



BRIEFING PAPER

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European Union (Notification of Withdrawal) Bill: analysis of Lords' amendments

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Summary

The Bill so far

The European Union (Notification of Withdrawal) Bill is returning to the Commons on Monday 13 March 2017 for consideration of two amendments inserted by the Lords. One is on the status of EU/EEA citizens in the UK, and the other is on a 'meaningful' parliamentary vote at the end of the negotiation period.

Similar amendments had previously been voted down in the Commons, who now have the option of agreeing or disagreeing with each Lords amendment, or amending or proposing alternatives to it.

EU/EEA citizens in the UK

Lords amendment 9B

On 1 March 2017 the House of Lords amended the Bill to include a provision to guarantee the residence rights of EU and EEA citizens (hereafter 'EU/EEA citizens') presently in the UK. It would require the Government to introduce proposals for achieving this within three months of the triggering of Article 50.

Peers in favour of the amendment spoke of the UK's moral obligation to reassure and protect the millions of EU/EEA citizens and their family members who came to Britain believing they could build careers and lives here. Some raised the complexity of the current arrangements by which EU/EEA citizens can acquire proof of their right to permanent residence; others highlighted the dependence of industry and the NHS on European workers. Many of those who opposed the amendment denounced talk of 'bargaining chips', and argued that the best way to protect both EU/EEA citizens in the UK and British nationals elsewhere in Europe was not to delay passage of the Bill and to allow negotiations to commence with this issue first on the agenda.

Free movement

Free movement is central to the concept of EU citizenship. It is a right enjoyed by all citizens of the Union (those with nationality of any of the 28 Member States).

All EU/EEA citizens have a right to reside in another EU Member State for up to three months without any conditions other than the requirement to hold a valid identity card or passport. After three months certain conditions apply, depending on the status of the EU/EEA citizen (eg whether they are a worker or a student etc). Those who opt to exercise their free movement rights are protected against discrimination in employment on the grounds of nationality. Provisions co-ordinating social security rules ensure citizens do not lose entitlements by working elsewhere.

EU/EEA citizens who have resided legally for a continuous period of five years in another EU Member State automatically acquire the right to permanent residence there. To qualify for permanent residence, students and the self-sufficient must possess comprehensive sickness insurance cover throughout the five year period. Confusingly, while EU/EEA citizens in the UK have access to NHS care, this does not satisfy the requirement to have comprehensive sickness insurance cover.

UK immigration law as it applies to non-EU/EEA citizens is significantly more restrictive.

What was said during the referendum campaign?

The Government White Paper noted that if the UK left the EU, remaining Member States would no longer be required to maintain the rights currently enjoyed by UK citizens. Securing these rights would likely require the offer of reciprocal protection for EU/EEA citizens resident in the UK.

Both the Vote Leave and Leave.EU campaigns claimed the status of EU/EEA citizens lawfully resident in the UK would be unaffected as a result of Brexit.

The Government position since the referendum

The Government immediately sought to reassure EU/EEA citizens in the UK that there was no change in their status as a result of the vote to leave.

In the months since the referendum ministers have reiterated that the Government wants to protect EU/EEA citizens' status. They say the only scenario in which such an outcome would be impossible is if the rights of British citizens in remaining Member States are not protected in return. In her Lancaster House speech of 17 January 2017 Theresa May suggested the blame for the failure to achieve a reciprocal agreement lay with a handful of other European leaders. Despite this, the Government has faced accusations of treating EU/EEA citizens as 'bargaining chips' in the expected negotiations with the European Commission.

Parliamentary reaction

The Joint Committee on Human Rights urged the Government to seek a quick resolution by way of a separate, preliminary agreement to avoid subjecting individuals to 'continuing and distressing insecurity'. The House of Lords European Union Committee called on the Government to give a unilateral guarantee that it will safeguard the EU citizenship rights of all EU nationals in the UK post-Brexit. The Brexit Committee is critical of the current, 'untenable' system by which EU migrants apply for proof of their right to permanent residence in the UK. It has called on the Government and the European Commission to make resolution of the issue the first order of business in the negotiations.

Commons Committee Stage

A similar amendment was moved by Harriet Harman during the Committee Stage in the Commons. The proposed amendment was rejected by a majority of 42, with 290 members voting in favour and 332 voting against.

A 'meaningful vote'?

What is the 'meaningful vote' debate about?

Now that Parliament has agreed in principle to the Government triggering Brexit, and the Government has agreed that there should be a vote on a proposed withdrawal agreement before it is signed, the debate boils down to three main questions:

- Should the Government's commitment to a vote be enshrined in legislation?
- What are the implications of Parliament voting against a withdrawal agreement?
- Should Parliament also have a vote if the Government decided to leave the EU without a withdrawal agreement?

These raise a wide range of issues, including parliamentary sovereignty, the negotiation of treaties and compliance with the referendum result.

Revocability is key

Underlying the whole debate is the unanswered question of whether a withdrawal notification can be suspended or revoked. Although there is a widespread assumption that it cannot, no court has ruled on this and there is considerable opinion that notification could in fact be revoked.

The effects of a vote against a withdrawal agreement (or against leaving without an agreement) would be completely different depending on the answer.

Government commitment and new clause compared

The main difference is that the new clause requires parliamentary approval of a Government decision to leave the EU without a withdrawal agreement, which the Government commitment does not.

Arguably the Government's undertaking does not say that the Prime Minister would necessarily be bound by the vote.

Should the vote be specified in legislation?

Whether or not to enshrine the commitment to a vote in legislation depends on issues including whether one trusts the Government, whether one wants to guard against a change of circumstances, and whether one considers that a legislative requirement will bind the Government's hand more than a political commitment.

Either would go further than is normal for treaties.

What if Parliament rejects the withdrawal agreement?

What would happen if either or both Houses voted against a proposed withdrawal agreement? Should the Government seek to renegotiate? Could a 'no' vote delay or even prevent Brexit? Or would it mean the UK leaving the EU with no agreement?

These questions apply both to a vote under the Government's commitment and one under the Lords' new clause (neither of which specifies the full implications of a no vote), and the answers are not clear. The only certainty is that the EU would not be able to prevent the UK from leaving the EU without an agreement.

Another question is what would happen if the Commons accepted the withdrawal agreement but the Lords rejected it.

What if the EP rejects the withdrawal agreement?

The European Parliament (EP) will not be involved in the withdrawal negotiations themselves, but under Article 50 of the Treaty on European Union (TEU) its consent is needed before the Council can conclude a withdrawal agreement. The EP would like greater involvement and says it might reject the final withdrawal agreement if EU leaders do not agree to this.

If the EP rejects the agreement, and if there is no possibility of continuing negotiations, the UK might have to leave without a withdrawal agreement.

Should Parliament have to approve leaving the EU without an agreement?

The Government suggests this would not be a 'meaningful vote'. But the Lords' new clause specifies that Parliament must approve a decision by the Prime Minister to leave the EU without an agreement, because of the implication on rights.

The effects of Parliament voting against such a decision are not clear.

Is an Act of Parliament required at the end of the negotiations?

A legal opinion published shortly before the Bill went to the Lords argues that there is a UK constitutional requirement for an Act of Parliament to give effect to a withdrawal agreement, or to authorise withdrawal from the EU without an agreement – the current Bill is not enough.

The Government and others disagree.

'Meaningful votes' on EU matters

The UK Parliament has not had a statutory power to approve any of the major EU Treaties or Treaty amendments on their conclusion by EU governments, although UK ratification has involved an Act of Parliament in each case to give them legal effect.

The closest the UK Parliament has come to a 'meaningful' vote in the sense of the Lords amendment was in 1971, when the then Prime Minister, Edward Heath, said Parliament would decide whether to proceed with the UK application to join the then European Economic Community (EEC) on the basis of the terms negotiated. That decision was made in October 1971 on a Government motion to approve its "decision of principle to join the European Communities on the basis of the arrangements which have been negotiated".

The European Union Act 2011 gave Parliament statutory powers to approve certain EU Treaty amendments or EU acts before the Government could agree to them at EU level. However, this has sometimes resulted in Parliament having to pass an Act of Parliament so that the Government can approve relatively insignificant EU proposals in the Council.

1. Introduction

1.1 The Bill's progress so far

The European Union (Notification of Withdrawal) Bill is returning to the Commons on Monday 13 March 2017 for consideration of two amendments inserted by the Lords. One is a new clause on the status of EU/EEA citizens in the UK, and the other is a new clause on a 'meaningful' parliamentary vote at the end of the negotiation period.

The vote on the first of these amendments was the second largest House of Lords vote on record since 1999 (614 Members – 358 for and 256 against). Then the vote on the second one was the largest ever vote in that Chamber: 634 Members (366 for and 268 against).

Similar amendments on both issues had previously been voted down in the Commons (where the Bill started). Harriet Harman's amendment on the status of EU/EEA citizens was defeated by 332 votes to 290 (a majority of 42), and Chris Leslie's 'meaningful vote' amendment was defeated by 326 votes to 293 (a majority of 33).

1.2 What happens now?

When the Lords have amended a Bill that started in the Commons, the Bill returns to the Commons for them to reach a decision on each Lords amendment.

As Paul Evans explains, as well as agreeing or disagreeing with a Lords amendment, the options for the Commons include amending or proposing alternatives to it:

Motions may be made to agree or disagree with, amend or provide an alternative to individual Lords Amendments. If necessary, the bill passes backwards and forwards between the two Houses ('ping pong') until all points of disagreement are resolved; the bill is then ready for Royal Assent. Lords Amendments and any Commons motions relating to them are published as separate papers. Lords Amendments are debated in groups of related amendments proposed by the 'Member in charge' of the bill. Amendments to Lords Amendments are subject to selection by the Speaker in the same way as other amendments to bills.¹

1.3 Scope of this briefing paper

This briefing paper looks at the two successful Lords amendments and surrounding debate.

There is broader information on the current Bill, and on the Supreme Court's judgment in the Miller case that triggered it, in other Commons and Lords Library briefing papers including:

¹ Paul Evans, A Short Guide to the Business of the House and its Committees: An introduction for Members, May 2015

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- Commons Library, [European Union \(Notification of Withdrawal\) Bill: Briefing for Commons Second Reading](#), CBP 7884, 30 January 2017
- Lords Library, [European Union \(Notification of Withdrawal\) Bill: Summary of Commons Second Reading Debate](#), Lords In Focus LIF-2017-0013, 3 February 2017
- Lords Library, [European Union \(Notification of Withdrawal\) Bill: Briefing for Lords Stages](#), 20 February 2017

Two other Commons Library briefing papers explain how the EU withdrawal process works, and discuss the expected UK legislation:

- [Brexit: how does the Article 50 process work?](#) CBP 7551, 16 January 2016
- [Legislating for Brexit: the Great Repeal Bill](#), CBP 7793, 24 February 2016

2. EU/ EEA citizens in the UK

2.1 The Lords amendment 9B

On 1 March 2017 the House of Lords amended the Bill to include a provision to guarantee the residence rights of EU and EEA citizens presently in the UK.

Amendment 9B, moved by Baroness Hayter of Kentish Town, reads as follows:

() Within three months of exercising the power under section 1(1), Ministers of the Crown must bring forward proposals to ensure that citizens of another European Union or European Economic Area country and their family members, who are legally resident in the United Kingdom on the day on which this Act is passed, continue to be treated in the same way with regards to their EU derived-rights and, in the case of residency, their potential to acquire such rights in the future.

Following a division, with 358 peers voting for and 256 against, the change was made to the Bill.

The debate in the Lords

Baroness Hayter opened the debate arguing that it is legitimate for EU citizens resident in the UK to think that they are being used as negotiating capital ‘because that is exactly what the Home Office told them’. Whilst highlighting the similar uncertainty faced by British expatriates living elsewhere in the EU, she made the point that the two groups are not identical. She did not accept the Home Secretary’s assertion that the issue was a matter for negotiation (see section 1.4 below):

Indeed, the big difference is that for EU nationals here, it is in the gift of our Government—the UK Government, answerable to this Parliament—to decide how to treat people resident in our country. So, contrary to the letter that was sent yesterday by Amber Rudd, we do not accept that this is a matter for our negotiations with the EU. This is a matter for the UK.²

She stressed both the ‘moral obligation’ owed by Britain to EU workers, students and families settled in the UK and the need to consider the industries that depend on them.

Viscount Hailsham recognised the Government’s position is ‘essentially pragmatic’ and that it had ‘shown sensitivity about this issue’. Whilst he professed to understanding its argument, he admitted he remained ‘extremely uncomfortable’ with it. He reminded peers that EU citizens who made the ‘career-changing, maybe life-changing’, decision to move to the UK did so ‘in the legitimate expectation that they will be able to live and work here for as long as they choose’. He argued that disturbing that expectation ‘would offend natural justice’ and would likely be challenged successfully in the courts. Remembering the outrage felt following the expulsion of Asians from Uganda and noting how

² [HL Deb 1 March 2017 c814-6](#)

Britain had offered a home to Huguenots fleeing France, Viscount Hailsham called for peers 'to take the moral high ground' so that EU migrants can continue to live and work in the UK.³

Baroness Ludford raised the issue of the problems faced by EU citizens and their family members in applying for proof of their right to permanent residence in the UK. She argued that the 'goalposts have been moved retrospectively' and criticised the amount of documentary evidence required by the Home Office.⁴

Lord Howard of Lympne referred to the similar amendment that had been defeated at the committee stage in the Commons (see section 1.7 below). Whilst he favoured a unilateral guarantee, he argued that peers could best support EU nationals resident in the UK by allowing the Bill to pass as quickly as possible.⁵

Lord Bragg drew attention to the positive role played by minorities over centuries in the development of British society. He condemned the 'reduction' of EU migrants to 'pawns in a government strategy' as 'largely clueless'.⁶

Lord Mackay of Clashfern argued that a unilateral declaration granting permanent residence to all EU migrants presently resident in the UK would not guarantee fair treatment for all the people affected (ie EU citizens in the UK and British nationals in the EU). He told the House that 'the chances of a complete settlement of the matter are greatly increased if the negotiations are triggered and the Prime Minister makes this the very first requirement, as she has said she will'.⁷

Lord Oates raised the requirement of comprehensive sickness insurance cover before an EU citizen can acquire permanent residence in a state other than their own (see section 1.2 below). He pointed out that the requirement was unknown to many EU migrants in the UK, and that many of those who were aware of it thought, not unreasonably, that their access to the NHS met their obligation. He called on the Government to state that evidence of insurance cover will not be a requirement for EU citizens resident in the UK to gain permanent residence.⁸

Lord Tebbit submitted that 'the first duty of this Parliament of the United Kingdom is to care for the interests of the citizens of this kingdom'. Rather than focussing on the 'rights of foreigners', peers ought to be 'concerned for the rights of British people to live freely and peacefully in other parts of Europe'. He argued that the amendment only delayed the commencement of negotiations that would allow for a 'decent and proper arrangement' to be made.⁹

³ [HL Deb 1 March 2017 c816-7](#)

⁴ [HL Deb 1 March 2017 c817-9](#)

⁵ [HL Deb 1 March 2017 c819-20](#)

⁶ [HL Deb 1 March 2017 c821-2](#)

⁷ [HL Deb 1 March 2017 c826-7](#)

⁸ [HL Deb 1 March 2017 c827-9](#)

⁹ [HL Deb 1 March 2017 c831-2](#)

Lord Green of Deddington chose to highlight the operation of the current rules on EU migrants attaining permanent residency. He said there is no doubt that those who have been in the UK for five years exercising their treaty rights have secured their permanent residency. Turning to those who may still move to the UK before Brexit, he argued that a grant of permanent residence would 'risk a very large inflow of people from eastern Europe before the date of withdrawal'. The 'trickiest', he thought, would be those who had come to the UK within the past three years - if they are granted permanent residence then 'some 85%' of EU citizens currently in the UK will qualify. He also expressed agreement with Lord Mackay. Whilst he denounced any 'bargaining chip' approach to the issue as 'absolutely wrong in principle and in practice', Lord Green opposed the amendment as 'completely disregarding' the position of British citizens elsewhere in the EU.¹⁰

Lord Clark of Windermere drew peers' attention to the 60,000 EU migrants working in the NHS and the current problems of labour shortages in the health service.¹¹

Lord Blencathra criticised Angela Merkel and Donald Tusk for their 'harsh treatment' and 'intransigence' in refusing to sanction reciprocal arrangements following the referendum.¹²

Lord Strathclyde suggested that those groups representing British expatriates may be wrong in the assumption that European Governments would respond in kind to a unilateral decision by the British Government securing EU nationals status in the UK.¹³

Responding for the Government, Lord Bridges of Headly acknowledged that this issue is perhaps the most emotive of the issues raised by the decision to leave the EU. He emphasised that until the date of the UK exit from the EU 'nothing will change for EU nationals living here in the UK'. He stressed that an EU national who has been continuously and lawfully residing in the UK for five years does not, under current rules, need to apply for a document to prove their right to be here permanently.

Lord Bridges told peers that the Government will continue to be bound by the European Convention on Human Rights, and, in particular, the obligation to protect the right to a private and family life, after the UK leaves the EU. He also offered reassurance that there would be no change in the status for any EU citizen without Parliament's approval.

He stressed the Government's 'duty of care' to British citizens living elsewhere in Europe and questioned whether the governments of the 27 other EU states would see securing the status of British expatriates as a negotiating priority should the amendment be agreed.¹⁴

¹⁰ [HL Deb 1 March 2017 c843-4](#)

¹¹ [HL Deb 1 March 2017 c845-6](#)

¹² [HL Deb 1 March 2017 c849](#)

¹³ [HL Deb 1 March 2017 c850](#)

¹⁴ [HL Deb 1 March 2017 c851-3](#)

2.2 The current position on free movement rights

For as long as the UK remains an EU Member State, it is subject to laws guaranteeing EU citizens the right to free movement throughout the Union. British citizens will continue to enjoy EU citizenship until the UK exits the EU.¹⁵

EU 'free movement' rights

The [right to move and reside freely](#) is conferred directly on every EU citizen by Article 21 of the [Treaty on the Functioning of the European Union](#) (TFEU). It is also enjoyed by those non-EU citizens who hold Swiss citizenship or citizenship of states in the European Economic Area (Iceland, Norway and Liechtenstein).¹⁶ For ease of reference all will be referred to as 'EU/EEA citizens' in this paper.

Free movement is central to the concept of EU citizenship

The right entitles EU/EEA citizens to reside on the territory of another EU Member State for up to three months without any conditions other than the requirement to hold a valid identity card or passport.¹⁷ After three months certain conditions apply, depending on the status of the EU/EEA citizen. In order to have an ongoing "right to reside" an EU/EEA citizen must fit into one of the following categories:

- a worker or self-employed person¹⁸
- a job-seeker (a person who is seeking employment and has a genuine chance of being employed)
- a self-sufficient person
- a student
- a family member accompanying or joining an EU citizen who fits into one of the above categories.¹⁹

There may also be certain administrative formalities to be met.²⁰

EU/EEA citizens who have resided legally for a continuous period of five years in another EU Member State acquire the right to permanent residence there. (See section 2.3 below for further details).

As well as conferring the freedom to move and reside freely throughout the EU under EU/EEA citizenship provisions, the TFEU specifies the free movement rights of workers and the self-employed.²¹ This fundamental

¹⁵ Any person who holds the nationality of an EU Member State is automatically also an EU citizen. EU citizenship is additional to nationality of a Member State and does not replace it.

¹⁶ The European Economic Area (EEA) allows Iceland, Liechtenstein and Norway to be part of the EU's single market. Switzerland is neither an EU nor EEA member but is part of the single market.

¹⁷ Directive 2004/38 of the European Parliament and of the Council, Article 6

¹⁸ In certain circumstances, a person who is no longer working can retain "worker" or "self-employed" status - for example, if temporarily unable to work due to illness or accident, or due to involuntary unemployment: Directive 2004/38/EC, Article 7(3)

¹⁹ A more limited range of relatives are eligible for a right of residence as the family member of a "student" than for the other categories: Directive 2004/38, Article 2(2), Article 7(4)

²⁰ Directive 2004/38, Article 7

²¹ Articles 45-48 TFEU and Articles 49-53 TFEU respectively

principle is supported by protections against discrimination in employment on the grounds of nationality and provisions co-ordinating social security rules so that citizens do not lose entitlements when they exercise their free movement rights in order to work elsewhere.

In practice, free movement law means that EU/EEA citizens do not require a visa in order to come to the UK. Those coming to the UK are not subject to rules on English language proficiency. The exclusion of an EU/EEA citizen must be justified on the grounds of public policy, public security or public health.

Immigration controls for non-EU nationals

The comparable provisions for non-EU citizens, including those who are family members of British citizens, are specified in the UK's [Immigration Rules](#) and are significantly more restrictive.

For example, opportunities for non-EU/EEA citizens to come to work in the UK under the [points-based system](#) are generally restricted to skilled migrants who already have a job offer. To secure a visa, non-EU/EEA citizen spouses of British citizens must satisfy various eligibility criteria, including a requirement that their British partner has an annual income of at least £18,600 (or a higher amount in savings). Most non-EU/EEA visa categories require that applicants have some proficiency in the English language, and initially grant only a temporary permission to stay in the UK. The scope to extend the permission, to switch to a different immigration category or to stay in the UK permanently, varies depending on the visa category.

The Immigration Rules impose significantly more restrictive conditions on non-EU migration

As the UK's Immigration Rules have become more restrictive the contrast between EU free movement rights and visa restrictions for non-EU/EEA citizens has become more striking. The UK and its fellow EU Member States recognised the potential for exploitation of EU free movement law, for example, through 'sham marriages' between EU/EEA citizens and non-EU/EEA nationals who would otherwise struggle to qualify for entry under national immigration legislation. The proposed '[new settlement for the United Kingdom within the European Union](#)' offered by the European Council in February 2016 included restrictions on freedom of movement so as to make non-EU/EEA family members subject to a host Member State's national immigration laws.²² However these measures will not come into force due to the outcome of the referendum.

Permanent residence

EU/EEA citizens who reside legally for a continuous period of five years in a Member State other than their own acquire the right of permanent residence in their host state. This right is acquired automatically. Citizens do not need to apply for it. Once acquired, the right of permanent residence is lost only through an absence from the host Member State for a period exceeding two consecutive years.²³

²² European Council, *European Council meeting (18 and 19 February 2016) Conclusions*, 19 February 2016

²³ Directive 2004/38 of the European Parliament and of the Council, article 16

Permanent residence is provided by Directive 2004/38 - often referred to as the "Citizens Rights Directive" or the "Free Movement Directive" - and transposed into UK law by the *Immigration (European Economic Area) Regulations 2006*.²⁴

Comprehensive sickness insurance cover

Those who are students or self-sufficient must meet a further requirement of possessing comprehensive sickness insurance cover in their host Member State (a condition to ensure the 'economically inactive' do not become a burden on their host state). Without such cover, any student or self-sufficient person will not be deemed to be exercising their Treaty rights. Such periods of time without comprehensive sickness insurance will not count towards the five years of lawful residence necessary to acquire permanent residence.

Certain categories of EU citizens in the UK require sickness insurance in order to exercise their Treaty rights

Whilst EU citizens in the UK have access to the NHS, this does not count as having comprehensive sickness insurance cover. The Home Office view that entitlement to NHS treatment is insufficient to meet the requirement of the Directive was upheld by the Court of Appeal in 2014.²⁵

Access to the NHS does not count as having sickness insurance

The UK requires family members of EU/EEA citizen students and self-sufficient people to have their own, separate comprehensive sickness insurance cover. The Government has faced calls to scrap this requirement. The Chair of the Health Select Committee, Sarah Wollaston, has warned of a "bureaucratic nightmare" facing EU citizens seeking certainty as to their status in the UK and is urging the Government to ensure that EU citizens in the UK will not be disqualified from permanent residency on the grounds of lacking insurance cover.²⁶

2.3 What was said during the referendum campaign?

The Government White Paper

In its pre-referendum White Paper the Government suggested that any agreement protecting the rights of British citizens living and working in EU Member States would likely include reciprocal protection for EU/EEA citizens remaining in the UK:

4.2 [*The approximately 2 million UK citizens living, working and travelling in the other 27 Member States of the EU*] all currently enjoy a range of specific rights to live, to work and access to pensions, health care and public services that are only guaranteed because of EU law. There would be no requirement under EU law for these rights to be maintained if the UK left the EU. Should an agreement be reached to maintain these rights, the expectation must be that this would have to be reciprocated for EU citizens in the UK.

²⁴ To be revoked and replaced by the [Immigration \(European Economic Area\) Regulations 2016](#) on 1 February 2017

²⁵ [Ahmad v Secretary of State for the Home Department \[2014\] EWCA Civ 988](#) (paragraphs 70 and 71)

²⁶ '[Scrap insurance rule for stay-at-home parents from EU, says Tory MP](#)', *the Guardian*, 30 December 2016

5.9 Many UK citizens would want any negotiations to secure their continued right to work, reside and own property in other EU states, and to access public services such as medical treatment in those states. UK citizens resident abroad, among them those who have retired to Spain, would not be able to assume that these rights will be guaranteed. At the very least, any terms which the UK seeks for its own citizens would have to be offered to EU citizens wishing to come to or stay in this country.²⁷

The Vote Leave campaign

The Vote Leave campaign denied the rights of EU nationals in the UK would be affected by Brexit. In a statement by Michael Gove, Boris Johnson, Priti Patel and Gisela Stuart, the campaign stated:

...there will be no change for EU citizens already lawfully resident in the UK. These EU citizens will automatically be granted indefinite leave to remain in the UK and will be treated no less favourably than they are at present.²⁸

Gisela Stuart, the chair of the Vote Leave campaign, also argued the Vienna Convention on the Law of Treaties guarantees the acquired rights of EU nationals in the UK and of British citizens elsewhere in the EU.²⁹

The Leave.EU campaign

The Leave.EU campaign stated "the EU would be obliged to grant permanent settlement rights to Britons living in Ireland and mainland Europe. The UK would do the same."³⁰

2.4 The Government position since the referendum

Immediate reaction

In his statement outside 10 Downing Street on the morning of 24 June David Cameron addressed British citizens living elsewhere in Europe and EU nationals in the UK:

I would also reassure Brits living in European countries, and European citizens living here, that there will be no immediate changes in your circumstances. There will be no initial change in the way our people can travel, in the way our goods can move or the way our services can be sold.³¹

Boris Johnson denied the result was due to concerns about immigration and said the status of EU nationals would not change:

I've seen a lot of confusion over the weekend about the status of people living in this country. It's absolutely clear that people from

²⁷ HM Government, *The process for withdrawing from the European Union*, February 2016, Cm 9216

²⁸ Vote Leave, *Restoring public trust in immigration policy - a points-based non-discriminatory immigration system*, 1 June 2016

²⁹ 'EU citizens in UK face Brexit uncertainty', *Guardian*, 15 May 2016

³⁰ <http://leave.eu/en/faqs> (accessed on 19 January 2017)

³¹ 10 Downing Street, *EU referendum outcome: PM statement*, 24 June 2016

other European countries who are living here have their rights protected.³²

Statement following the referendum

Following the referendum the Government made a statement on 11 July 2016 on the status of other EU citizens in the UK:

There has been no change to the rights and status of EU nationals in the UK, and UK nationals in the EU, as a result of the referendum.

The decision about when to trigger Article 50 and start the formal process of leaving the EU will be for the new Prime Minister. The UK remains a member of the EU throughout this process, and until Article 50 negotiations have concluded.

When we do leave the EU, we fully expect that the legal status of EU nationals living in the UK, and that of [UK nationals in EU member states](#), will be properly protected.

The government recognises and values the important contribution made by EU and other non-UK citizens who work, study and live in the UK.

I have lived in the UK for more than 5 years. What does the vote to leave the EU mean for me?

EU nationals who have lived continuously and lawfully in the UK for at least 5 years automatically have a permanent right to reside. This means that they have a right to live in the UK permanently, in accordance with EU law. There is no requirement to register for documentation to confirm this status.

EU nationals who have lived continuously and lawfully in the UK for at least 6 years are eligible to apply for British citizenship if they would like to do so. The eligibility requirements can be found [here](#).

What if I have lived in the UK for less than 5 years?

EU nationals continue to have a right to reside in the UK in accordance with EU law. EU nationals do not need to register for any documentation in order to enjoy their free movement rights and responsibilities. For those that decide to apply for a registration certificate, there has been no change to government policy or processes. Applications will continue to be processed as usual.

Non-EU family members of EU nationals must continue to apply for a family permit if they wish to enter the UK under EU law, and they do not have a residence card issued by a member state. There has been no change to government policy or processes, and applications will continue to be processed as usual.

Extended family members of EU nationals must continue to apply for a registration certificate (if they are an EU national) or residence card (if they are a non-EU national) if they wish to reside in the UK. There has been no change to government policy or processes, and applications will continue to be processed as usual.

The Government reminded EU citizens of the automatic right of permanent residence

³² ["PROJECT FEAR IS OVER' Boris welcomes ceasefire with Osborne after saying Brexit 'was NOT about immigration'", *The Sun*, 27 June 2016](#)

Irish nationals enjoy separate rights, under various pieces of legislation, which allow Irish nationals residing in the UK to be treated in the same way as British nationals in most circumstances. There is no change to this position.

Croatian nationals might continue to need to apply for a registration certificate to be allowed to work in the UK under the transitional arrangements that were put in place when Croatia joined the EU in 2013. The type of registration certificate that they might need will depend on whether they need permission to work in the UK, and what they will be doing. There has been no change to government policy or processes, and applications will continue to be processed as usual.

Does the government plan to remove EU nationals from the UK?

There has been no change to the right of EU nationals to reside in the UK and therefore no change to the circumstances in which someone could be removed from the UK.

As was the case before the referendum, EU nationals can only be removed from the UK if they are considered to pose a genuine, present and sufficiently serious threat to the public, if they are not lawfully resident or are abusing their free movement rights.

Irish citizens have rights separate to those of other EU citizens in the UK

Prime Minister's Lancaster House speech

In her Lancaster House speech of 17 January 2017, the Prime Minister reiterated her wish to 'guarantee' the right of EU citizens in the UK if there is a reciprocal deal for British citizens living elsewhere in Europe:

Fairness demands that we deal with another issue as soon as possible too. We want to guarantee the rights of EU citizens who are already living in Britain, and the rights of British nationals in other member states, as early as we can.

I have told other EU leaders that we could give people the certainty they want straight away, and reach such a deal now.

Many of them favour such an agreement - 1 or 2 others do not - but I want everyone to know that it remains an important priority for Britain – and for many other member states – to resolve this challenge as soon as possible. Because it is the right and fair thing to do.³³

Theresa May suggested that some EU leaders oppose a reciprocal agreement

Brexit White Paper

In its White Paper of 2 February 2017, '[The United Kingdom's exit from and new partnership with the European Union](#)', the Government stated:

6.3 Securing the status of, and providing certainty to, EU nationals already in the UK and to UK nationals in the EU is one of this Government's early priorities for the forthcoming negotiations. To this end, we have engaged a range of stakeholders, including expatriate groups, to ensure we understand the priorities of UK nationals living in EU countries. This is part of our preparations for a smooth and orderly withdrawal and we will continue to work closely with a range of organisations and individuals to achieve this. For example, we recognise the priority placed on easy access to healthcare by UK nationals living in the EU. We are also engaging closely with EU Member States, businesses and other

³³ 10 Downing Street, [The government's negotiating objectives for exiting the EU: PM speech](#), 17 January 2017

organisations to ensure that we have a thorough understanding of issues concerning the status of EU nationals in the UK.

6.4 The Government would have liked to resolve this issue ahead of the formal negotiations. And although many EU Member States favour such an agreement, this has not proven possible. The UK remains ready to give people the certainty they want and reach a reciprocal deal with our European partners at the earliest opportunity. It is the right and fair thing to do.

Home Secretary's letter to peers

Ahead of the House of Lords committee stage the Home Secretary Amber Rudd wrote to every peer in the House of Lords urging them not to amend the Bill. According to press reports she told peers that the Government "fully appreciates" concerns over the rights of migrants from elsewhere in the EU and sought to offer reassurance that they would be treated with the "utmost respect". The *Telegraph* reported that Ms Rudd blames a number of other EU Member States for the failure thus far to achieve an agreement securing the residence rights of EU/EEA nationals in the UK and British citizens elsewhere in Europe. It says she warned peers that guaranteeing the rights of EU/EEA citizens before any such agreement will leave British citizens living in the EU facing two years of uncertainty.³⁴

2.5 Parliamentary reaction

Opposition Day Debates

6 July 2016

The motion of the [Opposition Day Debate on 6 July 2016](#), held just before Theresa May's appointment as Prime Minister, was moved by Andy Burnham and read as follows:

That this House notes that there are approximately three million nationals of other EU member states living in the UK; further notes that many more UK nationals are related to nationals of other EU member states; rejects the view that these men, women and children should be used as bargaining chips in negotiations on the UK's exit from the EU; and calls on the Government to commit with urgency to giving EU nationals currently living in the UK the right to remain.

The motion was agreed to, with 245 in favour and two Members choosing to abstain by voting both for and against.

Members from both sides of the House supported the motion. Foreign Secretary Boris Johnson reminded the House of the reassurance the Vote Leave campaign had sought to offer EU citizens in the UK. He described it as "very, very disappointing" that their status should be called into question.³⁵ John Redwood expressed his hope that the motion passing would represent "a great offer of reassurance from this whole Parliament".³⁶

³⁴ ['Home Secretary writes to every peer urging them not to defeat the Government over Brexit bill'](#), *the Telegraph*, 28 February 2017

³⁵ HC Deb 6 July 2016 c939

³⁶ HC Deb 6 July 2016 c938

19 October 2016

The motion of the [Opposition Day Debate on 19 October 2016](#) was moved by Joanna Cherry and read as follows:

That this House recognises the contribution that nationals from other countries in the EU have made to the UK; and calls on the Government to ensure that all nationals from other countries in the EU who have made the UK their home retain their current rights, including the rights to live and work in the UK, should the UK exit the EU.

The motion was not agreed, with 250 members voting in favour and 293 voting against.

Joint Committee on Human Rights

In its report '[The human rights implications of Brexit](#)' the Joint Committee on Human Rights (JCHR) warned against any approach to Brexit negotiations that treated individuals' rights as bargaining chips:

50. On the question of residence rights, we believe that it is not appropriate to treat individuals' fundamental rights as a bargaining chip. Notwithstanding the moral imperative to respect the rights of EU nationals, there is also a considerable practical impediment to treating such rights as negotiable. It is not realistic to imagine that the UK Government would be in a position to deport the large numbers of EU nationals currently in the United Kingdom. Under Article 8 of the ECHR, individuals are entitled for respect to their private and family life and home.

51. While these rights are in no way absolute, it would not be possible to establish a bright-line rule that would allow the deportation of EU nationals simply on the grounds that they had only been resident for a fixed period of time. Other factors would certainly be relevant and each case would have to be considered on its own facts. In such circumstances, there would be the potential for significant, expensive and lengthy litigation which could lead to considerable uncertainty for a prolonged period of time and could potentially overwhelm the UK courts and tribunals system.³⁷

The JCHR highlighted the 'considerable practicable impediment' to treating EU nationals' rights as negotiable

The JCHR urged the Government to seek a quick resolution by way of a separate, preliminary agreement to avoid subjecting individuals to 'continuing and distressing insecurity'.³⁸

House of Lords European Union Committee

In its report '[Brexit: acquired rights](#)' the Lords EU Committee called on the Government to give a unilateral guarantee that it will safeguard the EU citizenship rights of all EU/EEA nationals in the UK post-Brexit. It described 'the overwhelming weight of the evidence' as pointing to this resolution being the 'morally right thing to do'.³⁹

The Committee cast doubt on claims made before the referendum that the Vienna Convention on the Law of Treaties or the customary

³⁷ Joint Committee on Human Rights, *The human rights implications of Brexit*, 19 December 2016, HC 695/ HL Paper 88, 2016-17, paragraphs 50-51

³⁸ Ibid, paragraph 53

³⁹ European Union Committee, *Brexit: acquired rights*, 14 December 2016, HL Paper 82, 2016-17, paragraph 147

international law doctrine of acquired rights would safeguard EU rights post-Brexit:

60. It is evident that the term 'parties' in Article 70 (1)(b) of the Vienna Convention on the Law of Treaties refers to States, not to individuals or companies. In no sense, therefore, can this provision be said to safeguard individual rights under EU law that will be lost as a consequence of the UK's withdrawal, in the absence of a negotiated settlement.

[...]

71. The evidence we received makes very clear that the doctrine of acquired rights under public international law will provide little, if any, effective protection for former EU rights once the UK withdraws from the EU. The scope of acquired rights is limited to certain contractual and property rights which, even were they to coincide with EU rights, are highly unlikely to be enforceable. Reliance on the doctrine before the referendum as a means of protecting EU rights was therefore misplaced.⁴⁰

Evidence received by the Lords EU Committee challenged the pre-referendum assertions that international law secures EU nationals' rights

What a post-Brexit immigration policy may look like was addressed in the Lords EU Committee's recent '[Brexit: UK-EU movement of people](#)'.⁴¹

The Committee revealed that the unanimous view of the public and private sector employers' groups who gave evidence to its inquiry was that the Government should not apply the UK's non-EU work permit system to EU/EEA nationals:

Employers' organisations were alarmed at the prospect that EU nationals might in future be subject to the UK's non-EU immigration regime, the 'Points Based System'. To do so would disproportionately affect some employers' ability to sponsor EU workers, and could result in labour shortages in some areas, including in publicly-funded sectors such as the NHS and social care, and in horticulture, where the closure of the Seasonal Agricultural Workers Scheme at the end of 2013 was premised on growers having unrestricted access to workers from the EU.⁴²

Private and public sector employers alike told the Lords EU Committee that they opposed the application of the points-based system to EU migrants

The Committee warned that placing EU/EEA citizens on the same footing as nationals from states outside the EU may impact upon the rights of British citizens living elsewhere in the EU. It also noted that the remaining EU Member States may not be so keen on a strictly reciprocal arrangement, given the differences in the composition of EU migration to the UK and UK migration to the EU.⁴³

Urging the Government not to close off options ahead of any exit negotiations, the Committee noted that offering preferential treatment to EU/EEA nationals compared to non-EU/EEA nationals in a future immigration regime may increase the likelihood of securing reciprocal preferential treatment for UK nationals in the EU.⁴⁴

⁴⁰ Ibid, paragraphs 60 and 71

⁴¹ European Union Committee, *Brexit: UK-EU movement of people*, 6 March 2017, HL Paper 121, 2016-17

⁴² Ibid, paragraph 166

⁴³ Ibid, paragraph 163

⁴⁴ Ibid, paragraph 169

Exiting the European Union Committee

In its report '[The Government's negotiating objectives: the rights of UK and EU citizens](#)' the Brexit Select Committee recognised the 'great deal of anxiety and uncertainty for EU citizens resident in the UK and for UK citizens in the EU' that had resulted from the referendum and subsequent debate.⁴⁵ Noting the apparent differences between the Government and the European Commission as to the sequencing of negotiations, the Committee said it would be 'unconscionable for EU citizens in the UK and UK citizens in the EU not to have clarity about their status for another two years'.⁴⁶ For the Committee the resolution of the issue should be the first order of business in exit negotiations:

51. We commend efforts by the UK nationals living in other EU countries to put pressure on the respective governments where they live to resolve questions around their status as soon as possible. We do not believe the electorates of Europe will thank politicians in any country if the situation is allowed to continue for another two years. It is imperative that all parties to the negotiations put the resolution of the rights of all EU citizens in the UK and UK citizens in the EU as their first priority.⁴⁷

The Brexit Committee expressed concern over the system currently in place for EU/EEA citizens seeking evidence of their right to permanent residency in the UK. It described it as 'not fit for purpose',⁴⁸ with 'unrealistic administrative and technical hurdles',⁴⁹ and 'too complex and onerous for clarifying the status of up to three million people'.⁵⁰ The Committee called on the Government to ensure, through legislation if necessary, that an EU/EEA migrant's access to the NHS is considered sufficient to meet the requirement to have comprehensive sickness insurance cover.⁵¹ It also expressed its disapproval of the current practice of sending letters marked 'Prepare to leave the UK' to those EU/EEA migrants unsuccessful in their applications for permanent residency in the absence of any genuine grounds for that applicant's removal.⁵²

The Brexit Committee was critical of the current, 'untenable' system by which EU migrants apply for proof of their right to permanent residence in the UK

2.6 NGO reaction

Liberty supported the Lords amendment, arguing that it would ensure fair and equal treatment for EU nationals in the UK and British citizens living elsewhere in the EU.

Migration Watch, on the other hand, calls for EU citizens currently living in the UK to be allowed to remain after the UK's exit from the EU, so long as the residence rights of British citizens elsewhere in Europe are protected.⁵³

⁴⁵ Exiting the European Union Committee, *The Government's negotiating objectives: the rights of UK and EU citizens*, 5 March 2017, HC 1071, 2016-17, paragraph 16

⁴⁶ Ibid, paragraph 49

⁴⁷ Ibid, paragraph 51

⁴⁸ Ibid, paragraph 74

⁴⁹ Ibid, paragraph 80

⁵⁰ Ibid, paragraph 63

⁵¹ Ibid, paragraph 73

⁵² Ibid, paragraph 75

⁵³ Migration Watch, '[European Union: key topics](#)', updated November 2016

2.7 Commons Report Stage

During the Committee Stage in the Commons, Harriet Harman, chair of the Joint Committee on Human Rights, moved an amendment designed to protect the residence rights of those EU citizens who were lawfully resident in the United Kingdom on the date of the EU referendum:

New Clause 57

Nothing in this Act shall affect the continuation of those residence rights enjoyed by EU citizens lawfully resident in the United Kingdom on 23 June 2016, under or by virtue of Directive 2004/38/EC, after the United Kingdom's withdrawal from the European Union.

The proposed amendment was rejected by a majority of 42, with 290 members voting in favour and 332 voting against.⁵⁴

A similar amendment was previously defeated in the Commons

3. A 'meaningful vote'?

3.1 What is this about?

Parliament has now agreed in principle to the Government triggering Brexit, and the Government has agreed that there should be a vote on a proposed withdrawal agreement before it is signed.

So the debate over whether Parliament will have a 'meaningful vote' at the end of the Brexit negotiations now boils down to three main questions:

- Should the Government's commitment to a vote on a proposed withdrawal agreement be enshrined in legislation?
- What are the implications of Parliament voting against a withdrawal agreement (whether under a political or a legal commitment)? Should the Government seek to renegotiate? Could a 'no' vote even delay or prevent Brexit? Or would it instead mean the UK leaving the EU with no agreement?
- Should Parliament also have a vote if the Government decided to leave the EU without a withdrawal agreement, and if so what effect would that have?

Broadly speaking, those in favour of a statutory requirement for parliamentary approval at the end of the negotiations present it as a matter of parliamentary sovereignty. They consider that the June 2016 referendum was on whether to leave the EU, not how. Given the likely scale and impact of the changes, there should be a statutory requirement for parliamentary approval of the arrangements for leaving (just as the European Parliament has) before they are concluded. There is even a strand of opinion that says that an Act of Parliament – not just a vote on a motion – is required at the end of the negotiations.

Those against argue that treaties are a matter for the Government to negotiate without parliamentary intrusion, and that a statutory requirement for parliamentary approval would bind the Government's hand in the negotiations and lead to a worse deal being offered. A further argument is that if a 'no' vote at the end of the negotiations prevented Brexit, it would amount to thwarting the will of the people as expressed in the June 2016 referendum.

Underlying the whole debate is the unanswered question of whether a withdrawal notification can be suspended or withdrawn. Although there is a widespread assumption that it cannot, no court has ruled on this. The effects of a vote against a withdrawal agreement (or against leaving without an agreement) would be completely different depending on the answer.

3.2 Could the Article 50 notification be revoked?

The unanswered question of whether or not a notice of intention to withdraw, under Article 50 of the [Treaty on European Union](#) (TEU), can

be revoked is central to the decision that Parliament will be taking both in authorising the Government to give this notice, and in voting at the end of the negotiations. This is the case whether that vote is under the Government commitment or a statutory requirement, and whether it is on a motion or a Bill.

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

- approving the final Brexit agreement; or
- calling on the Government to renegotiate the agreement; or
- leaving the EU without any agreement.

The Courts have not ruled on revocability

The Supreme Court in [Miller](#)⁵⁵ 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 – although it appeared to consider that the question was actually irrelevant to its decision:

even if this common ground is mistaken, it would make no difference to the outcome of these proceedings [26]

The court made no request for the Court of Justice of the EU (CJEU) to interpret Article 50 (see below).

The Government's view

The Government tends to answer questions on the revocability of Article 50 notification by saying that as a matter of policy 'the Government's position is that once given, our notification will not be withdrawn';⁵⁶ or that there is no precedent.⁵⁷

When giving evidence to the Exiting the EU Committee, David Davis said that he did not know whether it was revocable or not:

one of the virtues of the article 50 process is that it sets you on [your] way. It is very difficult to see it being revoked. We do not intend to revoke it. It may not be revocable—I don't know.⁵⁸

Opinion against revocability

There is a widespread assumption that Article 50 cannot be revoked, and that instead the UK would automatically leave the EU two years after giving notification if no agreement had been reached and no extension period unanimously agreed. This is based on the wording of Article 50(3) TEU:

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,

⁵⁵ [2017] SC 5

⁵⁶ [HL3138](#), answered 21 November 2016

⁵⁷ [Written question 49168](#), 25 October 2016

⁵⁸ [Oral evidence, 14 December 2016](#), Q516

unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.

There are also political arguments against revocability. For instance Martin Wolf argued in the Financial Times:

I find it impossible to imagine that after two years of hard negotiations, the UK would be allowed to get away with saying to its counterparties that the deal they have offered is so bad that it has decided to stay inside, almost as a form of punishment. This would violate all norms of decent behaviour. I suspect that any attempt to withdraw the Article 50 application in these circumstances would be rejected by the members, supported by the European Court of Justice. The latter would view such whimsical behaviour as incompatible with the survival of the EU itself.⁵⁹

Opinion in favour of revocability

There is however considerable legal and political 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.⁶⁰

Lord Kerr of Kinlochard, who drafted Article 50 itself, has many times stated that notification under it would be revocable. He suggests that every time the Government says that 'as a matter of policy' they will not withdraw the notification 'they implicitly confirm that, in law, they could withdraw it—and they could'. He also refers to other opinions supporting his view:

If you want a definitive source, do not look at me, listen to the President of the European Council, who has said so on the record. If you want a definitive EU legal view, and this would be an EU legal question if it were ever tested, try the present head of the Council's legal service or the one who advised me when I was writing the wretched thing. Just a point of clarification: it is revocable.⁶¹

[The 'Three Knights' opinion on Article 50](#), published by the law firm Bindmans shortly before the Lords considered the Bill (see section 3.8 below) puts forward a number of arguments in favour of being able to revoke or suspend an Article 50 notification. Several of these do not rely on their main contention that an Act of Parliament is required at the end of the negotiations, and are summarised in the box below.

⁵⁹ Martin Wolf, [Britain plays with fire over Brexit](#), Financial Times, 7 March 2017

⁶⁰ 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

⁶¹ [HL Deb 7 March 2017 c1281](#)

Box 1: Summary of selected arguments on suspending or revoking Article 50 notification from the 'Three Knights' opinion

Inferences from the text of Article 50

- The use of the word 'intention' in Article 50(2), and the present tense 'which decides', rather than 'has decided', allows for the possibility that a Member State may change its decision and, therefore, its intention.
- Article 50 does not expressly prevent revocation of a notice of withdrawal.
- Article 50(5) addresses the situation of a Member State which has already withdrawn from the Union but later changes its mind and asks to rejoin. The fact that there is no comparable provision for a Member State that changes its mind prior to withdrawing tends to indicate that no particular formalities apply: such a Member State simply remains within the Union.

Purpose of Article 50

Article 50 is a mechanism for voluntary withdrawal from the Union – not expulsion of a Member State. The two-year cut-off is to prevent disagreements within the EU from preventing a Member State leaving if it wishes to do so.

Fundamental principles and aims of the EU

Where a Member State has legitimately reconsidered its decision to withdraw, its forced expulsion would be contrary to the principle of solidarity and the fundamental European Union citizenship rights and status of nationals of that Member State who, until departure of the Member State, are also citizens of the European Union.

Change in circumstances

Article 50 must be read to allow for the possibility of a change in circumstances within the two-year negotiating period. Interpreting Article 50 restrictively, to preclude the option of a Member State changing its mind if certain conditions are not fulfilled, would mean that the Member State would be expelled from the Union even if it triggered economic meltdown in that State, even if it were in the midst of an unexpected global crisis, and even if there had been a change of government following an election fought on whether the Member State should remain in the Union; or indeed a referendum opting to do so.

Other opinions on revocability are summarised in Commons Briefing Paper 7763, [Brexit and the EU Court](#), 14 November 2016.

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 of notification, 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, which it is necessary to resolve to determine the case before it, 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 the [CILFIT case](#)).

[Litigation has begun](#) 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.

3.3 Government commitment and Lords' new clause compared

What has the Government promised?

In her [Lancaster House speech](#) on 17 January 2017, the Prime Minister announced 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 was a new commitment: most treaties other than EU Treaties and tax treaties do not require a vote or even a debate in Parliament.⁶²

The Government's Brexit White Paper reiterated that the Government would put 'the final deal that is agreed between the UK and the EU' to a vote in both Houses of Parliament.⁶³

Then in the Commons Committee stage on the Bill, David Jones, Minister of State at the Department for Exiting the European Union, announced that the Government was now undertaking to hold a parliamentary vote on both the withdrawal agreement and the 'future relations' agreement, before a deal was finally concluded:

The Government have committed to a vote on the final deal in both Houses before it comes into force. This will cover both the withdrawal agreement and our future relationship with the European Union. I can confirm that the Government will bring forward a motion on the final agreement, to be approved by both Houses of Parliament before it is concluded. We expect and intend that that will happen before the European Parliament debates and votes on the final agreement.⁶⁴

Mr Jones later clarified that the text to be voted on would be 'the final agreed draft of the agreement before it was submitted to the European Parliament'.⁶⁵

The Government said that it expected and intended the vote in Parliament to take place before a vote in the European Parliament, but could not absolutely guarantee it because 'what the Commission does

⁶² See [Parliament's role in ratifying treaties](#), Commons Library Briefing 5855, 17 February 2017

⁶³ [The United Kingdom's exit from and new partnership with the European Union White Paper](#), 2 February 2017, para 1.12

⁶⁴ [HC Deb 7 February 2017 c274](#)

⁶⁵ [HC Deb 7 February 2017 c326](#)

with the information it sends to the European Parliament is out of our hands'.⁶⁶

In the Government's view, a 'no' vote would result in the UK leaving the EU without any agreement,⁶⁷ rather than any renegotiation of the agreement, and would not delay or prevent Brexit.

Main Commons amendments (withdrawn/rejected)

On the second day of the Committee stage in the House of Commons⁶⁸ - before Mr Jones's announcement – Sir Keir Starmer (Shadow Secretary of State for Exiting the European Union) moved the lead amendment on this issue. It would have prevented Ministers from concluding any proposed withdrawal agreement unless they had gained the approval of Parliament before final terms were agreed with the Commission and prior to endorsement by the European Parliament and Council:

New Clause 1

Parliamentary approval for agreements with the Union

“(1) Where a Minister of the Crown proposes to conclude an agreement with the European Union setting out the arrangements for the withdrawal of the United Kingdom from the European Union—

(a) the Secretary of State must lay before Parliament a statement of the proposed terms of the agreement, and

(b) no Minister of the Crown may conclude any such agreement unless the proposed terms have been approved by resolution of both Houses.

(2) The requirements of subsection (1) also apply where a Minister of the Crown proposes to conclude an agreement with the European Union for the future relationship of the United Kingdom with the European Union.

(3) In the case of a proposed agreement setting out the arrangements for the withdrawal of the United Kingdom from the European Union, the statement under subsection (1)(a) must be laid before the proposed terms are agreed with the Commission with a view to their approval by the European Parliament or the Council.”

But Sir Keir withdrew his amendment, as he considered that the Government's announcement about a final vote (see above) met most of his concerns.

Instead there was a vote on a slightly wider amendment, Chris Leslie's New Clause 110:

New Clause 110

Future relationship with the European Union

“(1) Following the exercise of the power in section 1, any new Treaty or relationship with the European Union must not be concluded unless the proposed terms have been subject to approval by resolution of each House of Parliament.

⁶⁶ [HC Deb 7 February 2017 c326](#)

⁶⁷ [HC Deb 7 February 2017 c271](#)

⁶⁸ [HC Deb 7 February 2017 c260 ff](#)

(2) In the case of any new Treaty or relationship with the European Union, the proposed terms must be approved by resolution of each House of Parliament before they are agreed with the European Commission, with a view to their approval by the European Parliament or the European Council.”

This was rejected by 326 votes to 293 (a majority of 33).⁶⁹

Main Lords amendment (accepted)

In the House of Lords, there was no vote on the amendments on this subject that were moved at Committee stage, as the Members concerned decided to re-draft them in the light of the debate.

But at Report stage, a record 634 Lords voted on Lord Pannick’s amendment, passing it by 366 to 268 votes (a majority of 98):

Parliamentary approval for the outcome of negotiations with the European Union

(1) The Prime Minister may not conclude an agreement with the European Union under Article 50(2) of the Treaty on European Union, on the terms of the United Kingdom’s withdrawal from the European Union, without the approval of both Houses of Parliament.

(2) Such approval shall be required before the European Parliament debates and votes on that agreement.

(3) The prior approval of both Houses of Parliament shall also be required in relation to an agreement on the future relationship of the United Kingdom with the European Union.

(4) The prior approval of both Houses of Parliament shall also be required in relation to any decision by the Prime Minister that the United Kingdom shall leave the European Union without an agreement as to the applicable terms.⁷⁰

Under this new clause, parliamentary assent would be needed for the Prime Minister to conclude a withdrawal agreement and any ‘future relationship agreement’, and also for leaving the EU without an agreement. It does not specify how that assent would be obtained, leaving it up to the Government to decide whether to use a motion or a Bill.

It is this new clause that the Commons now has to consider.

Comparison in brief

The table overleaf sets out the terms of the Government’s commitment and the Lords’ new clause side by side:

⁶⁹ [HC Deb 7 February 2017 cc329-34](#)

⁷⁰ [HL Deb 7 March 2017 c1300](#)

Government commitment	Lords' new clause
I can confirm that the Government will bring forward a motion on the final agreement, to be approved by both Houses of Parliament before it is concluded.	The Prime Minister may not conclude an agreement with the European Union under Article 50(2) of the Treaty on European Union, on the terms of the United Kingdom's withdrawal from the European Union, without the approval of both Houses of Parliament.
We expect and intend that that will happen before the European Parliament debates and votes on the final agreement.	Such approval shall be required before the European Parliament debates and votes on that agreement.
This will cover both the withdrawal agreement and our future relationship with the European Union.	The prior approval of both Houses of Parliament shall also be required in relation to an agreement on the future relationship of the United Kingdom with the European Union.
	The prior approval of both Houses of Parliament shall also be required in relation to any decision by the Prime Minister that the United Kingdom shall leave the European Union without an agreement as to the applicable terms.

The following table summarises some of the main differences between the Government's commitment, the Lords' new clause, and Parliament's existing statutory role in relation to treaties under the Constitutional Reform and Governance Act 2010 (CRaGA):

Procedure	Requires debate and vote?	Vote before agreement signed?	Stated effect of 'no' vote*	Includes vote if no agreement reached?
Government's commitment	Yes	Yes	Brexit with no agreement	No
Lords' new clause	Yes	Yes	'Nobody knows'	Yes
CRaGA	No	No	Commons can repeatedly delay ratification	No

* The actual implications of Parliament voting against a withdrawal agreement are not specified in either the Government commitment or the Lords' new clause.

The Government's commitment is arguably in looser terms than the new clause. It says that a motion on the final agreement is to be approved by both Houses of Parliament before it is concluded, whereas the new clause says that an agreement may not be concluded without

the approval of both Houses of Parliament. Lord Mackay of Clashfern (a former Lord Chancellor) concluded that the undertaking 'did not say that the Prime Minister would necessarily be bound by the decision of both Houses'.⁷¹

3.4 Should the commitment to a vote be enshrined in legislation?

Questions of principle

Whether or not to enshrine the commitment to a vote in legislation depends on issues including whether one trusts the Government or wishes to introduce legal certainty for both the UK and the EU; whether one wants to guard against a change of circumstances; and whether one considers that a legislative requirement will bind the Government's hand more than a political commitment – particularly if the negotiations continue right up to the two-year point.

Although this is not a direct comparison, a recent Government commitment to hold a debate on the floor of the House on the EU-Canada free trade agreement (CETA) before the European Parliament voted on it was not met (the debate was held instead in European Committee).⁷²

Comparison with other treaties

Either would go further than is normal for treaties.

Under the Constitutional Reform and Governance Act 2010 (CRaGA) there is no legal requirement for a debate or vote on treaties at any stage. Instead, Parliament is given the opportunity to resolve that a signed treaty laid before it should not be ratified. But it has never yet done so – nor even held a debate or vote on such a motion.⁷³

As section 4 below explains, the UK Parliament has not had a statutory power to approve any of the major EU Treaties or Treaty amendments on their conclusion by EU governments, although UK ratification has involved an Act of Parliament in each case to give them legal effect.

The closest the UK Parliament has come to a 'meaningful' vote in the sense of the Lords amendment was in 1971, when the then Prime Minister, Edward Heath, said Parliament would decide whether to proceed with the UK application to join the then European Economic Community (EEC) on the basis of the terms negotiated. That decision was made in October 1971 on a Government motion to approve its 'decision of principle to join the European Communities on the basis of the arrangements which have been negotiated'.

The European Union Act 2011 gave Parliament statutory powers to approve certain EU Treaty amendments or EU acts before the

⁷¹ [HL Deb 7 March 2017 c1277](#)

⁷² See [CETA: the EU-Canada free trade agreement](#), Commons Library Briefing 7492, 3 February 2017

⁷³ See [Parliament's role in ratifying treaties](#), Commons Library Briefing 5855, 17 February 2017

Government could agree to them at EU level. However, this has sometimes resulted in Parliament having to pass an Act of Parliament so that the Government can approve relatively insignificant EU proposals in the Council.

Commons and Lords views

Sir Keir Starmer accepted the Government's announcement as an alternative to his proposed new clause. He said the commitment was a 'huge and very important concession', and that it 'meets in large part everything I have been driving at in new clause 1'.⁷⁴ He therefore did not press his amendment to a vote.

However, Sir Keir, Alex Salmond, Kenneth Clarke and others said that it would be better if the Government set down its undertaking in writing.⁷⁵ One way of doing so would be an amendment to this Bill.

Other Members were less convinced that the Government's announcement added much. For instance, Owen Smith said:

I disagree that the Government have made a substantive concession today. I confess that I am far less sanguine than some of my right hon. and hon. Friends about that. It does not feel to me that we have moved much beyond where we were in the Lancaster House speech.⁷⁶

David Jones said he had given a serious commitment, which should be accepted as such, so there was no need for a further amendment.⁷⁷

Lord Pannick, speaking during the Lords Committee stage, argued that:

A political promise made by the Prime Minister in good faith is no substitute for an obligation in an Act of Parliament. On a matter of this importance, it is vital to ensure that there is a clear, binding obligation on the Government to return to Parliament at a defined time.⁷⁸

Viscount Hailsham added that statutory assurances stand against changes in circumstances such as Prime Ministers leaving, Parliaments changing and Governments ceasing to exist.⁷⁹

And Baroness Hayter suggested that Parliament should have a legislative requirement on the exit deal to match the European Parliament's involvement.⁸⁰

Later, during the report stage, Lord Oates argued that

If the Government are genuine in the commitment they have given on these matters, they should have no problem accepting the amendment. If they are not willing to do so, it will call into question the sincerity of their commitment and only strengthen the argument to pass this amendment into law.⁸¹

⁷⁴ [HC Deb 7 February 2017 cc265-6](#)

⁷⁵ [HC Deb 7 February 2017 cc266, 268 and 305](#)

⁷⁶ [HC Deb 7 February 2017 c307](#)

⁷⁷ [HC Deb 7 February 2017 c272](#)

⁷⁸ [HL Deb 1 March 2017 c903](#)

⁷⁹ [HL Deb 1 March 2017 c921](#)

⁸⁰ [HL Deb 1 March 2017 c922](#)

⁸¹ [HL Deb 7 March 2017 c1256](#)

Baroness Kennedy of The Shaws argued that the legislation at the end of the negotiations was necessary because of the Supreme Court's conclusions in the [Miller case](#):

In that case, the Supreme Court's principal conclusion was that primary legislation is required to authorise the UK's withdrawal from the European Union. I make it clear that this Bill is a notification Bill; it is not an authorisation Bill. It does not authorise withdrawal from the European Union. What it does is to notify other European Union members that we are in a process of negotiation. The withdrawal must come back before this Parliament.⁸²

Lord Lisvane however cautioned that regulating parliamentary proceedings by statute 'generally ends in some sort of tears':

A question of whether the outcome met the requirements of the legislation could be resolved only by the courts, and that might not be a welcome result.⁸³

Lord Pannick took account of this when re-drafting his amendment, which now 'allows the Government to decide what would be the best means of seeking and obtaining approval from both Houses'.⁸⁴

Lord Howard of Lympne nevertheless argued that 'if we put the [new clause] on the face of the statute, it will become justiciable ... just think of the potential for arguing that the Motion approved by one House or the other did not quite match up to this or that interpretation of the proposed new clause'.⁸⁵

Dominic Grieve, a former Attorney General, suggested that it could be difficult to draft language that would cover 'a whole series of conditionalities' and that would not fetter the Government's discretion to reach a deal if negotiations with the EU ran 'until the 11th hour, 59th minute and 59th second' before the negotiating deadline expired.⁸⁶

The Archbishop of York considered that the new clause amounted to 'the intrusion of Parliament into the negotiation processes ... in such a way that it could prevent any deal ever being reached'.⁸⁷ He argued that it 'shows no awareness as to the realities presented by the Article 50 timeframe', suggesting that he agrees with the Government that the UK would have to leave after two years regardless.⁸⁸ (However, the same could be argued about the Government commitment.)

3.5 What if Parliament rejects the withdrawal agreement?

What would happen if either or both Houses voted against a proposed withdrawal agreement? Should the Government seek to renegotiate?

⁸² [HL Deb 7 March 2017 c1270](#)

⁸³ [HL Deb 1 March 2017 c920](#)

⁸⁴ [HL Deb 7 March 2017 c1251](#)

⁸⁵ [HL Deb 7 March 2017 c1284](#)

⁸⁶ [HC Deb 7 February 2017 cc304-5](#)

⁸⁷ [HL Deb 7 March 2017 c1264](#)

⁸⁸ [HL Deb 7 March 2017 c1264](#)

Could a 'no' vote delay or even prevent Brexit? Or would it mean the UK leaving the EU with no agreement?

The only certainty is that the EU would not be able to prevent the UK from leaving the EU without an agreement.

These questions apply both to a vote under the Government's commitment and one under the Lords' new clause. Neither specifies the full implications of a no vote.

The risk of a 'no' vote may of course be mitigated if Parliament feels it has been appropriately involved during the negotiations.⁸⁹

Government: 'deal or no deal'

The Government's view is that any vote would be for 'deal or no deal'. If the House of Commons voted against the withdrawal agreement, 'it would be highly unlikely that it would ever be put to the European Parliament'.⁹⁰ Mr Jones explained that if there were no agreement at all (which he described as 'an extremely unlikely scenario'), then 'ultimately we would be falling back on World Trade Organisation arrangements', as the Prime Minister had previously made clear.⁹¹ But of course this is not just about trade: it would also mean no agreement about residence rights, EU agencies, financial liabilities and the whole host of other negotiating topics.

The Foreign Affairs Committee will publish its Report *Article 50 negotiations: Implications of 'no deal'*, on 12 March 2017.

Renegotiate?

Mr Jones rejected the idea of renegotiating after a 'no' vote. He declared he could not 'think of a greater signal of weakness than for the House to send the Government back to the European Union saying that we want to negotiate further', describing it as the 'surest way of undermining our negotiating position and delivering a worse deal'.⁹²

Baroness Deech also argued that renegotiation would be unlikely to lead to a better deal:

Can it honestly be imagined that if one or other House, whether through approval or an Act of Parliament, goes back to Europe in just under two years' time and says, "We don't like the deal", the other 27 will say, "Oh dear. Here is a much better one", or, "Let us, all 27, now agree to extend the negotiation time"? I do not think so.⁹³

But she recognised that much of the argument turns on whether Article 50 notice is revocable or not.

Chris Leslie, whose amendment on this was lost on a vote, argued to the contrary, that it would strengthen the Government's negotiating

⁸⁹ See for example Michael Bowman, Director of the University of Nottingham Treaty Centre, [written evidence to the Joint Committee on the Draft Constitutional Renewal Bill](#), 2008, p341

⁹⁰ [HC Deb 7 February 2017 c271](#)

⁹¹ [HC Deb 7 February 2017 c272](#)

⁹² [HC Deb 7 February 2017 c273](#)

⁹³ [HL Deb 7 March 2017 c1276](#)

hand to be able to say 'Parliament is really keen for a better deal'. He rejected the Government's 'Hobson's choice, take-it-or-leave-it style votes' as 'not acceptable and not good enough for Parliament'.⁹⁴

Sir Keir Starmer considered that the Government's promise answered the 'great fear' that the vote would be only on an already concluded deal.

However, if a 'no' vote before signature did not lead to renegotiation, there would be no advantage over a vote between signature and ratification.

Blocking Brexit?

Lord Forsyth of Drumlean considered that requiring the approval of Parliament for a proposed withdrawal agreement would amount to blocking Brexit:

This effectively gives this House, and the House of Commons, a veto on Brexit. It gives us the ability to prevent us from leaving the European Union, despite the fact that we have had the biggest vote in our history from people requiring that. It would be immensely destructive to the reputation of Parliament and of this House.⁹⁵

Baroness Deech argued similarly:

Plainly, the amendment requiring a second parliamentary assent is designed to enable Brexit to be blocked in the mistaken belief that the EU will roll over. If this amendment is enacted, it is more likely to lead to no deal at all. In practice, it is unworkable and defies the result of the referendum.⁹⁶

But Baroness Ludford sought to rebut these assertions:

There is no basis whatever for the assertion, made variously by the noble Lords, Lord Lawson and Lord Forsyth, and the most reverend Primate the Archbishop of York that it would give this House a veto. Given that the Prime Minister offered to give approval by both Houses of Parliament, presumably she knows how that would work and has shared it with the Government. It is for the Government to deal with that process, which could, as other noble Lords have mentioned, be avoided if there was primary legislation because then the rules would be clear.⁹⁷

Again the revocability question is central. A 'no' vote could block Brexit only if notification could be withdrawn. Otherwise the UK would leave without agreement two years after notifying.

Uncertainty?

Lord Pannick admitted that he did not know what would happen if Parliament voted no – and that that was the point:

What happens? Nobody knows what will happen: that is the whole point of the difficulty that we face in 21 months' time. I do not know what will happen. The noble Lord does not know what will happen. I am saying to the House that it is essential that

⁹⁴ [HC Deb 7 February 2017 c302](#)

⁹⁵ [HL Deb 7 March 2017 c1260](#)

⁹⁶ [HL Deb 7 March 2017 c1277](#)

⁹⁷ [HL Deb 7 March 2017 c1293](#)

Parliament has an opportunity, guaranteed by legislation, to address the circumstances at the time.⁹⁸

Disagreement between the two Houses

There was concern in the House of Lords over what would happen if the Commons voted yes but the Lords voted no.

Lord Pannick said that it was the Government's idea to give both Houses a vote, and that if they were concerned about disagreement between the two Houses, they could amend his new clause:

I will also address a point that has been raised with me by some noble Lords, about what happens if the two Houses disagree when the agreement, or lack of agreement, is put to Parliament. It is of course the Prime Minister who has decided that the terms of our withdrawal are so important that the approval of both Houses of Parliament should be required. The White Paper says, at paragraph 1.12:

"The Government will ... put the final deal that is agreed between the UK and the EU to a vote in both Houses of Parliament".

The Minister, Mr David Jones, stated in the House of Commons in Committee that,

"the Government will bring forward a motion on the final agreement, to be approved by both Houses of Parliament before it is concluded".—[Official Report, Commons, 7/2/17; col. 264.]

In any event, if this House were to agree this amendment today, it is open to the Government, if they are concerned about this issue, to seek to amend this proposed new clause in the Commons next week to address what happens if the two Houses were to disagree.⁹⁹

Baroness Ludford added that the Opposition would be happy to work with the Government on the form of words to make it 'absolutely crystal clear' that the Commons had supremacy.¹⁰⁰

A close parallel is the CRaGA procedures for ratifying treaties. Here disapproval by the House of Lords has only a limited statutory effect, and only operates once, whereas the Commons can disapprove ratification repeatedly, thus effectively blocking ratification.

Effect of any later vote against ratification

Under the CRaGA procedures any vote against ratifying a signed withdrawal agreement would have statutory effect – but the most that could happen is that the Commons could repeatedly block ratification. The agreement could not be renegotiated at that stage.

3.6 What if the European Parliament rejects the withdrawal agreement?

Under Article 50 TEU the consent of the European Parliament (EP) is needed before the Council can conclude a withdrawal agreement. The

⁹⁸ [HL Deb 7 March 2017 c1254](#)

⁹⁹ [HL Deb 7 March 2017 c1252](#)

¹⁰⁰ [HL Deb 7 March 2017 c1293](#)

EP can approve or reject the final text by a simple majority vote but cannot itself amend it.

MEPs have in the past used their veto in international negotiations when the European Commission and the Member States have not involved them 'properly' in the negotiation process.¹⁰¹

In the case of Brexit, EU leaders have agreed to brief the EP before and after Council meetings at which ministers discuss the negotiating mandate of the EU-27.¹⁰² The EP's Brexit representative, Guy Verhofstadt, will participate in the preparatory meetings of the European Council. He will also "work closely with the Chair of the Constitutional Affairs committee, Danuta Hübner (EPP, PL), and other committees wherever necessary to shape the European Parliament's negotiating position".¹⁰³

But Mr Verhofstadt will not be allowed to join the EU's negotiating team, and he has threatened that MEPs could vote down the final withdrawal agreement if EU leaders do not change their minds about this. Agata Gostyńska-Jakubowska of the Centre for European Reform, thinks that "Threatening to vote down the final withdrawal deal just to make a point about inter-institutional co-operation could undermine the European Parliament's public standing".¹⁰⁴

If the EP rejects the withdrawal agreement, for whatever reason, it is possible that negotiations could continue until a text acceptable to the EP can be concluded. This will depend on how much time is left under the Article 50 timetable of two years from notice of withdrawal; or, if the two years are already up, on agreement by the other 27 Member States to extend the negotiating period. If there is no time left and no agreement to extend, the UK may leave without a withdrawal agreement.

3.7 Should Parliament have to approve leaving the EU without an agreement?

Government view

In response to a question about whether there would still be a vote if the Government was unable to reach a deal, Mr Jones said that it was 'hard to see what meaningful vote could be given if there had been no deal at all', but in these circumstances the 'absence of an agreement would be the subject of statements to this House'.¹⁰⁵

¹⁰¹ eg the EP blocked the US-EU agreement on the processing and transfer of financial data for the purposes of terrorist finance tracking (the SWIFT agreement).

¹⁰² [Informal meeting of the Heads of State or Government of 27 Member States, as well as the Presidents of the European Council and the European Commission Brussels](#), 15 December 2016

¹⁰³ European Parliament Information Office in London, [Brexit- what next?](#)

¹⁰⁴ Centre for European Reform, [Parliamentarians in Brexit talks: Bulls in a china shop?](#) Agata Gostyńska-Jakubowska, February 2017

¹⁰⁵ [HC Deb 7 February 2017 c272](#)

Lords' new clause

Perhaps the most controversial aspect of the Lords' new clause is the fourth paragraph, requiring parliamentary approval 'in relation to any decision by the Prime Minister that the United Kingdom shall leave the European Union without an agreement as to the applicable terms'.

Lord Pannick's argument is that such a decision would have at least a similar degree of impact on rights to a withdrawal agreement, and so parliamentary approval is required.

Baroness Kennedy of The Shaws summarised her view of the relevance of the [Miller case](#):

The principle is very straightforward. It is that when it comes to our rights, Parliament makes those decisions. That is why when the process comes to the end and there is a deal on the table it has to be voted upon by Parliament but, if there is no deal, that too becomes an issue. It is not good enough for Ministers of Government to say that we just walk away as though that has no consequences. Walking away also has consequences for the rights of citizens in this country. That is why it is a matter for Parliament. That is why this proposed new clause is so important.¹⁰⁶

Lord Finkelstein intervened to suggest that her interpretation assumed that Article 50 authorisation is revocable, which was not supported by the Miller judgment:

Was the court's judgment not based on the idea that this was authorisation? The court would have not have ruled as it did if it had not assumed that this was not unilaterally revocable. Both sides in the court case, including the noble Lord, Lord Pannick, said that it is not unilaterally revocable, and the court ruled specifically because of that that authorisation is delivered by triggering Article 50. If it had not done so, it would not have ruled as it did; therefore, it is crucial to the understanding that this is authorisation.¹⁰⁷

Some arguments on the revocability issue are set out above.

Of course there are many different circumstances that might lead to 'no deal', not just a decision by the Prime Minister.

Effect of voting against leaving without an agreement?

What would happen if Parliament voted against leaving the EU without an agreement? Would it somehow revive the negotiations on an agreement? Or would the UK leave the EU anyway, under the operation of the two-year cut-off in Article 50(3)? Would the answer be different if it was the EU that had rejected the terms of a proposed withdrawal agreement?

The Exiting the EU Minister Lord Bridges of Headley argued that 'denying the Prime Minister the ability to walk away from the negotiating table, as proposed new subsection (4) would do, would only

¹⁰⁶ [HL Deb 7 March 2017 c1270](#)

¹⁰⁷ [HL Deb 7 March 2017 c1270](#)

incentivise the European Union to offer us a bad deal'.¹⁰⁸ He added that it was totally unclear as to 'what happens if the House says no to walking away'. Underlying this was the Government's position that an Article 50 notification will not be revoked, so 'any question of whether notification under Article 50 is legally reversible is irrelevant'.¹⁰⁹

Lord Howard suggested that a 'no' vote would put the Government in an 'absurd position':

we have still not yet had an answer to the fact that subsection (4) of the proposed new clause in Amendment 3 would facilitate repeated coming and going between Parliament, Government and the European Union. The Government would say, "We haven't done a deal, and we propose to leave"; then, according to proposed new subsection (4), Parliament could say, "Go back to the table". That could happen again and again, which would put our Government in an absurd position.

For the reasons that I have tried to express, the amendment is totally unnecessary. It is also a recipe for conflict between this House and the other place, and between Parliament and the courts.¹¹⁰

Lord Lawson argued that this provision would give Parliament the power to prevent Brexit, with unacceptable consequences:

the mischief of subsection (4) of this proposed new clause is that it would not merely give Parliament the power to reject a bad deal but enable it to prevent Brexit altogether by refusing to allow the UK to leave the European Union without an agreement. This not only is in diametric opposition to the Pannick thesis on which the Bill rests but, more importantly, would be an unconscionable rejection of the referendum result that would drive a far greater wedge between the political class and the British people than the dangerous gulf that already exists.

It might be argued that all Parliament would be doing would be instructing the Government to go back to Brussels and accept whatever agreement, however bad, the 27 were prepared to offer. That is clearly unacceptable, and indeed constitutionally improper. The only practical effect of subsection (4) would be to create a political crisis, causing highly damaging uncertainty to business and the economy, which could in practice be resolved only by a dissolution of Parliament and a general election—something the Opposition can always try to achieve, if that is what they wish, without this clause, simply by moving and carrying a vote of no confidence in the Government. This mischievous proposed new clause, masquerading as an assertion of parliamentary sovereignty, deserves to be rejected out of hand.¹¹¹

¹⁰⁸ [HL Deb 7 March 2017 c1297](#)

¹⁰⁹ [HL Deb 7 March 2017 c1298](#)

¹¹⁰ [HL Deb 7 March 2017 c1284](#)

¹¹¹ [HL Deb 7 March 2017 c1273](#)

3.8 Is an Act of Parliament required at the end of the negotiations?

The 'Three Knights' opinion

[The 'Three Knights' opinion](#), prompted debates about whether further legislation would be needed to approve the terms of a withdrawal agreement, or to leave the EU without one.

The opinion was commissioned by the crowd-funded campaign group The People's Challenge (one of the parties that supported Gina Miller in the recent Article 50 litigation). It was signed by a group of five QCs, three of whom have knighthoods (hence the soubriquet):

- Sir David Edward KCMG PC QC (formerly a judge of the European Court of Justice)
- Sir Francis Jacobs KCMG PC QC (formerly Advocate General at the European Court of Justice)
- Sir Jeremy Lever KCMG QC (retired EU lawyer)
- Helen Mountfield QC (represented The People's Challenge in the Miller case)
- Gerry Facenna QC (represented The People's Challenge in the Miller case)

Their main conclusion is that there is a UK constitutional requirement for an Act of Parliament to give effect to a withdrawal agreement, or to authorise withdrawal from the EU without an agreement – the current Bill is not enough.

They suggest that the most effective way of ensuring this would be to amend the current Bill to make this a condition of leaving the EU – in other words making the UK's Article 50 notification conditional on such an Act being passed.

They summarise their reasoning on this as follows:

(i) it is a constitutional requirement that only Parliament can authorise the United Kingdom entering into a withdrawal agreement with the European Union, or the United Kingdom's withdrawal from the European Union in the absence of such an agreement, because that decision will affect or remove existing rights and will require domestic legal implementation;

(ii) Parliament can only know what rights of British citizens and businesses, and of nationals of other Member States lawfully resident or established in the United Kingdom, will be lost when the terms of withdrawal agreed with the European Union are known, or when it is clear that no acceptable terms can be agreed;

(iii) given the nature of the changes in the law and legal rights that will result from leaving the European Union, such authorisation by Parliament must be expressed unambiguously in primary legislation;

(iv) there is a well-established constitutional practice of legislating to require international agreements, particularly those relating to

the European Union, to be authorised by Parliament before they can be entered into by the United Kingdom and take effect.¹¹²

Points (ii) and (iii) of their summary chime with an [article by Dr Paul Daly](#), Senior Lecturer in Public Law at the University of Cambridge, in which he suggests that a general Bill (like the current one) is not enough to deprive individuals of rights:

I am not confident that a bill in such general terms would be sufficient to account for the rights that would inevitably be removed by withdrawal from the EU. If one of the problems with using the prerogative to trigger Article 50 is that it would inevitably deprive individuals of rights, it is difficult to see how a general statutory power would avoid the same problem. Common law courts are just as wary of broad statutory powers as they are of broad prerogative powers.

Lord Hope, in the Lords Second Reading debate on the Bill, also cautioned against thinking that the Bill on its own would give the Government all the parliamentary authority they need to leave the EU:

Let the Government have their Bill, I say. However, I would caution the Government against thinking that by introducing this legislation they have done all that the Supreme Court's decision in Miller requires. Brevity is all very well but much more lies ahead. If passed, the Act will give the Government all the authority they need to give notification of the UK's intention to withdraw from the EU under Article 50. That is what the Bill says. However, the notification does no more than start the Article 50 process. The article makes it clear that the process involves two more stages, both mentioned in the article: negotiation, and the concluding of an agreement between the Union and the state in question. The Bill says nothing about these two further stages. I do not think it needed to give the Government the authority to negotiate, as none of the rights of the people who have written to us will be affected or lost at that stage. However, the concluding of an agreement is another matter entirely. The Bill does not say anything at all about that stage of the process.¹¹³

Of course there is very likely to be specific legislation – the Great Repeal Bill and others – addressing specific rights. However, the Three Knights' opinion considers that that might not be enough to meet the constitutional requirement – partly because there are some EU rights that could not be transferred into or removed by domestic legislation (for instance rights enjoyed by British citizens in the UK but enforceable against other Member States).¹¹⁴

The Three Knights' opinion concludes by arguing that without legislation approving a withdrawal agreement (or withdrawal without an agreement) a domestic 'constitutional requirement' remains unsatisfied. Accordingly, the Article 50 notification – which must be 'in accordance with [the withdrawing state's] own constitutional requirements – withers. Here they rely largely on the argument that 'Article 50 cannot have the effect of ejecting a Member State from the

¹¹² Para 35

¹¹³ [HL Deb 20 February 2017 c22](#)

¹¹⁴ They give examples of different categories of such rights in the [Annex to the Written Case of the Pigney Respondents in the Supreme Court](#), p MS12509ff

European Union contrary to its own constitutional requirements' or against its will (see section 3.2 above).

Critiques

The Government disagrees, arguing that the requirements of the Miller judgment are entirely fulfilled by the Bill:

The Supreme Court ruled that because withdrawal from the EU involves removing a source of domestic law in the UK, and because of the far-reaching effects of the European Communities Act, the authority of primary legislation is needed before the Government can decide to give notice under Article 50. The Supreme Court did not rule that anything further is required to satisfy our constitutional requirements.¹¹⁵

Two critiques of the Three Knights opinion argue that not only is it not supported by the Miller judgment, but even that it directly contradicts Miller.

[Professor Mark Elliott](#), Professor of Public Law at the University of Cambridge and Legal Adviser to the House of Lords Constitution Committee, argues that the Miller judgment requires the assumption that triggering Article 50 will (or at least could) lead inevitably to losing rights. But in his view the Three Knights opinion holds that triggering Article 50 cannot remove rights:

As is well known, Lord Pannick's 'bullet' metaphor — and the line of thinking for which it stood — was central to the decision in Miller...

The crucial issue, as far as the majority reasoning in Miller is concerned, is that ... a causal link exists in the first place, such that the natural consequence (irrespective of whether it is a consequence that can be averted by supervening events) of triggering Article 50 is the loss of EU law rights and of EU law as a source of UK law. Indeed, if no such link existed, the whole argument in Miller would have collapsed, and the triggering of Article 50 would have been nothing more than the initiation of a negotiation process that could result in no loss of rights absent primary legislation at the end of that process. But that, of course, is not how the majority saw the effect of giving notice under Article 50: rather, it said that doing so had 'fundamental and irreversible consequences'.

For that reason, it is questionable whether the opinion of Sir David Edward *et al* can withstand the majority judgment in *Miller*, given that the former denies Article 50 notification an effect that is central to the reasoning contained in the latter. If *Miller* is right — or if we at least accept that it represents the law, as we now surely must — then it is hard to see how the 'Three Knights' can be correct as well. One cannot have one's cake and eat it.

Joshua Rozenberg's 17 February comment, '[Pro-cake and pro-eating it](#)', similarly argues that 'If parliament could stop the clock at the end of the two-year period – or catch the bullet – there would have been no need for the Miller litigation'.

¹¹⁵ [HL Deb 7 March 2017 c1297](#)

[Dr Daly](#) concedes that 'it could plausibly be argued from the general context that Parliament would plainly intend [through the current Bill] to authorise the elimination of all such affected rights'.

The question of whether an Article 50 notification can be revoked is central to the arguments. One way of reading the Three Knights opinion is as an exploration of how the principles of the Miller judgment would apply if – as they argue – an Article 50 notification could be revoked.

4. Has there been a 'meaningful vote' on other EU matters?

4.1 Introduction

Since the UK joined the European Economic Community (EEC) in 1973, there have been five major EU Treaty amendment procedures in the UK Parliament. These concerned the Single European Act and the Treaties of Maastricht, Amsterdam, Nice and Lisbon. They took account of institutional and constitutional changes, new policy developments and additional EU competences. There have also been other Treaty amendments – concerning new accessions, for example.

This section considers whether parliamentary votes on the EU Treaties and Treaty amendments were 'meaningful' in the sense of the Lords amendment.

4.2 EEC accession

In June 1971 the then Prime Minister, Edward Heath, made clear in a [statement](#) on 17 June that Parliament would decide whether to proceed with the UK application to join the then European Economic Community (EEC), based on the membership terms negotiated:

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 [...] to resolve the remaining issues in the negotiations.¹¹⁶

That decision was made in a six-day debate, which ended on 28 October 1971, on a [Government motion](#) to approve the Government's "decision of principle to join the European Communities on the basis of the arrangements which have been negotiated". Edward Heath made clear that if the Motion was not passed, the UK Government would not seek to join the EEC.¹¹⁷

But there were similar calls then for Parliament to vote on the accession agreement before it was signed.

On 20 January 1972 the Commons [debated](#) a Government amendment to an Opposition Motion which asked the House to approve its intention "to lay before the House the full and agreed English text of the Treaty when signed and the Government's proposals for the legislation required for its implementation".¹¹⁸ In other words, the Government would sign the Accession Treaty first and then put it to the House.

The Motion tabled by the eurosceptic Labour MP, Peter Shore, asked the Government, "recognising the unique character of Treaty [...], not

¹¹⁶ [HC Deb 17 June 1971 c643](#). At this point, the important matter of fisheries had not been settled.

¹¹⁷ [HC Deb 28 October 1971 c2210-11](#).

¹¹⁸ [HC Deb 20 January 1972](#).

to sign the Treaty of Accession [...] until the full text has been published and its contents laid before this House for its consideration”.

Geoffrey Rippon, who had led the UK negotiating team, said the procedure by which the Government had sought Parliament’s approval of accession had been “unique”:

All in all, I do not think Parliament in negotiations on a treaty has ever been brought so closely into the process of treaty-making as on the present occasion. So we all accept the unique character of the Treaty of Accession; I do not think anybody on either side of the House would dispute that. It is for this reason that the procedure adopted by the Government for informing and consulting Parliament and obtaining the approval of Parliament for the principle at stake has indeed been unique.¹¹⁹

The Solicitor-General, Geoffrey Howe, set out why the vote in October 1971 had been an important vote for Parliament:

It is in that setting, a constitutional political setting, rather than one of pure law, that the vote on 28th October is and can properly be regarded as a decisively important expression of the will and of the support of Parliament. Although, quite rightly, it has been pointed out that legislation and ratification are still necessary, the vote of this House on 28th October is, as everyone recognised at that time, a fundamental fortification for my right hon. Friends when they come to sign the Treaty of Accession on Saturday.¹²⁰

The Government amendment was passed. The Government signed the Accession Treaty on 22 January 1972 and the [European Communities Bill 1972](#) paved the way for UK ratification of the Accession Treaty and entry into the EEC.

For the anti-Marketeer Conservative MP, Enoch Powell, the October 1971 vote had not been meaningful enough. He told the Commons during the debate on the Government’s renegotiated terms of entry in 1975 (see below): “the full-hearted consent of Parliament has never been given to this measure” (EEC membership),¹²¹ and “the legislative consequences were never until 1972 placed before the judgment of hon. Members”.¹²² He thought the guillotine motion on the Bill had also reduced Parliament’s role: “The Bill itself was passed at all only by reason of a guillotine motion, carried by a majority of 11. So not even Parliament in its legislative capacity, doing its work in its proper way, has yet given its full-hearted consent”.¹²³

4.3 1974-75 renegotiation of UK terms of entry

The Labour Party’s [general election manifesto February 1974](#) committed Labour to providing a referendum on whether Britain should stay in the EEC on renegotiated terms, or leave.

¹¹⁹ [HC Deb 20 January 1972 829 c704](#)

¹²⁰ Ibid, c 799.

¹²¹ [HC Deb 09 April 1975 c 1295](#).

¹²² Ibid, c 1297.

¹²³ Ibid, c 1296.

The main achievements of the renegotiation were reached in December 1974 and March 1975. The new terms were agreed by the Cabinet on 18 March, and on 18 March Harold Wilson set out to the Commons what had been asked for and what had been achieved at the renegotiation.¹²⁴ A White Paper on Membership of the European Community (Command No. 5999) was debated on 9 April 1975 on a motion to approve the Government's recommendation to continue in the EEC. The Commons approved the Government's recommendation by 396 to 170¹²⁵ and on 22 April 1975 the Lords approved continued membership by 261 votes to 20.

The vote was not 'meaningful' in the sense of the present Lords amendment, but several Members thought it had great moral weight, as the electorate would look to Parliament for a lead. One Member, Peter Kirk, thought that those who supported the motion were in effect "taking a pledge to campaign to see that the vote that takes place in this House is repeated by the vote that takes place in the country" (c1265).

4.4 Comparison between 1970s votes and the present

There were major differences between the two votes in the 1970s, as well as some similarities with the present situation:

- The October 1971 vote on EEC accession in principle was not "meaningful" in the sense of the Lords amendment, as it had no statutory basis. But as there was no referendum on joining the EEC, the parliamentary vote alone was crucial. Had Parliament voted against the principle of joining the EEC, the Government would not, presumably, have pursued its membership application and the status quo would have prevailed.
- The 1975 vote on the Government White Paper was not "meaningful" in the sense of the Lords amendment, although it had some political weight; it also preceded a referendum on membership on the basis of a renegotiated deal. Had both Parliament and the electorate voted to leave, or if Parliament had supported membership but not the electorate, it is not clear how either outcome would have been addressed – there was at this time no Article 50 procedure for leaving the EEC. The Government's view was that it would negotiate its exit from the EEC.
- In the current situation a majority of the electorate that participated in the referendum has already voted to leave the EU. The Government has accepted this as binding on it, but Parliament is demanding an Act of Parliament on the terms of

¹²⁴ [HC Deb 18 March 1975 cc1456-80](#).

¹²⁵ See debates on European Community (Membership), [HC Deb 7 April 1975](#), [HC Deb 8 April 1975](#) and [HC Deb 9 April 1975](#).

exit. This is more than the parliamentary “consideration” Peter Shore asked for in 1972.

4.5 Other Treaty amendments

The Single European Act and the Maastricht, Amsterdam, Nice and Lisbon Treaties were not preceded by binding votes before they were signed. However, in each case legislation was needed before ratification so that the UK would meet its proposed new treaty requirements, and this legislation was in each case passed. Parliament succeeded in amending the Maastricht Treaty bill to give it more powers of oversight of Economic and Monetary Union and UK fulfilment of economic criteria. The issue of whether the UK would sign up to the ‘Social Protocol’ in ratifying the Treaty gave rise to a vote of confidence in the Government’s European policy.

If any of these European Community and European Union Amendment Bills had not been passed, the UK would not have been in a position to ratify the Treaties whose effects they sought to give effect to.

4.6 Parliament’s powers under the European Union Acts in 2008 and 2011

Acts of Parliament are now also necessary for a wide range of EU measures, many of which are relatively insignificant.

The [European Union \(Amendment\) Act 2008](#), passed under the previous Labour Government, set out specific parliamentary procedures to be completed before EU Treaty change could be approved in the UK. Amendments to the EU Treaties agreed using the Ordinary Revision Procedure¹²⁶ had to be approved by an Act of Parliament (in practice this was already the case). For the simplified Treaty revision procedures, it set out a process for obtaining parliamentary approval by means of a motion agreed by each House approving the Government’s intention to support the adoption of a draft decision. This applied to eight Treaty Articles.

But the [European Union Act 2011](#), which gave effect to a 2010 Conservative election manifesto pledge to “restore democratic control”, gave Parliament unprecedented powers to reject certain EU proposals or Treaty changes that would transfer powers from the UK to the EU, and prohibited the Government from agreeing to or voting for them in the EU Council.¹²⁷

This Act stipulated that an Act of Parliament had to be passed before a ‘ratchet clause’ or a *passerelle* (bridging clause) in the EU Treaty could be used.¹²⁸ It lists Treaty Articles requiring an Act of Parliament after

¹²⁶ Involving an Intergovernmental Conference of Member State leaders, or a Convention of representatives of national parliaments as well as representatives of governments, the European Parliament and the Commission.

¹²⁷ It also provided for a referendum in certain circumstances.

¹²⁸ The Lisbon Treaty introduced new Treaty revision procedures which do not require the traditional amendment and ratification methods. The so-called ratchet clause’ allows Treaty provisions in the main EU policy areas to be changed by a unanimous decision of the European Council and the approval of Member States. The *passerelle*

their adoption by the EU Council and Articles requiring an Act of Parliament before the Government can agree to their adoption in the Council. Twelve Treaty Articles require an Act of Parliament and a referendum.

Article 352 TFEU, the catch-all or 'flexibility clause', is in a general category of Articles needing enhanced parliamentary approval. This Article allows the EU to adopt measures to attain an EU objective within its areas of competence where there is no explicit Treaty base for the EU to act. Section 8 of the 2011 Act prohibits the Government from supporting a proposal made on the basis of Article 352 TFEU unless various sub-sections have been complied with; one of these requires an Act of Parliament.

There is a certain irony, in the context of the present Lords demand for a meaningful vote, that the 2011 Act has resulted in Parliament having to pass an Act of Parliament before the Government could approve some relatively insignificant EU decisions made under Article 352, such as the participation of the Former Yugoslav Republic of Macedonia as an observer at the European Union Agency for Fundamental Rights, access to the historical archives of the European institutions from a single location at the European Union Institute in Florence, and the 'Europe for Citizens' programme (promoting remembrance of Europe's history) from 2014 to 2020.

The European Scrutiny Committee commented in its report on the EU Archives draft that the need for an Act of Parliament was "consistent with a faithful interpretation of [section 8], even if the consequence is that an Act of Parliament will be required before the Government can agree to this unimportant proposal in the Council".¹²⁹

allows for changes to be made to EU voting rules, replacing unanimity by qualified majority voting, without a formal Treaty amendment.

¹²⁹ [23rd Report](#), December 2012.

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