

**Parliamentary sovereignty worth fighting for:
European Union (Notification of Withdrawal) Bill 2017
Lords' Committee Stage briefing on the 'parliamentary approval' clause**

What this briefing is about

Parliament has been asked to pass a Bill authorising the Prime Minister to notify the EU Council of the UK's intention to withdraw from the Union. But the Bill contains no mechanism for Parliamentary decisions on actual withdrawal or agreement to anything that is negotiated with other EU states. Ministers have said Parliament will be offered no more than a 'take it or leave it' vote. This is remarkable given what was decided by the Supreme Court in *Miller* and accepted in the [White Paper](#) at §2.1: "[t]he sovereignty of Parliament is a fundamental principle of the UK constitution".

Parliament has not been told why it should surrender any of its sovereignty to the Government in relation to the most important constitutional decisions of a generation – whether we should leave the EU on any terms the Government negotiates with the remaining member states or, if no terms can be agreed within two years, what should then happen. Parliament's decisions on withdrawal are to be made once negotiations are over. Confirming that Parliament will make the final decisions will not weaken the Government's negotiating hand.

Most importantly, Parliament cannot fulfil its own constitutional role by writing a 'blank cheque' authorising withdrawal from the EU two years from now, either on whatever unknown terms may be agreed, or without any agreement at all. To do so would be a serious abdication of parliamentary sovereignty, with implications for the rights of every UK national and business.

What then should peers do about the Bill's silence on Parliament's sovereignty?

Appreciating the constitutional requirements of Brexit

First, it is important to appreciate the true scope of the Bill. We have obtained an authoritative Opinion from five leading experts on constitutional and EU law which sets out the constitutional requirements that must be met before a valid decision can be made to withdraw from the EU, in accordance with the Supreme Court's decision in *Miller* - the '[Three Knights Opinion](#)'. It concludes that statutory authority is required for any step which changes the legal rights and entitlements of UK nationals and businesses. This Bill does not itself provide authority for the UK's withdrawal, as Lord Hope pointed out in his Second Reading speech ([HL Deb., 20 Feb 2017](#), vol. 779, col. 22).

Pressing for constitutional clarity in the Bill

Although the Bill is unlikely to be amended in a way that confronts all of the problems identified in the Three Knights Opinion, it can certainly be improved by amendments. Supporting such amendments is a proper constitutional function for members of the Upper House.

In this briefing we urge peers to support the 'parliamentary approval amendment' proposed by Baroness Hayter, Lord Hannay, Lord Pannick and Lord Oates. They propose inserting a new 'parliamentary approval' clause after Clause 1 which would read:

“Parliamentary approval for the outcome of negotiations with the European Union

- (1) No Minister of the Crown may agree to arrangements for the withdrawal of the United Kingdom from the European Union under Article 50(2) of the Treaty on European Union until—
 - (a) Her Majesty's Government has laid a copy of the final draft of the proposed arrangements before each House of Parliament, and
 - (b) each House of Parliament has passed a resolution approving the final draft of the proposed arrangements.
- (2) The requirements under paragraphs (a) and (b) must also be met where a Minister of the Crown proposes any separate arrangements pertaining to the future political and economic relationship between the United Kingdom and the European Union.
- (3) In the case of a proposed agreement with the European Union setting out the arrangements for the withdrawal of the United Kingdom from the European Union, any resolution under subsection (1) must have been passed by each House of Parliament before the proposed terms are agreed with the European Council, with a view to their approval by the European Parliament.
- (4) No Minister of the Crown may agree to the termination, or terminate unilaterally, the negotiations regarding the arrangements for the withdrawal of the United Kingdom from the European Union under Article 50(2) of the Treaty on European Union without the prior approval of each House of Parliament by resolution.”

Why the parliamentary approval clause is important

When the Government notifies the EU of the UK's intention to withdraw from the EU under Article 50(2), it will trigger a two-year negotiation period. The Government's ambition is to negotiate, within those two years, a withdrawal agreement dealing with the terms of the UK's departure from the EU, and a new agreement setting out the future trading relationship with the EU. It will need to reach agreement with every remaining EU Member State.

The Government has indicated that it will put the terms of any proposed withdrawal arrangements and future relationship with the EU to both houses on consent motions *“before the European Parliament debates and votes on the final agreement”* ([White Paper](#), §1.12; David Jones, [HC Deb., 7 Feb 2017](#), vol. 621, col. 264), adding *“[t]he vote will be either to accept the deal that the Government will have achieved—I repeat that the process of negotiation will not be without frequent reports to the House—or for there to be no deal. Frankly, that is the choice that the House will have to make...”* (col. 273).

This presents several constitutional problems.

First, such statements by Ministers have political, but no legal, force.

Secondly, the Government's concession does not address what role, if any, there will be for Parliament if (as is possible) the Government does not reach any agreement with the European Union within the two-year negotiation period.

Thirdly, nothing is said about the consequences, and the options available to the UK, if Parliament decides to reject the terms of the deal that the Government negotiates.

Fourthly, ministers have said that if no deal is agreed, or if Parliament rejects the deal which Ministers have negotiated, the United Kingdom will automatically leave the European Union and fall back on WTO trading rules, without the need for any further decision by Parliament (HC Deb, 7 Feb 2017, vol. 621, cols. 272 “...if there were no agreement at all... ultimately we would be falling back on World Trade Organisation arrangements. That is nothing new...”).

In short, according to the Government, the future choice it will offer Parliament will be to ‘take it or leave it’: accepting the terms negotiated by Ministers or automatically defaulting to a ‘hard Brexit’ without any negotiated withdrawal terms or transitional arrangements. That is not much of a choice. Nor does it comply with the constitutional requirements upheld by the Supreme Court in *Miller*. The Supreme Court made it clear that, given the impact on domestic laws and existing legal rights, a decision to withdraw from the European Union must be expressly authorised by legislation, using clear words (see the [Miller judgment](#) at [5], [82]-[83], [87], [101], [111], [124]).

The present Bill only authorises the Prime Minister to notify the EU of an intention to withdraw, not actually withdraw. Parliament cannot authorise actual withdrawal until it knows what rights and laws will be affected by the withdrawal. In order to ensure respect for Parliament’s constitutional role in the Brexit process, the Bill should be amended to make it clear that Parliament must authorise the decisions at the end of the process, which will change our laws, remove existing rights and affect the British people for years to come.

The parliamentary authority amendment would make it clear that the UK cannot agree to leave the EU on agreed terms unless Parliament consents to the terms of any withdrawal agreement negotiated with the EU and, if there is one, an agreement relating to the future trading relationship. It would also prevent the Government from unilaterally abandoning negotiations without Parliament’s authority.

It is not an attempt to ‘block Brexit’ and the Prime Minister will not be prevented from issuing an Article 50 notification in any way.

Detail of the parliamentary approval clause

It has five important features:

1. It creates meaningful choices for Parliament.

The clause requires Parliament to approve not only withdrawal from the EU on the basis of an agreement. It goes beyond the ‘take it or leave it’ choice offered by the Government. It also makes provision for Parliament to approve any proposed new trading agreement, in accordance with the Government’s concession. If there is a risk of the negotiations stalling, the Government will need Parliament’s approval before it abandons them.

2. It gives Parliament genuine control.

Notwithstanding the Commons debate concession, at the moment it is left to the discretion of Ministers whether any agreement should be placed before Parliament for approval and whether the UK should seek to extend the time for negotiations.

Parliament cannot have control over Brexit by receiving progress reports and a ministerial promise of a ‘take it or leave it’ vote at the end of the process. The amendment gives legislative force to the Government’s assurance that Parliament will have a meaningful say. It requires Ministers to obtain Parliament’s express and informed consent before taking any action that involves changes to UK

laws or legal rights. It makes it clear that Parliament is the body that will decide whether the terms of Brexit are acceptable to the British people, before Ministers can agree to those terms.

3. It makes Parliament's approval a condition to any new agreement.

An 'assurance' that Parliament will be asked to express a view in a consent motion is constitutionally meaningless. Even if that assurance is honoured, a vote on a Parliamentary motion has no legal effect. A positive resolution procedure, with statutory underpinning, is far better.

It is an established constitutional practice for Parliament to impose legislative preconditions before international agreements can be agreed by the Government on behalf of the UK.

4. It is clear about what Parliament must decide.

The proposed amendment will mean that, if there is no acceptable agreement on withdrawal from the EU, Parliament will decide whether to consent to withdrawal without one or can require the Government to seek better terms and otherwise reconsider the UK's options.

5. It provides greater legal certainty.

Legal certainty is important. A decision to withdraw from the EU can only be effective for Article 50 purposes if it is taken in accordance with the UK's constitutional requirements.

The amendment will give legislative force to the Government's assurances about allowing Parliament 'a meaningful vote'.

It will also provide legal certainty for the EU and the UK by making it clear that, as a matter of UK constitutional law, the final decision about leaving the EU, and on what terms, rests with Parliament.

This Briefing Note has been prepared on behalf of 'the People's Challenge', a crowdfunding group who were an Interested Party in the recent Supreme Court litigation concerning Article 50. All enquiries regarding the content of this note or the [Three Knights Opinion](#) of Sir David Edward KCMG PC QC, Sir Francis Jacobs KCMG PC QC, Sir Jeremy Lever KCMG QC, Helen Mountfield QC and Gerry Facenna QC should be directed to:-

*John Halford, Partner
Bindmans LLP
236 Gray's Inn Road, London WC1X 8HB
Email: j.halford@bindmans.com
Tel: +44(0) 207 833 4433
DDI: +44 20 7833 7827*