

potential scale of technical changes needed could mean that the powers included are nonetheless far-reaching.

4.4 During negotiations

Commitment to providing information

The Secretary of State has committed to ensuring that Members of Parliament are "at least as well informed as the European Parliament as negotiations progress", as long as this does not undermine the national interest.[78]

In the Article 50 debate on 24 January 2017, David Davis told the Commons that he would probably give Parliament *more* information than the EP would get from the European Commission, and that the House would be "as well informed as it has been on any matter of such importance".[79]

But information does not necessarily mean influence.

The Exiting the EU Committee has said that it will expect:

- Appropriate access to relevant documents, including draft negotiating objectives, draft amendments to those objectives, draft negotiating texts, agreed articles and draft agreements;
- Provision of these documents in sufficient time for the Committee to be able to express its view (or elicit views from other Committees), and for the Government to take account of the Committee's views;
- The Government to respond to Committee recommendations in a timely manner and to explain fully where any recommendations are not accepted; and
- Consideration to be given to information being provided on a confidential basis to the Committee.[80]

Several amendments already tabled on the Bill seek to enhance Parliament's ability to scrutinise the negotiations.

What information does the European Parliament get?

There is no precedent for an Article 50 withdrawal agreement, so we do not know exactly what the European Parliament (EP) will get in relation to the withdrawal negotiations. Lord Bridges of Headley noted on 22 November 2016 (c 1902):

> … we do not yet know the extent to which the previous and most relevant precedents will be followed by the institutions of the EU,

78 HC Deb 7 December 2016 c 235.
79 HC Deb 24 January 2017 c 171.
80 House of Commons Exiting the European Union Committee, The process for exiting the European Union and the Government's negotiating objectives, 13 January 2017, para 36

> not least because there is no direct precedent for an exit negotiation of the kind that we are about to enter into, so we do not yet know precisely what level of information the European Parliament will receive.

But we do know that the agreement will be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union (TFEU). This Article provides the mechanism for negotiating external agreements with third countries or international organisations. The UK will be neither of these during the negotiations, but Article 50 appears to provide that in some respects the withdrawing state is treated as such.

The EP does not take part in treaty negotiations, but under Article 218(10) it is "immediately and fully informed at all stages of the procedure".[81] Specific EP rights of access to negotiating documents are based not on EU laws but on internal rules of the institutions and inter-institutional agreements.

The key document is the Framework Agreement on relations between the EP and Commission.[82] This was amended in December 2015 to give all MEPs access to consolidated negotiating texts. The provisions on international agreements set out the Commission's commitments to the EP:

> 23. Parliament shall be immediately and fully informed at all stages of the negotiation and conclusion of international agreements, including the definition of negotiating directives. The Commission shall act in a manner to give full effect to its obligations pursuant to Article 218 TFEU, while respecting each Institution's role in accordance with Article 13(2) TEU.
>
> 24. The information referred to in point 23 shall be provided to Parliament in sufficient time for it to be able to express its point of view if appropriate, and for the Commission to be able to take Parliament's views as far as possible into account. This information shall, as a general rule, be provided to Parliament through the responsible parliamentary committee and, where appropriate, at a plenary sitting. In duly justified cases, it shall be provided to more than one parliamentary committee.

The detailed arrangements are contained in Annex III to the Framework Agreement:

> 1. The Commission shall inform Parliament about its intention to propose the start of negotiations at the same time as it informs the Council.
>
> 2. In line with the provisions of point 24 of the Framework Agreement, when the Commission proposes draft negotiating directives with a view to their adoption by the Council, it shall at the same time present them to Parliament.

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81 For example, see Annex XIII of EP Rules of Procedure, Framework Agreement on relations between the EP and Commission. Under Annex 3 para. 3, "the Commission shall take due account of Parliament's comments throughout the negotiations".

82 This was originally adopted in 1990 but was revised to take account of Lisbon Treaty provisions.

> 3. The Commission shall take due account of Parliament's comments throughout the negotiations.
>
> 4. In line with the provisions of point 23 of the Framework Agreement, the Commission shall keep Parliament regularly and promptly informed about the conduct of negotiations until the agreement is initialled, and explain whether and how Parliament's comments were incorporated in the texts under negotiation and if not why.
>
> 5. In the case of international agreements the conclusion of which requires Parliament's consent, the Commission shall provide to Parliament during the negotiation process all relevant information that it also provides to the Council (or to the special committee appointed by the Council). This shall include draft amendments to adopted negotiating directives, draft negotiating texts, agreed articles, the agreed date for initialling the agreement and the text of the agreement to be initialled. The Commission shall also transmit to Parliament, as it does to the Council (or to the special committee appointed by the Council), any relevant documents received from third parties, subject to the originator's consent. The Commission shall keep the responsible parliamentary committee informed about developments in the negotiations and, in particular, explain how Parliament's views have been taken into account.
>
> 6. In the case of international agreements the conclusion of which does not require Parliament's consent, the Commission shall ensure that Parliament is immediately and fully informed, by providing information covering at least the draft negotiating directives, the adopted negotiating directives, the subsequent conduct of negotiations and the conclusion of the negotiations.
>
> 7. In line with the provisions of point 24 of the Framework Agreement, the Commission shall give thorough information to Parliament in due time when an international agreement is initialled, and shall inform Parliament as early as possible when it intends to propose its provisional application to the Council and of the reasons therefor, unless reasons of urgency preclude it from doing so.
>
> 8. The Commission shall inform the Council and Parliament simultaneously and in due time of its intention to propose to the Council the suspension of an international agreement and of the reasons therefor.
>
> 9. For international agreements which would fall under the consent procedure provided for by the TFEU, the Commission shall also keep Parliament fully informed before approving modifications to an agreement which are authorised by the Council, by way of derogation, in accordance with Article 218(7) TFEU.

Procedures and safeguards for the forwarding of confidential information from the Commission to the EP are set out in Annex II to the Framework Agreement.

The EP can question the European Commission and invite it to meetings of its International Trade Committee (INTA). The Commission usually briefs the EP before signing agreements with third countries, but formal consultation comes later.

Under Article 218(6) the EP's involvement before the conclusion of agreements (except Common Foreign and Security Policy agreements) is either by way of consent or consultation.

In the case of withdrawal, Article 50(2) TFEU stipulates that the Council must obtain the EP's consent before concluding a withdrawal agreement.

Example: the TTIP negotiations

In practice, withdrawal agreement negotiations, and subsequent questions on access to documents, might be similar to the arrangements for the Trans-Atlantic Trade and Investment Partnership (TTIP) agreement.

Since spring 2014, the EP has been entitled to the "consolidated negotiating texts" of the negotiations on TTIP. Confidential texts can be accessed in secure reading rooms of the Commission and the EP under their respective rules governing the access to and handling of restricted documents.

The UK Department for Business, Innovation and Skills (BIS – now the Department for Business, Energy & Industrial Strategy) said in early 2016 that it would provide a reading room for classified documents, including consolidated texts, relating to TTIP.[83] The reading room opened on 19 October 2016.

It is not clear whether the Government will provide similar facilities in relation to the Brexit negotiations. Lord Bridges observed in November 2016 that "we are closely watching the recently opened TTIP reading rooms to see what the advantages and disadvantages of this approach are".[84]

Amendment on parliamentary oversight in line with EP scrutiny provisions

Proposed new clause 3 to the Bill calls for the Prime Minister to guarantee to report regularly to the House on the withdrawal negotiations, to "lay before each House of Parliament as soon as reasonably practicable a copy in English of any document which the European Council or the European Commission has provided to the European Parliament or any committee of the European Parliament relating to the negotiations" and to "make arrangements for Parliamentary scrutiny of confidential documents".

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83 See Transatlantic Trade and Investment Partnership. Written question 28524, 1 March 2016.

84 HL Deb 22 November 2016 c 1902.

4.5 Vote on a final agreement

Commitment to a vote in both Houses of Parliament

In her Lancaster House speech on 17 January 2017, the Prime Minister, confirmed that the Government would put the final withdrawal agreement between the UK and the EU to a vote in both Houses of Parliament before it comes into force. This goes some way towards matching the requirement for EP consent for a withdrawal agreement.

It was a new commitment: under the Constitutional Reform and Governance Act 2010 (CRaGA), most treaties do not require a vote or even a debate in Parliament.

It could imply a legally-binding vote on whether or not the Government should ratify a signed Brexit agreement. Or it could imply a vote on the agreement, outside CRaGA, on a resolution of both Houses.

Approval by Parliament?

Either way, if Parliament endorses the final deal, and assuming it is also agreed by the EU Council and the European Parliament (and possibly the continuing Member States in their own right), then Brexit will proceed as planned.

Rejection by Parliament under the Constitutional Reform and Governance Act?

Under the CRaGA procedures, both Houses of Parliament have the opportunity to vote against the Government ratifying a treaty that it has laid before Parliament. But there is no requirement to debate or vote on treaties, and no power to amend them.

A vote in either House against ratification would mean the Government had to explain to Parliament the reasons why it nevertheless wished to ratify.

The Lords can only vote against ratification once.

But if the Commons voted against ratification this process could be repeated indefinitely – potentially going beyond the two-year cut-off point for Brexit negotiations and resulting in the UK leaving the EU without any agreement at all.

Rejection by Parliament under an additional procedure?

The Prime Minister's words could instead mean using a Parliamentary process outside CRaGA, in addition to the CRaGA procedures.

This additional procedure would not necessarily be legally binding, so the implications of a 'no' vote are unclear.

It seems unlikely that Parliament would be able to amend the agreement itself under an additional procedure.

4.6 Comparison with joining the European Economic Community

The Supreme Court in Miller emphasised the degree of parliamentary involvement when the Government joined the then European Economic Community (EEC – along with the Atomic Energy Community and the Coal and Steel Community). It stated that leaving the EU "will constitute as significant a constitutional change" as the 1972 Act (para 81).

This section looks at parliamentary involvement in debating and scrutinising Government decisions on membership of the EEC and the membership negotiations.

Wilson Government and EEC membership bids

The UK made three applications to join the EEC. The first two were vetoed by the French President Charles de Gaulle in 1963 and 1967 after initial rounds of discussions.

In May 1967 the Government of Harold Wilson published two White Papers and two detailed statements linked to the EEC membership bid:

- *The Legal and Constitutional Implications of the UK's EEC membership,* Cmnd. 3301, May 1967.
  This White Paper set out the pros and cons of EEC membership for the UK, including the likely constitutional, legal and economic effects.
- *The Common Agricultural Policy of the European Economic Community*, Cmnd. 3274, May 1967. This White Paper set out the potential effects of the Common Agricultural Policy (CAP) on the UK.
- *Membership of the European Communities*: *Prime Minister's statement to the House of Commons*, 2 May 1967, Cmnd. 3269. The statement set out the reasons for the decision to apply for EEC membership and the issues the Government wanted to resolve during the negotiations. The statement was debated on 8, 9 and 10 May 1967.
- *Statement to the Western European Union*, The Hague, in July 1967, Cmnd. 3345. Here the Foreign Secretary, George Brown, spelled out in some detail everything the Government hoped to achieve in the accession negotiations.

The UK made its third bid for EEC membership in 1969, and Georges Pompidou, who succeeded de Gaulle, did not veto it. When MPs asked for information on the implications of membership for the UK, however, they were generally referred back to Cmnd 3301, *The Legal and*

Constitutional Implications of the UK's EEC membership, of May 1967.[85]

But the Wilson Government did publish a further White Paper, *Britain and the European Communities: an economic assessment*, Cmnd. 4289, in February 1970. This Paper set out the main agricultural issues the Government wanted to discuss with Community Members *before* entry. The Minister referred at paragraph 16 to "preliminary discussions" with EEC Member States:

> We seek to reduce the area of negotiations to the minimum. Much useful preliminary work was in fact done in the series of discussions which the Prime Minister and I had with your Governments earlier this year. These discussions isolated the major issues and pointed to ways of resolving them.

The Paper outlined the Government's aims in the areas of agriculture and food, trade and industry, capital movements and invisible trade, and also contained an overall economic assessment.

Heath Government and EEC negotiations

Edward Heath won the 1970 election and became Prime Minister on 19 June 1970. Discussions on EEC membership started on 30 June 1970. On 17 June 1971 Edward Heath made a statement to the House in which he stated precisely the stages that had to be completed before the UK could become a member of the EEC:

> We have first to resolve the major issues outstanding in the negotiations. Second, Parliament should be invited to take a decision of principle on whether the arrangements so negotiated are satisfactory and whether we should proceed to join the Communities. If that be agreed, we have, third, to resolve the remaining issues in the negotiations. Fourth, a treaty of accession has to be prepared and signed. Fifth, legislation to give effect to that treaty has to be drafted, considered by Parliament and enacted. Finally, we and the other parties to the treaty have to deposit instruments of ratification of the treaty.[86]

He also promised to publish a White Paper "setting out in detail the arrangements that have been agreed and the Government's conclusions on whether they constitute a satisfactory basis for joining the Communities".

The Government published the White Paper, *The United Kingdom and the European Communities* (Cmnd 4715) in July 1971. In a long introduction, it described the post-World War II geopolitical environment of the time to explain the origins of the EEC, and set out in some detail political and economic reasons for membership.

The White Paper also recorded progress in the negotiations after one year of "intensive discussions", setting out where agreement had been

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85 See, for example, Fred Mulley Mr Fred Mulley Written Answer, 13 May 1969, and Geoffrey Rippon, HC Deb 7 December 1970.

86 Edward Heath, statement to Commons, 17 June 1971, cc643-9.

reached, including on transitional provisions, and what remained to be settled (mainly the fisheries issue).

The White Paper was debated in the Commons on 21, 22, 23 and 26 July 1971 and in the Lords on 26, 27 and 28 July 1971.

Debate on the principle of joining the Communities

On 21, 22, 25, 26, 27 and 28 October 1971 the Commons debated the Government's "decision of principle to join the European Communities on the basis of the arrangements which have been negotiated". The Lords debated the same motion.

Edward Heath signed the Accession Treaty on 22 January 1972 and the European Communities Bill was introduced on 25 January 1972, with second reading on 15, 16 and 17 February 1972. It took 29 days to be passed, with 102 divisions.

Further information

Detailed information on parliamentary time spent on the 1972 Bill and all subsequent major EU Treaty amendment bills is available in Commons Briefing Paper 3341, EU Treaty change: the parliamentary process of bills, 15 June 2015.

Parliament's involvement in debating the Government's position in EEC negotiations and other European and international treaty negotiations is outlined in Commons Briefing Paper 7823, Treaty negotiations: when has the Government published its position?, 19 January 2017.

5. Is the Article 50 notice revocable?

Whether or not an Article 50 notice is revocable is relevant to the decision that Parliament will be taking both in authorising the Government to give this notice, and in voting on the final Brexit agreement.

5.1 The Courts have not ruled on revocability

The Supreme Court in Miller did not rule on whether notice given under Article 50 can be revoked. Instead it followed the Divisional Court in accepting that it was common ground between the parties that Article 50 notice was irrevocable (para 26). It made no request for the Court of Justice of the EU (CJEU) to interpret Article 50 (see below).

However, there is considerable opinion that an Article 50 notice could be revoked:

> Professor Closa, for example, has raised a number of formal and substantive objections to the assumption of Article 50's irrevocability, the most compelling drawing on a comparative assessment of international law and practice under which a withdrawing state is bestowed a 'cooling off period' allowing it to change its decision. Lord Kerr of Kinlochard, the drafter of the Article 50 provision, has also attested to its revocability. Further, Donald Tusk, the President of the European Council, has asserted, in his political capacity, that upon conclusion of the Article 50 negotiation process the status quo could be maintained, meaning that, if the UK was not happy with the agreed terms of Brexit, it could opt to continue to be a member of the EU.[87]

There is more discussion in Commons Briefing Paper 7763, Brexit and the EU Court, 14 November 2016.

5.2 Relevance to this Bill

If the notice is irrevocable, authorising the Government to issue notice would effectively commit Parliament to one of the following:

- approving the final Brexit agreement;
- seeking a renegotiation of the agreement reached by the Government (if practicable – the consent of all other EU Member States would be needed to extend the negotiation period beyond two years, and there is no guarantee that the UK Parliament would endorse an amended agreement); or
- leaving the EU without any agreement.

One commentator argues:

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87 Rosie Slowe, Article 50, the Supreme Court judgment in Miller and why the question of revocability still matters, UK Human Rights blog, 25 January 2017

> When fulfilling its duty in our parliamentary democracy, acting in the best interests of all citizens and not just in respect of the wishes of those eligible to vote, Parliament must be fully aware that in bestowing ministers a mandate to trigger Article 50 it is endorsing absolute Brexit as a default result.[88]

5.3 Case pending

Litigation is contemplated before the Irish High Court that would include a request for that court to ask the Court of Justice of the EU whether Article 50 notice is revocable. If this litigation proceeds and if the Irish Court does make a reference, the Court of Justice's interpretation of Article 50 could be known before March 2019, the likely projected date of Brexit.

5.4 Possible referral to EU Court on revocability?

The interpretation of Article 50, if one were needed, would be a matter of EU, not UK, law. The EU Treaty is silent on the matter of revocability, but under Article 267 TFEU there could be a role for the CJEU in determining whether an Article 50(2) notice can be withdrawn if a Member State which has served notice of an intention to withdraw changes its mind.

There is a general principle of international law, set out in Article 68 of the *Vienna Convention on the Law of Treaties,* that a notification of intention to withdraw from a treaty "may be revoked at any time before it takes effect". This provision does not override any specific arrangements in a treaty.

But are questions about the decision to trigger Article 50 under national constitutional arrangements relevant to the CJEU?

If a court of last instance has some uncertainty as to the correct interpretation of EU law, it *must* refer a question on the interpretation of EU law or the EU Treaties to the CJEU, but not if the national court decides something is clear "beyond reasonable doubt". This is known as the 'acte clair' doctrine, and it has been established in the case law of the CJEU (largely in *CILFIT*).

Although the parties to the *Miller* case assumed that notice of withdrawal is irrevocable, as set out above, there are possible arguments, and a preponderance of academic opinion, to the contrary.

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88 Rosie Slowe, Article 50, the Supreme Court judgment in Miller and why the question of revocability still matters, UK Human Rights blog, 25 January 2017

6. EEA withdrawal

Theresa May's Lancaster House speech on 17 January 2017 made it clear that when withdrawing from the EU, the Government intends also to withdraw from the single market and the European Economic Area (EEA). But is legislation also required to do that?

6.1 Case pending

There are currently proceedings before the UK Divisional Court claiming that an Act of Parliament is necessary for the UK to leave the EEA.[89] The case is listed for hearing an application for permission to proceed on 3 February 2017.

Professor Steve Peers, of the University of Essex, has summarised the claimants' arguments:

> (1) as with the European Communities Act, the royal prerogative does not give the executive power to issue an notice under Article 127 of the EEA; and
>
> (2) following the Miller judgment, the exercise of the prerogative without authority of an Act of Parliament will lead to a destruction of fundamental rights and freedoms conferred to UK and EEA nationals living and residing in the UK. As Miller confirmed, the referendum result is advisory; and in any event, it was an expression of political will with respect to leaving the EU and not the EEA.[90]

One commentator suggests, however, that the Miller judgment has only limited consequences for withdrawing from the EEA agreement:

> given that the EEA agreement is lacking the supranational features of the EU, the Government can serve a notice of withdrawal from that agreement without prior parliamentary authorisation.[91]

The current Bill as drafted does not appear to provide Parliamentary authority for the UK to withdraw from the EEA. Unlike Euratom, the EEA is not included in the definition of "EU" in the European Union (Amendment) Act 2008.

6.2 What does the EEA agreement say?

The EEA Agreement contains its own withdrawal clause: clause 127, allowing its 'Contracting Parties' to withdraw from the EEA if they give 12 months' notice. The argument is that the Government must also trigger this clause otherwise the UK will stay in the EEA (and hence the single market) even after Brexit:

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89 R (Yalland) v Secretary of State for Exiting the EU (Case No CO/6524/2016). See for example Tobias Lock, 'Brexit and the Single Market: You say Article 50, we say Article 127?', 12 December 2016

90 Professor Steve Peers, 'The judgment in Miller: Representative Democracy Strikes Back', EU law analysis blog, 25 January 2017

91 Tobias Lock, 'The Supreme Court in Miller – some early comments', Verfassungsblog, 24 January 2017

> The claimants in the Article 127 challenge contend that withdrawal from the EU under Article 50 will not lead to withdrawal from the EEA, given that with Article 127 the EEA agreement contains its own termination clause. Hence their argument goes that unless the Government also triggers Article 127, the UK will stay in the EEA even after Brexit; and that would mean that the UK would remain in the single market.
>
> Much like the Article 50 case, the impending court case therefore seeks a declaration by the High Court that the Government cannot trigger Article 127 without prior approval of Parliament. The claimants' hope is that while Parliament may feel politically bound by the EU referendum result to allow the Government to leave the EU, it may not vote in favour of leaving the EEA, viz. the single market, as this was not a question on the ballot paper.[92]

It is not clear how the EEA Agreement could continue to apply to the UK after Brexit in the absence of specific arrangements. The UK is listed as one of the EEA Contracting Parties, and would presumably continue to be unless it invoked Article 127. Unlike Euratom, the EEA is not governed by the EU institutions. But the EEA Agreement applies only to the territories to which the EU Treaties apply, plus Norway, Iceland and Liechtenstein (the states of the European Free Trade Association, EFTA) (Article 126(1)).

6.3 Further information

There is more information on the EEA in another House of Commons Library briefing paper, Brexit: trade aspects, and on the website of the European Free Trade Association (EFTA).

[92] Tobias Lock, 'Brexit and the Single Market: You say Article 50, we say Article 127?', Verfassungsblog, 12 December 2016

7. Devolution issues

7.1 Introduction: the Miller case

The Bill does not deal directly with any devolution considerations.

This is because in the Miller case,[93] all 11 Supreme Court judges agreed with the Government that it is not under a legal obligation to seek consent from the devolved legislatures before serving notice.

The Supreme Court was responding to references from the courts in Northern Ireland, and interventions of Scotland's Lord Advocate and the Welsh Counsel General. The question was whether the terms on which powers were devolved to Scotland, Northern Ireland and Wales required the agreement of those legislatures before the Article 50 notice was served.

7.2 The Sewel convention is not legally enforceable…

One of the questions raised before the Court in the Miller case was whether the Sewel convention meant that an Act of Parliament authorising the UK's exit from the EU was contingent on the devolved legislatures' consent. The Court unanimously said no.

Under the Sewel convention the UK Parliament will not normally legislate on devolved matters or the scope of devolved powers except with the agreement of the Scottish Parliament or that of the Northern Ireland or Welsh Assemblies. It is set out in a Memorandum of Understanding:

> The United Kingdom Parliament retains authority to legislate on any issue, whether devolved or not. It is ultimately for Parliament to decide what use to make of that power. However, the UK Government will proceed in accordance with the convention that the UK Parliament would not normally legislate with regard to devolved matters except with the agreement of the devolved legislature. The devolved administrations will be responsible for seeking such agreement as may be required for this purpose on an approach from the UK Government.[94]

Whilst the Miller judgment stressed the importance and fundamental role of constitutional conventions, it highlighted their political nature. It emphasised that there is no role for the courts in ensuring their enforcement:

> Judges therefore are neither the parents nor the guardians of political conventions; they are merely observers.[95]

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93 R (on the application of Miller and another) v Secretary of State for Exiting the European Union [2017] UKSC 5

94 Memorandum of Understanding and Supplementary Agreements between the United Kingdom Government, the Scottish Ministers, the Welsh Ministers and the Northern Ireland Executive Committee, October 2013, paragraph 14

95 R (on the application of Miller and another) v Secretary of State for Exiting the European Union [2017] UKSC 5 para 146

Parliament's putting the Sewel convention on a statutory footing in the Scotland Act 2016 (and in the Wales Bill 2016-2017) reflected the convention as a statement of political intent. The Supreme Court found that Parliament's intention was to entrench it as a convention – not as a legal rule. Despite the convention's importance in the harmonious operation of the UK constitution, its operation lies outside the remit of the courts. The devolved legislatures therefore have no legally-enforceable veto on any Act of Parliament.

7.3 …but could it still be applicable?

Having concluded that the Sewel convention was non-justiciable, the Supreme Court did not need to decide whether the Article 50 legislation would fall within its scope. Could it therefore still be a political requirement for this Bill?

The UK Government has said it is not:

> The Bill does not contain any provision which gives rise to the need for a legislative consent motion in the Scottish Parliament, the National Assembly for Wales or the Northern Ireland Assembly.[96]

But Scotland's First Minister, Nicola Sturgeon, has said that her Government will table a legislative consent motion on this Bill to give the Scottish Parliament the chance for a symbolic vote on triggering Article 50.[97]

The presiding officer of the Scottish Parliament, Ken Macintosh, has said that he would not decide on whether that is legally competent until he sees the Bill and the wording of the Scottish motion.[98] For example, the fact that the Memorandum of Understanding refers to 'an approach from the UK Government' to trigger the process could be problematic.[99]

The way the Sewel convention operates is that if the Scottish Executive agrees with the UK Government that a Westminster Bill should include provisions on devolved matters, it will table a legislative consent motion in the Scottish Parliament, seeking its approval. An accompanying Memorandum will explain its reasons. This would typically be considered by a Scottish Parliament committee before a vote in plenary. Similar arrangements apply in Wales and Northern Ireland.

The Supreme Court noted in Miller that the devolved parliaments and assemblies had not passed any legislative consent motions in relation to the Act incorporating the Lisbon Treaty (and Article 50) into the European Communities Act 1972 (para 140).

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96 European Union (Notification of Withdrawal) Bill: Explanatory Notes, para 9

97 'Court rejects Scottish government Article 50 argument', BBC news online, 24 January 2017

98 'Scottish government set to table motion calling for article 50 rejection', Guardian, 25 January 2017

99 See Jim Duffy, 'Defying convention: Supreme Court puts Sewel on the sidelines', UK Human Rights blog, 26 January 2017

Legislative consent motions might be used for other Brexit legislation such as the Great Repeal Bill and/or for removing references to the EU from the devolution statutes such as the Scotland Act 1998.

Is giving notice under Article 50 a devolved matter?

Relations with the EU are reserved (not devolved) with some exceptions. Does giving notice under Article 50, which the Bill authorises, fit the exceptions (the matters that are within devolved competence)?

Using the example of Scotland, the reservation of foreign affairs is contained in paragraph 7 of Schedule 7, Part I, to the *Scotland Act 1998*. This refers, depending on the reading, to "the European Union" or "relations with … the European Union":

> 7(1) International relations, including relations with territories outside the United Kingdom, the European Union (and their institutions) and other international organisations, regulation of international trade, and international development assistance and co-operation are reserved matters.

However, this does not reserve implementing international obligations and obligations under EU law:

> 7(2) Sub-paragraph (1) does not reserve—
>
> (a) observing and implementing international obligations, obligations under the Human Rights Convention and obligations under EU law,
>
> (b) assisting Ministers of the Crown in relation to any matter to which that sub-paragraph [7(1) above] applies.

"EU law" is defined in s126(9) as

> (a) all those rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the EU Treaties, and
>
> (b) all those remedies and procedures from time to time provided for by or under the EU Treaties.

Scottish Ministers and the Scottish Parliament therefore have competence to observe and implement obligations under EU law, including under rights, powers, liabilities, obligations and restrictions created by the Treaties or arising under them. This has been the basis for their implementing specific directives.

They have competence to observe and implement obligations under the remedies and procedures provided for, by or under the Treaties.

They also have competence to assist UK Ministers in relation to the matters in para 7(1), including the EU or relations with the EU, depending on the reading.

The *Government of Wales Act 2006* works in a different way, but the provisions in respect of Northern Ireland are broadly similar to those for Scotland.

The Supreme Court in *Miller* ruled that 'in imposing the EU constraints and empowering the devolved institutions to observe and implement EU law, the devolution legislation did not go further and require the United

Kingdom to remain a member of the European Union.[100] Ultimately, the application of the Sewel convention is a political matter.

Legislative consent for the Great Repeal Bill?

The Secretary of State for Scotland, David Mundell, has suggested that consent would be sought for a Great Repeal Bill:

> The bill has not been published, so you can't be definitive, but given the Great Repeal Bill will both impact on the responsibilities of this parliament on and on the responsibilities of Scottish ministers, it's fair to anticipate that it would be the subject of a legislative consent process.[101]

[100] R (on the application of Miller and another) v Secretary of State for Exiting the European Union [2017] UKSC 5 para 129

[101] "Mundell: Holyrood to be consulted on Great Repeal Bill," *BBC News*, 26 January 2017

8. Appendix: Parliamentary debates on Brexit

A number of Parliamentary debates on Brexit have already taken place since the June 2016 referendum:

Lords, 26 January 2017, Brexit: UK International Relations

Lords, 26 January 2017, UK Withdrawal from the EU and Potential Withdrawal from the Single Market

Lords, 24 January 2017, The Process for Triggering Article 50

Commons, 24 January 2017, Leaving the EU: Animal Welfare Standards in Farming

Commons, 24 January 2017, Leaving the EU: Funding for Northern Ireland

Article 50, 24 January 2017, Statement on the Government's response to the judgement of the Supreme Court.

Lords, 19 January 2017, Brexit: Creative Industries

Commons, 18 January 2017, Leaving the EU

Commons, 18 January 2017, Leaving the EU: Security, Law Enforcement and Criminal Justice

Lords, 17 January 2017, A New Partnership with the EU

Commons, 17 January 2017, Leaving the EU: the Rural Economy

Commons, 17 January 2017, Leaving the EU: Infrastructure in Wales

Commons, 17 January 2017, New Partnership with the EU

Lords, 16 January 2017, Brexit: Fisheries (EUC Report)

Commons, 10 January 2017, Leaving the EU: European Social Funding in Scotland and the UK

Commons 19 December 2016, Exiting the EU: Science and Research

Commons, 14 December 2016, Exiting the EU: Scotland

Commons, 14 December 2016, Exiting the EU: Businesses in Wales

Lords, 8 December 2016, Brexit: Armed Forces and Diplomatic Service

Lords, 1 December 2016, Brexit: UK-EU Relationship

Commons, 1 December 2016, UK Fishing Industry

Commons, 25 November 2016, Leaving the EU: Aviation Sector

Lords, 24 November 2016, Health and Social Care

Commons, 23 November 2016, Exiting the EU and Transport

Commons, 23 November 2016, Exiting the EU: Higher Education

Lords, 22 November 2016, Brexit (EUC Report)

Lords, 22 November 2016, Article 50 (Constitution Committee Report)

Commons, 15 November 2016, Leaving the EU: NHS Funding

Lords, 7 November 2016, Brexit: Article 50

Commons, 7 November 2016, Article 50

Commons, 7 November 2016, Exiting the EU and Workers' Rights

Lords, 3 November 2016, Brexit: Impact on Universities and Scientific Research

Commons, 3 November 2016, Leaving the EU: Financial Services

Lords, 27 October 2016, Brexit: Domestic and International

Commons, 25 October 2016, Leaving the EU: North-East Exports

Commons, 25 October 2016, Leaving the EU: Wales

Lords, 20 October 2016, Brexit: Environment and Climate Change Policy

Lords, 20 October 2016, Brexit: Foreign and Security Policy Co-operation

Commons, 19 October 2016, South-West Agriculture and Fishing

Commons, 19 October 2016, Rights of EU Nationals

Lords, 18 October 2016, Brexit: Peace and Stability

Commons, 17 October 2016, UK Exiting from the European Union

Commons, 12 October 2016, European Medicines Agency

Commons, 12 October 2016, Leaving the EU: UK Tourism

Commons, 12 October 2016, Parliamentary Scrutiny of Leaving the EU

Lords, 10 October 2016, Next Steps in Leaving the European Union

Commons, 10 October 2016, Next Steps in Leaving the European Union

Lords, 5 September 2016, Exiting the European Union

Commons, 5 September 2016, Exiting the European Union

Lords, 21 July 2016, NHS and Social Care: Impact of Brexit

Lords, 21 July 2016, Farming: Impact of Brexit

Commons, 21 July 2016, EU Exit: Devolved Governments

Commons, 20 July 2016, EU Referendum: Gibraltar

Commons, 19 July 2016, EU Referendum: UK-Ireland Border

Lords, 14 July 2016, EU Citizens in the UK

Commons, 13 July 2016, EU Referendum: UK Steel Industry

Commons, 12 July 2016, EU Referendum: Energy and Environment

Lords, 11 July 2016, Article 50

Commons, 11 July 2016, Article 50: Parliamentary Approval

Lords, 7 July 2016, Brexit: Case for a Second Referendum

Lords, 6 July 2016, Outcome of the European Union Referendum

Commons, 6 July 2016, EU Nationals in the UK

Lords, 5 July 2016, Outcome of the European Union Referendum

Commons, 5 July 2016, EU Referendum: Race Hate Crime

Commons, 4 July 2016, EU Nationals: UK Residence

Lords, 29 June 2016, Hate Crime

Commons, 29 June 2016, Hate Crime

Lords, 27 June 2016, Outcome of the EU Referendum

Commons, 27 June 2016, Outcome of the EU Referendum

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