



News

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Leading EU experts advise that EU Notification of Withdrawal Bill does not disable Parliament's 'constitutional handbrake' on Brexit

The UK's most senior EU law experts, Sir David Edward, former judge of the European Court of Justice, Sir Francis Jacobs, that Court's former Advocate General, and distinguished EU lawyer Sir Jeremy Lever, have provided a written legal opinion on the constitutional role of Parliament in future decision-making on Brexit and the linked question of whether an Article 50 notice can be withdrawn after it has been given.

The 'Three Knights Opinion (https://www.bindmans.com/uploads/files/documents/Final_Article_50_Opinion_10.2.17.pdf)' is being sent to peers ahead of Monday's second reading debate of the European Union (Notification of Withdrawal) Bill 2017. It was commissioned by John Halford of Bindmans LLP for the People's Challenge, a campaigning group who supported Gina Miller's successful Supreme Court challenge to the Government's proposed use of the Royal Prerogative to commence the Brexit process.

The authoritative Opinion concludes that the 2017 Bill will allow the Prime Minister to notify the UK's intention to leave the EU and to start the Article 50 process, but that actual withdrawal from the EU will need to be authorised by Parliament in a future Act, once the outcome of the negotiations, and the impact on individual and business rights, is known.

The Opinion adds that the UK's "*constitutional arrangements*" for Article 50 purposes mean that notification will effectively be conditional on Parliament subsequently authorising the UK's exit from the EU and that, under EU law, there are "*very strong arguments*" that, if Parliament decided to reject the available terms of withdrawal two years from now, the notification could be unilaterally revoked by the UK (paras 2(vi) and 48). "*Article 50 cannot have the effect of ejecting a Member State from the European Union contrary to its own constitutional requirements*", including Parliament's final decision, say the Opinion's authors (para 2(vii)).

The Opinion recommends amendment of the Bill by Parliament to provide clarity and legal certainty over the constitutional position, but concludes that a further Act of Parliament approving Brexit will be needed even if that does not happen. The Opinion draws attention to the real risk of no agreement being reached within the Article 50 negotiating period, and the constitutional requirement in those circumstances for Ministers to seek legislative consent from Parliament for the UK leaving the EU in the absence of a withdrawal agreement.

Grahame Pigney of the People's Challenge group said today:

“ On Monday the House of Lords will debate a Bill designed to surrender the Parliamentary sovereignty that was upheld by the Supreme Court only weeks ago. We hope this Opinion will help peers understand that the Bill does not have that effect, Parliament will still be able to deploy its constitutional handbrake at any time during the next two years, and the EU will be bound to respect that. This leaves open the option of withdrawing our Article 50 notice if there is no acceptable deal agreed and Parliament decides that a hard Brexit is not in the national interest. The Three Knights' Opinion is now the most authoritative view available on Article 50, short of a judgment by the European Union's own Court of Justice. It brings into sharp focus Parliament's constitutional role in protecting the national interest and the rights of businesses and millions of citizens, whatever the Government might say and whatever promises it makes about being able to negotiate an agreement with 27 other countries during the next eighteen months. ”

Notes to editors

1. The Opinion's authors are Sir David Edward KCMG PC QC, Sir Francis Jacobs KCMG PC QC, Sir Jeremy Lever KCMG QC (retired) and the QCs that acted for the People's Challenge Group in Miller, Helen Mountfield QC and Gerry Facenna QC.

- Sir David Edward QC practised at the Bar in Scotland prior to his appointment as the United Kingdom's Judge at the European Court of First Instance from 1989-1992 and subsequently Judge of the European Court of Justice from 1992 until 2004. In 2004 he returned to become a part-time judge of the Court of Session in Scotland. He is a Privy Councillor, Professor Emeritus at the University of Edinburgh and an Honorary Fellow of University College, Oxford.
- Sir Francis Jacobs QC served as the United Kingdom's Advocate General at the European Court of Justice from 1988 to 2006, having previously combined an academic career as Professor of European Law at the University of London with practice at the Bar. He is the President of the Centre of European Law at King's College London and a visiting professor at the College of Europe. He was appointed a Privy Councillor in December 2005 and continues to practice at the Bar.
- Sir Jeremy Lever QC is one of the most senior and respected figures in EU and competition law. During his more than fifty years at the Bar he acted in many of the leading cases in the fields of European law, competition law, and regulatory public law, including by or on behalf of the UK Government, the European Commission and the European Parliament. He is a Distinguished Fellow and Senior Dean of All Souls College, Oxford and in 2003 was knighted for services to European Law.

2. The first part of the Opinion is grounded in the constitutional principles at issue in the Miller case. The Opinion develops the Supreme Court's principal conclusion that primary legislation is required to authorise the UK's withdrawal from the EU. It states that the current Notification Bill does not authorise withdrawal as *“it is a constitutional requirement of the United Kingdom that Parliament must expressly authorise the terms of any withdrawal agreement between the United Kingdom and the European Union, or authorise withdrawal from the European Union in the absence of such agreement, in an Act of Parliament. That is because it is only Parliament that can give legal effect to the removal or conferral of individual rights that necessarily follow from that decision”* (Para 23). The Opinion adds that

“[m]eaningful Parliamentary decision-making cannot be achieved by Parliament authorising exit from the European Union, two years in advance, on as yet unknown terms” (para 2(ii)).

3. Although the Government has said that the terms of any deal will be the subject of a Parliamentary vote *“before it comes into force”*, this falls short of the UK’s constitutional requirements for withdrawal from the EU, which includes authorisation by Act of Parliament (para 4(ii)). The Opinion explains that *“Parliamentary sovereignty and the principle of legality require Parliament expressly to authorise withdrawal from the European Union on the terms of withdrawal agreed with the European Union, or to authorise withdrawal if no acceptable terms can be agreed. Given the fundamental changes in the law and legal rights that will result, such authorisation must take the form of primary legislation. Parliamentary resolutions, without legislation, cannot change domestic law, nor amend or abrogate existing rights...”* (para 2(iii)).

4. The Opinion discusses why the Bill is legally inadequate to authorise withdrawal: *“[t]he Bill does not say anything about rights and obligations currently enjoyed under EU law, for example which of them will be preserved, or which will be removed. It does not remove any rights, nor does it make any changes to domestic law, nor authorise the Government to do so. The Bill only authorises the Prime Minister to notify the United Kingdom’s intention to withdraw from the European Union. It cannot serve as the legislative basis for the United Kingdom’s withdrawal from the European Union without it being read as an exceptionally wide enabling law, handing to the Executive power to decide which legal rights may be given away or lost through negotiations with the European Union, or by leaving the European Union without an agreement. No such intention is expressed on the face of the Bill and we doubt that the Courts would interpret the Bill in that way”* (para 21).

5. The second part of the Opinion, based on the authors’ unrivalled expertise in EU law, addresses the question of what happens if Parliament decides that the outcome of the withdrawal negotiations is unacceptable. The Opinion makes it clear that Parliament will not be powerless to act even though, on its face, Article 50 suggests that EU membership will automatically end after two years unless the period of negotiations is extended by agreement. The Opinion establishes that withdrawing the Article 50 notice remains an option throughout the process. It notes that the Supreme Court did not decide the question of whether a notification given under Article 50 may be qualified or can be withdrawn once it is given and concludes that there are *“very strong arguments”* in EU law *“that a notification under Article 50(2) can be given in qualified or conditional terms and can be unilaterally withdrawn”* (paras 2(vi) and 48).

6. The Opinion says, therefore, that: *“the United Kingdom is entitled to say to the European Union: ‘We have decided to withdraw and here is our notice under Article 50. However, since withdrawal will involve a fundamental change to our laws and will inevitably amend or abrogate individual rights, the terms of withdrawal, in so far as they have such a consequence, can be given effect under our constitution only by an Act of Parliament, and our decision to withdraw is therefore subject to approval of the terms of withdrawal by our Parliament’”* (para 39).

7. The Opinion notes *“the fundamentally integrationist rationale of the [EU] Treaties and their emphasis on democracy”* and the fact that *“Member States changing their mind is a common experience in the history of European Union integration”* (para 52). It concludes that, if Parliament decides not to accept the terms of any deal agreed with the European Union and not to authorise Brexit in the absence of any deal: *“the notification would have to be treated as having lapsed because the constitutional requirements necessary to give effect to the notified intention have not been met”...“it would be incompatible with the European Union Treaties for a Member State to be forced out of the Union against its will, or contrary to its own constitutional requirements”* (paras 61 and 55).

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