

# IN THE MATTER OF ARTICLE 50 OF THE TREATY ON EUROPEAN UNION

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## OPINION

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1. We are asked to advise on the following questions:

- (i) What are the United Kingdom's 'constitutional requirements' for a decision to withdraw from the European Union, within the meaning of paragraph 1 of Article 50 of the Treaty on European Union ('TEU') ('Article 50')? Do they include a requirement for an Act of Parliament approving the terms of withdrawal at the end of the Article 50 process?
- (ii) Does Article 50 permit the United Kingdom to decide to withdraw from the European Union, and notify its 'intention' to do so, subject to the fulfilment of constitutional requirements, such as an Act of Parliament approving the terms of withdrawal? If such constitutional requirements are not satisfied, would the notification lapse, or could it be withdrawn, before the end of the two-year period referred to in the third paragraph of Article 50?
- (iii) What is the position if the United Kingdom and the European Union do not reach any agreement?

## SUMMARY

2. Our advice, in summary, is as follows:

- (i) The constitutional requirements for a decision by the United Kingdom to leave the European Union include the enactment of primary legislation consenting to give legal effect to the terms of a withdrawal agreement between the United Kingdom and the European Union, or authorising the United Kingdom's withdrawal from the European Union in the absence of any such agreement. Only Parliament has the constitutional authority to authorise, and give legal effect to, the changes in domestic law and existing legal rights that will follow from that decision.

- (ii) At present it is impossible to know what rights of British citizens and businesses, and of nationals of other Member States, will be lost or retained following withdrawal from the European Union. Parliament is responsible for the United Kingdom's decision to leave the European Union. It must take that decision once it is clear what the consequences will be for the rights of British citizens and businesses, and nationals of other Member States lawfully resident or established here. Meaningful Parliamentary decision-making cannot be achieved by Parliament authorising exit from the European Union, two years in advance, on as yet unknown terms. Equally, it cannot be achieved by a single, 'take it or leave it' vote at the end of the process.
- (iii) Parliamentary sovereignty and the principle of legality require Parliament expressly to authorise withdrawal from the European Union on the terms 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. Primary legislation would, moreover, provide legal certainty and minimise the risk of further legal challenge.
- (iv) This is not a novel proposition. There is a well-established constitutional practice of Parliament legislating to require new international agreements, particularly those concerned with the European Union, to be approved by an Act of Parliament before they can take effect.
- (v) The most effective way of ensuring that this constitutional requirement is respected would be to include in the European Union (Notification of Withdrawal) Bill 2017 a provision making it clear that the United Kingdom shall leave the European Union when Parliament has legislated to approve the terms of a withdrawal agreement or to authorise withdrawal in the absence of any agreement. Such a provision would provide clarity for the United Kingdom and for the European Union. It would be understood that, in accordance with our constitutional requirements, the United Kingdom Parliament must consent to any decision as to when, and on what terms, the United Kingdom shall leave the European Union.

- (vi) There are very strong arguments that Article 50 permits a Member State to notify its intention to leave the European Union subject to the fulfilment of such constitutional requirements, and that a notification under Article 50 may be unilaterally revoked if those constitutional requirements are not met.
- (vii) Therefore, if Parliament were to refuse to give legal effect to the terms of a withdrawal agreement negotiated with the European Union, or were to refuse to authorise withdrawal in the absence of any agreement, the notification given by the United Kingdom of its intention to leave the European Union could be treated as having lapsed (since the constitutional requirements required to give effect to that intention had not been met), or could be unilaterally withdrawn. Article 50 cannot have the effect of ejecting a Member State from the European Union contrary to its own constitutional requirements.

## CONTEXT

3. Parliament is considering the European Union (Notification of Withdrawal) Bill 2017 ('the Bill'), introduced on 26 January 2017 following the Supreme Court's judgment in *R (Miller & Anor) v. Secretary of State for Exiting the European Union* [2017] UKSC 5 ('*Miller*'). The Bill authorises the Prime Minister to notify the United Kingdom's intention to withdraw from the European Union notwithstanding any provision made by or under the European Communities Act 1972 or any other enactment.
4. On 8 February 2017 the Bill was read a third time and passed, without amendment, by the House of Commons. A number of proposed amendments were debated by that House, including amendments attempting to introduce a requirement for Parliament to approve the terms of any withdrawal agreement with the European Union. We note that:
  - (i) in its report published on 14 January 2017 the House of Commons Exiting the European Union Committee called on the Government: '*to make it clear now that Parliament will have a vote on the Treaty and that the timetable for this vote will allow for proper consideration of any deal that is negotiated*';<sup>1</sup>

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<sup>1</sup> HC815, 14 Jan 2017, §168.

- (ii) on 17 January 2017 the Prime Minister confirmed in her speech at Lancaster House that the Government: ‘*will put the deal to a vote in both Houses of Parliament before it comes into force*’;<sup>2</sup>
  - (iii) on 2 February 2017 the Government published a White Paper, *The United Kingdom’s exit from and new partnership with the European Union* (‘the White Paper’), which includes a statement that: ‘*The Government will then put the final deal that is agreed between the UK and the EU to a vote in both Houses of Parliament*’;<sup>3</sup>
  - (iv) during the debate in the House of Commons on 7 February 2017 the Minister informed the House that: ‘*we intend that the vote will cover not only the withdrawal arrangements but also the future relationship with the European Union. Furthermore, 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 this will happen before the European Parliament debates and votes on the final agreement.*’<sup>4</sup>
5. In *Miller* the Supreme Court confirmed that: ‘*...ministers’ intentions are not law, and the courts cannot proceed on the assumption that they will necessarily become law. That is a matter for Parliament to decide in due course.*’<sup>5</sup> Notwithstanding the concessions offered by Ministers, some Members of Parliament continued to press for amendments to the Bill to make it clear that Parliament will have the final say on the terms of withdrawal at the end of the Article 50 negotiation process. One proposed amendment (New Clause 110) was put to a vote and defeated, although it attracted support from across the House of Commons.<sup>6</sup>

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<sup>2</sup> ‘*The government’s negotiating objectives for exiting the EU*’, Speech by the Prime Minister, 17 January 2017.

<sup>3</sup> CM 917, 2 Feb 2017, §1.12.

<sup>4</sup> HC Deb, 7 Feb 2017, vol. 621, col. 264 (Rt. Hon. David Jones MP, Minister of State). The Prime Minister’s spokesman was subsequently reported as saying that this was not a change in policy and merely set out the process around what had previously been offered.

<sup>5</sup> *Miller*, [35], referring to Lord Browne-Wilkinson in *R v. Secretary of State for the Home Department, Ex p Fire Brigades Union* [1995] 2 AC 513, 552.

<sup>6</sup> HC Deb, 7 Feb 2017, vol. 621, col. 330-334. The amendment was defeated by 326 votes to 293 but received support from members of all parties other than the Democratic Unionist Party and UK Independence Party.

6. Despite the concessions made by the Government, and the clear constitutional position following *Miller* that *only Parliament* can decide that the United Kingdom shall leave the European Union, it remains unclear: (i) what role, if any, there will be for Parliament if no agreement is reached with the European Union within the Article 50 negotiation period; and (ii) the consequences if Parliament decides to reject the terms of the final deal. The White Paper does not address those issues, although it acknowledges the need for legislation if no deal is agreed, to ‘*ensure that our economic and other functions can continue*’.<sup>7</sup> The Government’s position is that, if no deal is agreed, or if Parliament rejects the deal negotiated by the Government, the United Kingdom will automatically leave the European Union and fall back on World Trade Organisation trading rules.<sup>8</sup>
7. This Opinion considers certain legal questions arising out of the debate on whether Parliament must authorise the final terms of any deal with the European Union, including: (i) whether such a requirement is a ‘constitutional requirement’ of the United Kingdom within the meaning of Article 50(1); (ii) whether the United Kingdom can validly notify its intention to withdraw from the European Union subject to such a requirement; and (iii) what will happen if that requirement is not satisfied, i.e. if Parliament refuses to give legal effect to the terms of any deal, or if there is no deal for Parliament to consider.

### **The common ground in *Miller***

8. The judgments of the Divisional Court and the Supreme Court in *Miller* record it as common ground between the parties, for the purposes of the proceedings, that a notification given under Article 50(2) may not be qualified or given conditionally and cannot be withdrawn once it is given.<sup>9</sup>
9. The Supreme Court did not decide the point and refrained from expressing its own view, in particular because the Secretary of State’s position was that it would make no

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<sup>7</sup> CM 917, 2 Feb 2017, §12.3.

<sup>8</sup> HC Deb, 7 Feb 2017, vol. 621, col. 272, Rt. Hon. David Jones MP, Minister of State: “...if there were no agreement at all, which I think is an extremely unlikely scenario, ultimately we would be falling back on World Trade Organisation arrangements. That is nothing new. It has been made very clear previously, including by my right hon. Friend the Prime Minister”; col. 273: “The vote will be either to accept the deal that the Government will have achieved—I repeat that the process of negotiation will not be without frequent reports to the House—or for there to be no deal. Frankly, that is the choice that the House will have to make. That will be the most meaningful vote that one could imagine.”

<sup>9</sup> *Miller* [2017] UKSC 5, [26] (Supreme Court); [2016] EWHC 2768 (Admin), [10] (Divisional Court).

difference to the outcome if that common ground was mistaken.<sup>10</sup> The Attorney-General informed the Divisional Court that: ‘*as a matter of firm policy, once given a notification will not in fact be withdrawn*’.<sup>11</sup> The Supreme Court therefore examined the Government’s proposed use of prerogative powers to trigger Article 50 on the assumption that a notification, once given, would not be withdrawn.

10. It was tactically advantageous to the parties in *Miller* to adopt that common ground. It avoided the possibility of a reference to the Court of Justice of the European Union on the meaning of Article 50, which would have been obligatory under the third paragraph of Article 267 of the Treaty on the Functioning of the European Union (‘TFEU’) had the Supreme Court concluded that the interpretation of Article 50 was necessary to enable it to give judgment. Making a reference to the Court of Justice in the proceedings would have been politically unattractive and would have resulted in delay.
11. Contrary to the common ground in *Miller*, for the reasons we set out below, we believe the better view to be that a notification under Article 50(2) can be given in qualified or conditional terms and can be unilaterally withdrawn.

## **ARTICLE 50 OF THE TREATY ON EUROPEAN UNION**

12. Article 50 provides as follows:

1. *Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.*
2. *A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.*

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<sup>10</sup> *Miller* [26], [169]. Statements to the contrary in the House of Commons are not correct: see, e.g. Sir Oliver Letwin MP: ‘*the Supreme Court has ruled that, in its view, this is an irrevocable act*’ (HC Deb, 31 Jan 2017, vol. 620, col. 870); John Redwood MP: ‘*It clearly did rule on the matter. It found against the Government because it deemed article 50 to be irrevocable. It would not have found against the Government if it had thought it revocable.*’ (HC Deb, 7 Feb 2017, vol. 621, col. 281).

<sup>11</sup> Divisional Court Transcript, 17 Oct 2016, p.64.

3. *The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.*
4. *For the purposes of paragraphs 2 and 3, the member of the European Council or of the Council representing the withdrawing Member State shall not participate in the discussions of the European Council or Council or in decisions concerning it.  
A qualified majority shall be defined in accordance with Article 238(3)(b) of the Treaty on the Functioning of the European Union.*
5. *If a State which has withdrawn from the Union asks to rejoin, its request shall be subject to the procedure referred to in Article 49.*

## ANALYSIS

### (i) The United Kingdom's 'constitutional requirements'

13. Under Article 50(1) the decision to withdraw from the European Union must be taken by a Member State in accordance with '*its own constitutional requirements*'.<sup>12</sup>
14. In *Shindler & Anor v. Chancellor of the Duchy of Lancaster & Anor* [2016] EWCA Civ 469 at [7] the Master of the Rolls observed that the effect of the phrase '*in accordance with its own constitutional requirements*' is that European Union law: '*has expressly provided an area where Member States may adopt their own requirements*'. The Court of Appeal went on to confirm, at [19], that '*...by passing [the European Union Referendum Act 2015], Parliament decided that one of the constitutional requirements that had to be satisfied as a condition of a withdrawal from the European Union was a referendum*'.<sup>13</sup>
15. The Supreme Court's judgment in *Miller* confirms that the constitutional requirements for a decision by the United Kingdom to leave the European Union also include the enactment by Parliament of primary legislation authorising Ministers to withdraw from the European Union Treaties.<sup>13</sup> Unlike in countries with a written constitution, in our

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<sup>12</sup> Similar words are used elsewhere in the European Union Treaties: see, e.g., TEU Articles 42(2), 48(4) and (6), 49, 54 and TFEU Articles 25, 218(8), 223(1), 262, 269, 357.

<sup>13</sup> *Miller* [5], [82]-[83], [101], [111], [124].

system of laws there is no higher constitutional authority than primary legislation enacted by the Queen in Parliament.

16. The Supreme Court confirmed in *Miller*:<sup>14</sup>

*121. Where, as in this case, implementation of a referendum result requires a change in the law of the land, and statute has not provided for that change, the change in the law must be made in the only way in which the United Kingdom constitution permits, namely through Parliamentary legislation.*

*122. What form such legislation should take is entirely a matter for Parliament. But, in the light of a point made in oral argument, it is right to add that the fact that Parliament may decide to content itself with a very brief statute is nothing to the point. There is no equivalence between the constitutional importance of a statute, or any other document, and its length or complexity. A notice under article 50(2) could no doubt be very short indeed, but that would not undermine its momentous significance. The essential point is that, if, as we consider, what would otherwise be a prerogative act would result in a change in domestic law, the act can only lawfully be carried out with the sanction of primary legislation enacted by the Queen in Parliament.*

17. It is, therefore, for Parliament to decide that the United Kingdom shall leave the European Union, and what conditions shall be applicable to that decision, including how it should be implemented and Parliament's role in the process. Ministers have no power to withdraw from the European Union Treaties without authorisation by a prior Act of Parliament.
18. The Supreme Court also confirmed that removing or changing rights currently enjoyed by individuals and businesses as a result of the United Kingdom's membership of the European Union must be effected by legislation, and fundamental rights cannot be overridden by general or ambiguous words but only by express statutory language.<sup>15</sup>
19. It is certain that withdrawal from the European Union will amend or remove rights currently enjoyed by British nationals, and by nationals of other Member States, including those lawfully resident or established in the United Kingdom.<sup>16</sup> Until the terms

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<sup>14</sup> *Miller* [121]-[122]. See also the Divisional Court's judgment, [20].

<sup>15</sup> *Miller* [56]-[57] and [83]-[87], upholding the reasoning of the Divisional Court and referring to *R v Secretary of State for the Home Department, Ex p Simms* [2000] 2 AC 115. See also the Divisional Court's judgment at [83].

<sup>16</sup> This was recorded as common ground in *Miller* [69].

of any withdrawal agreement and future relationship with the European Union are known, it is impossible for Parliament to know which rights will be lost or retained.

20. Since, according to our Constitution, Parliament alone can legislate to remove existing rights, or give effect to new rights, it must be for Parliament to consent to the terms of any withdrawal agreement with the European Union, and the changes to domestic law and existing rights that will necessarily follow from that decision. Only Parliament can give legal effect in the United Kingdom to any such agreement and it can do so expressly only when the parameters of that decision are known, in particular when it is clear which rights will be affected.
21. The Bill does not say anything about rights and obligations currently enjoyed under European Union 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 unless it is 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.<sup>17</sup>
22. It follows that a further Act of Parliament will be required to authorise, and give legal effect to, the United Kingdom's decision to leave the European Union, and the removal of legal rights that will follow as a result of the terms of withdrawal. Parliamentary sovereignty and the principle of legality require Parliament to take that decision once the terms of withdrawal are known, or to authorise withdrawal if no acceptable terms can be agreed. Unless clearly provided for by statute, the amendment or abrogation of legal rights currently enjoyed under European Union law would leave any ultimate deal, or

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<sup>17</sup> To the extent that the Bill could be argued to authorise any interference with legal rights at all, '*the Courts may interpret the legislation as requiring that any such interference should be no greater than is objectively established to be necessary to achieve the legitimate aim of the interference: in substance, a requirement of proportionality*'. See *Pham v. Secretary of State for the Home Department* [2015] UKSC 19 at [119] *per* Lord Reed.

non-deal, open to judicial challenge. General or ambiguous words are not sufficient. Moreover, as the Supreme Court has confirmed, Parliamentary resolutions, without legislation, cannot change domestic law, or remove legal rights.<sup>18</sup>

23. We consider, therefore, that it is a constitutional requirement of the United Kingdom that Parliament must expressly consent to 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, and must do so 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 will necessarily follow from that decision. This is in accordance with the reasoning of the Supreme Court in *Miller*.
24. It is no answer to this point to say that Parliament will be asked to pass the ‘Great Repeal Bill’. The White Paper presents this as an aspect of ‘*parliamentary involvement and scrutiny*’:<sup>19</sup>

*1.1 To provide legal certainty over our exit from the EU, we will introduce the Great Repeal Bill to remove the European Communities Act 1972 from the statute book and convert the ‘acquis’ – the body of existing EU law – into domestic law. This means that, wherever practical and appropriate, the same rules and laws will apply on the day after we leave the EU as they did before.*

*1.2 This approach will preserve the rights and obligations that already exist in the UK under EU law and provide a secure basis for future changes to our domestic law. This allows businesses to continue trading in the knowledge that the rules will not change significantly overnight and provides fairness to individuals whose rights and obligations will not be subject to sudden change. It will also be important for business in both the UK and the EU to have as much certainty as possible as early as possible.*

*1.3 Once we have left the EU, Parliament (and, where appropriate, the devolved legislatures) will then be able to decide which elements of that law to keep, amend or repeal...*

*1.8 Parliament also has a critical role. First, legislation will be needed to give effect to our withdrawal from the EU and the content of such legislation will of course be determined by Parliament. This includes the Great Repeal Bill, but any significant policy changes will be underpinned by other primary legislation – allowing Parliament the opportunity to debate and scrutinise the changes. For example, we expect to bring forward separate bills on immigration and customs. There will also be a programme of secondary legislation under the Great Repeal*

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<sup>18</sup> *Miller* [123].

<sup>19</sup> CM 917, 2 Feb 2017, §§1.1-1.8.

*Bill to address deficiencies in the preserved law, which will be subject to parliamentary oversight.*

25. In our opinion, the ability of the ‘Great Repeal Bill’ to transfer the existing body of European Union law rights into domestic law has been overstated. There are many rights enjoyed under European Union law that are not capable of replication in domestic law, including: rights with geographical scope extending to the Member States; rights that cannot be provided without the cooperation of other Member States or the European Union institutions; and rights enjoyed by British citizens in the United Kingdom but enforceable against other Member States.<sup>20</sup>
26. More importantly, however, the argument that Parliamentary involvement will be sufficiently secured by the need for Parliament to legislate to deal with the effects of withdrawal from the European Union was rejected by the Supreme Court in *Miller*:

*94. The Secretary of State relied on the fact that it was inevitable that Parliament would be formally involved in the process of withdrawal from the European Union, in that primary legislation, not least the Great Repeal Bill referred to in para 34 above, would be required to enable the United Kingdom to complete its withdrawal in an orderly and coherent manner. That seems very likely indeed, but it misses the point. If ministers give Notice without Parliament having first authorised them to do so, the die will be cast before Parliament has become formally involved. To adapt Lord Pannick’s metaphor, the bullet will have left the gun before Parliament has accorded the necessary leave for the trigger to be pulled. The very fact that Parliament will have to pass legislation once the Notice is served and hits the target highlights the point that the giving of the Notice will change domestic law: otherwise there would be no need for new legislation...*

*100. ... if, as the Secretary of State has argued, it is legitimate to take account of the fact that Parliament will, of necessity, be involved in its legislative capacity as a result of UK withdrawal from the EU Treaties, it would militate in favour of, rather than against, the view that Parliament should have to sanction giving Notice. An inevitable consequence of withdrawing from the EU Treaties will be the need for a large amount of domestic legislation. There is thus a good pragmatic argument that such a burden should not be imposed on Parliament by exercise of prerogative powers and without prior Parliamentary authorisation. We do not rest our decision on that point, but it serves to emphasise the major constitutional change which withdrawal from the*

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<sup>20</sup> We note the examples of each of these categories provided in the Annex to the Written Case of the Pigney Respondents in the Supreme Court, here: <https://www.supremecourt.uk/docs/pigney-and-others-written-case.pdf> at pp. MS12509ff.

*European Union will involve, and therefore the constitutional propriety of prior Parliamentary sanction for the process.*

27. As set out above, the effect of the Supreme Court's decision in *Miller* is that only an Act of Parliament can authorise the withdrawal of the United Kingdom from the European Union Treaties, given the impact on domestic law and existing rights. Parliament's role is not merely to give legal effect to whatever Ministers negotiate on the international plane, after the fact. The White Paper's assertion that legislation will be needed and that '*the content of such legislation will of course be determined by Parliament*' must be read subject to the fact that the scope and content of such legislation will necessarily be dictated largely by the terms of any agreement reached between the United Kingdom and the European Union.<sup>21</sup>
28. The Government has conceded that Parliament should have 'a vote' on the terms of withdrawal negotiated with the European Union. In our opinion, in accordance with *Miller*, it is a *constitutional requirement*<sup>22</sup> that there should be an Act of Parliament accepting those terms of withdrawal, or authorising the United Kingdom to leave the European Union without any agreement.
29. Such a provision would provide clarity for the United Kingdom and for the European Union. It would be understood that, in accordance with our constitutional requirements, the United Kingdom Parliament must consent to any decision as to when, and on what terms, the United Kingdom shall leave the European Union.
30. The most effective way of ensuring that this constitutional requirement is respected would be to include in the Bill a provision to make it clear that the United Kingdom shall withdraw from the European Union when Parliament has legislated to authorise the terms of a withdrawal agreement, or to authorise the United Kingdom's withdrawal in the absence of any agreement. Doing so would provide clarity for the United Kingdom and

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<sup>21</sup> The White Paper acknowledges, at §1.5, that: '*Domestic legislation will also need to reflect the content of the agreement we intend to negotiate with the EU.*'

<sup>22</sup> As explained above, in *Miller* the Supreme Court proceeded, without deciding the point, on the assumption that a notice given under Article 50 is an irrevocable act that necessarily results in the Member State leaving the European Union. But that does not alter the basic proposition in *Miller* that Ministers cannot, without prior statutory authority, take actions on the international plane in relation to the EU Treaties, where those actions will make a fundamental change to the United Kingdom's laws and remove existing rights, and will therefore require domestic implementation.

for the European Union, making it clear that, in accordance with the United Kingdom's constitutional requirements, it will be for Parliament to consent to any decision as to when, and on what terms, the United Kingdom shall leave the European Union, with knowledge of the terms that the Government has been able to negotiate.

31. A requirement for primary legislation authorising the final terms of the decision to leave the European Union will also provide legal certainty and minimise the risk of legal challenge. It is important, as much to affected individuals as to everyone else, that there should be finality, and that is what the constitutional requirement for an Act of Parliament would produce.
32. Such a requirement would not be a novelty:
  - (i) Parliament has already imposed a constitutional requirement under section 20 of the Constitutional Reform and Governance Act 2010, which dictates that, otherwise than in exceptional cases, a treaty must be laid before Parliament for a period of 21 sitting days before it can be ratified, and cannot be ratified if it is the subject of a negative resolution in the House of Commons. In the Divisional Court in *Miller* the Secretary of State's counsel indicated that a new agreement between the United Kingdom and the European Union would '*in all probability*' be subject to that mechanism<sup>23</sup> (although for the reasons given in *Miller* that is not by itself sufficient to safeguard Parliament's constitutional role); and
  - (ii) Parliament has repeatedly legislated to retain the power to accept or reject treaties governing the United Kingdom's relationship with the European Union, requiring an Act of Parliament and in some cases a referendum: see, for example, section 5 of the European Union (Amendment) Act 2008 requiring an Act of Parliament to approve any treaty amending the Euratom Treaty, and Part 1 of the European Union Act 2011 imposing various requirements in respect of treaties that amend or replace the TEU or TFEU.

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<sup>23</sup> Divisional Court Transcript, 17 Oct 2016, p.164; 18 Oct 2016, pp.2-3. This must be on the assumption that any new treaty agreed with the EU does not fall within the scope of the more rigorous procedures applicable under section 5 of the European Union (Amendment) Act 2008 relating to a treaty amending the Euratom Treaty, or Part 1 of the European Union Act 2011.

33. The existence of such requirements demonstrates that it is an established constitutional practice for Parliament to impose legislative preconditions requiring international agreements (and particularly those relating to the European Union) to be authorised by a further Act of Parliament before they can take effect. Similar constitutional arrangements apply in other Member States (for example, Ireland), where new European Union treaties must be put to a referendum and/or approved by the national parliament. Indeed, the requirement, in Article 50(2), for the consent of the European Parliament as a prerequisite for concluding a withdrawal agreement evidences a recognition, by the authors of the Treaty, of the constitutional role of parliaments in the operation of Article 50.
34. We are aware of a suggestion that, if Parliament were to indicate that the United Kingdom might remain in the European Union if the deal offered were bad enough, the European Union would offer the worst possible deal.<sup>24</sup> That is an essentially political argument that cannot prevail over the constitutional requirements of the United Kingdom, which require Parliament to take the final decision. In any event, we do not regard the suggestion as realistic, for two reasons. First, if an Article 50 notice were irrevocable, without there being any subsequent role for Parliament, the United Kingdom would be bound to accept whatever terms were offered by the European Union (bad or otherwise), or leave without any agreement. Second, given the position adopted by the Government, and the widely expressed views of British politicians as to the respect to be afforded to the outcome of the referendum, it would not be rational for the European Union to forgo the possibility of a mutually beneficial agreement in the hope that offering a bad deal might persuade Parliament to reverse the United Kingdom's decision.
35. In short:
- (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;

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<sup>24</sup> See, e.g., Sir Oliver Letwin, HC Deb, 31 Jan 2017, vol. 620, col. 871-872.

- (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.

**(ii) Does Article 50 permit a decision, and notification, in conditional terms?**

- 36. Article 50(1) is premised on the existence of national constitutional requirements in the prospectively withdrawing Member State and a decision by that Member State to withdraw from the European Union in accordance with those constitutional requirements.
- 37. Article 4 TEU requires the European Union to respect the equality of Member States before the Treaties, as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. Under Article 5 TEU, the European Union institutions are also bound to respect the principles of subsidiarity and proportionality.
- 38. Since, as a matter of the United Kingdom's constitutional requirements, withdrawal from the European Union requires an Act of Parliament, it follows that, in order to respect the constitutional requirements of the United Kingdom, Article 50 must allow for the possibility of a decision to leave the European Union that is conditional on that requirement being satisfied.
- 39. In other words, 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.’*

40. If the United Kingdom were to express its genuine intention to leave the European Union in that way it would be acting in good faith, in accordance with its own constitutional requirements. Essentially, the Article 50 notification would be subject to the national constitutional requirement that the terms of withdrawal, including but not limited to, any effect on rights, must be authorised by subsequent Act of Parliament.
41. We consider that the European Union would afford respect to this requirement, in accordance with Articles 4 and 5 TEU and since it reflects shared democratic values and views on the role of parliaments.<sup>25</sup> It is difficult to envisage a condition for parliamentary approval being refused, given the emphasis within the European Union Treaties of respect for democracy, constitutionality and individual rights. As already noted, Article 50(2) requires the *European Parliament* to consent to the terms of any withdrawal agreement and, in our opinion, respect for the principles of democracy and constitutionality requires that the United Kingdom Parliament should have at least the same opportunity, in keeping with our constitutional requirements.
42. We do not consider that there would be any basis for the European Council to reject a notification in those terms as legally invalid, or as incapable of triggering the obligation on the Union to negotiate a withdrawal agreement as envisaged under Article 50(2).
43. The question then arises as to the consequences if the relevant constitutional requirements are not satisfied, i.e. if, in the case of the United Kingdom, Parliament decides not to accept the terms of any deal agreed with the European Union and not to authorise

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<sup>25</sup> Protocol No. 1 to the Treaties, on the Role of National Parliaments in the European Union, recalls that ‘*the way in which national Parliaments scrutinise their governments in relation to the activities of the Union is a matter for the particular constitutional organisation and practice of each Member State*’ and notes the desirability of national Parliaments being involved, and able to express their views, on matters which may be of particular interest to them.

withdrawal in the absence of any deal. We are asked whether, in those circumstances, the notification given under Article 50(2) would lapse, or could be unilaterally withdrawn.

44. Different opinions have been expressed on the question of whether a notification under Article 50(2) can, once given, be revoked.<sup>26</sup> As noted above, in *Miller* the Supreme Court did not decide the point.
45. Article 50(3) provides that, in the absence of a concluded withdrawal agreement, the Treaties shall cease to apply to the State in question two years after the notification given in Article 50(2), unless the European Council unanimously agrees with the Member State to extend that period. On its face, that allows for only three possibilities following notification: (i) the Treaties ceasing to apply to the Member State following the successful conclusion of a withdrawal agreement; (ii) failing that, the Treaties automatically ceasing to apply after two years; or (iii) the Member State agreeing with the European Council, acting unanimously, to extend the two-year period. Read literally, Article 50(3) suggests that, having given notice under Article 50, a Member State is on a one-way street with no exits, leading inevitably to its departure from the European Union, and at the mercy of the European Council and the European Parliament as to whether any withdrawal agreement will be concluded on the part of the European Union, and at risk of the two-year negotiating timetable not being extended because of lack of complete unanimity among the other 27 Member States.

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<sup>26</sup> See, e.g., in favour of revocability: C. Streeten, 'Putting the Toothpaste Back in the Tube: Can an Article 50 Notification Be Revoked?', UK Const. L. Blog (13 Jul 2016); A. Dashwood, 'Invoking Article 50' (InFacts, 18 Jul 2016); D. Wyatt and D. Edward, quoted in the House of Lords Select Committee on the Constitution's report, 'The invoking of Article 50' (13 September 2016); A. Sari, 'Biting the Bullet: Why the UK Is Free to Revoke Its Withdrawal Notification under Article 50 TEU', UK Const. L. Blog (17 Oct 2016); P. Craig 'Brexit: Foundational Constitutional and Interpretive Principles: II' (OxHRH Blog, 28 Oct 2016); T. Tridimas, 'Article 50: An Endgame without an End?', King's Law Journal 297-313 (3 Dec 2016); A. Sari, 'Reversing a Withdrawal Notification under Article 50 TEU: Can the Member States Change their Mind?' (Exeter Law School Working Paper Series, 19 Nov 2016); and Piet Eeckhout & Eleni Frantziou, 'Brexit and Article 50 TEU: A Constitutionalist Reading' (UCL European Institute Working Paper, Dec 2016). For those supporting a non-revocability interpretation see, e.g.: N. Barber, T. Hickman and J. King, 'Pulling the Article 50 'Trigger': Parliament's Indispensable Role', UK Const. L. Blog (27 Jun 2016); J.W. Rylatt, 'The Irrevocability of an Article 50 Notification: Lex Specialis and the Irrelevance of the Purported Customary Right to Unilaterally Revoke' UK Const. L. Blog (27 Jul 2016); and S. Smismans, 'About the Revocability of Withdrawal: Why the EU (Law) Interpretation of Article 50 Matters', UK Const. L. Blog (29 Nov 2016). For views of EU officials see, e.g., 'Speech by President Donald Tusk at the European Policy Centre conference' (Speech 575/16, 13 Oct 2016); J-C Piris, 'Article 50 is not for ever and the UK could change its mind', *Financial Times*, 1 Sep 2016; J-C Juncker, *Answer given by President Juncker on behalf of the Commission* in response to European Parliamentary question p-008603/2016 (17 Jan 2017).

46. It is not surprising that the House of Commons Briefing Paper published alongside the Bill observes that: ‘*Whether or not an Article 50 notice is revocable is relevant to the decision that Parliament will be taking both in authorising the Government to give this notice, and in voting on the final Brexit agreement*’. It points out that, if the notice is irrevocable, then authorising the Government to issue the notice will effectively commit Parliament to: (i) approving the final Brexit agreement; (ii) seeking a renegotiation of the agreement if practicable; or (iii) leaving the European Union without any agreement.<sup>27</sup>
47. In the absence of clear words in Article 50 addressing the possibility of revocation of a notification of a decision to leave, the point could ultimately be determined authoritatively only by the Court of Justice of the European Union. Unless and until it is determined by that Court, it is impossible to know for sure whether the giving of notice under Article 50(2) commences a process of withdrawal that the withdrawing Member State can unilaterally stop.
48. However, in our opinion there are very strong arguments in favour of an interpretation of Article 50 that permits a notification to be given in a conditional form, and that would allow a Member State unilaterally to withdraw a notification that it has given, prior to the end of the two-year negotiating period, for example if its constitutional requirements for leaving have not been satisfied, if there is a material change in circumstances, or if it is unable to negotiate acceptable terms for withdrawal and wishes to remain.
49. First, there are inferences that can be drawn from the text of Article 50:
- (i) A decision to withdraw from the European Union must be in accordance with the Member State’s constitutional requirements. For the reasons given above, in the case of the United Kingdom those requirements cannot be satisfied at the time when notice is given under Article 50 (the same is no doubt true for other Member States). It follows that notice must be revocable if it transpires that national constitutional requirements have not been satisfied.
  - (ii) The language of Article 50 does not require a Member State’s decision to withdraw from the European Union to be irrevocable or unconditional prior to it being

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<sup>27</sup> House of Commons Briefing Paper No. 7884, 30 Jan 2017.

notified. 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.

- (iii) The absence of any provision *precluding* revocation of a notice indicates that such a step is otherwise permitted. There is no language in Article 50 permitting a notification to be withdrawn *by mutual consent*, but it must be possible for a notification to be withdrawn if both the Member State and the European Union prefer that outcome.
- (iv) 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.

50. Second, there is the purpose of the provision. Article 50 is a mechanism dealing with *voluntary withdrawal* from the Union. It is not a mechanism for expulsion of a Member State. Article 50 is derived from Article I-60 of the ill-fated Treaty Establishing a Constitution for Europe, and in that Treaty Article I-60 was headed: ‘*Voluntary Withdrawal from the Union*’. Lord Kerr of Kinlochard, who was primarily responsible for drafting the provision, has confirmed publicly that: (i) it was intended to provide a procedural framework for the pre-existing right of a Member State to leave the Union of its own free will; and (ii) a decision to leave under that provision is indeed revocable.<sup>28</sup>

51. Third, it would be inconsistent with the fundamental principles and aims of the European Union for a Member State to be expelled against its will (at least in the absence of some

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<sup>28</sup> See, e.g., ‘*Article 50 author Lord Kerr says Brexit not inevitable*’, BBC website 3 Nov 2016 <http://www.bbc.co.uk/news/uk-scotland-scotland-politics-37852628>. See also the analysis of the *travaux préparatoires* in Piet Eeckhout & Eleni Frantziou, ‘*Brexit and Article 50 TEU: A Constitutionalist Reading*’ (UCL European Institute Working Paper, Dec 2016), which the authors consider to clarify two issues: (i) that respect for the constitutional requirements of the withdrawing state is a key component of an EU-constitutional-law-compliant reading of Article 50; (ii) the broad discretion allowed in respect of Article 50(1) was intended to be counterbalanced by stricter conditions under Article 50(3) in order to prevent the withdrawing state holding the Union hostage in the negotiations.

gross violation of the European Union’s fundamental norms).<sup>29</sup> Where a Member State has legitimately reconsidered its decision to withdraw, its forced expulsion would be contrary, at least, 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.

52. Fourth, as we have said above, Article 50 is predicated on respecting the constitutional requirements of the Member States. If, in accordance with its own constitutional requirements, a Member State’s intention to withdraw from the Union changes—for example following a binding referendum or where the terms of withdrawal are rejected by a national parliament—we do not think that such a change of intention could be rejected by the European Union consistently with the fundamentally integrationist rationale of the Treaties and their emphasis on democracy. Member States changing their mind are a common experience in the history of European Union integration: see, for example, the referendums in Denmark on the Maastricht Treaty, and in Ireland on the Nice Treaty and the Lisbon Treaty.
53. Fifth, 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 give rise to potentially severe consequences, as Professor Craig has argued.<sup>30</sup> It 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.
54. Sixth, some support can be drawn from the provisions of the Vienna Convention on the Law of Treaties. Article 65 of that Convention lays down a procedure to be followed for, amongst other things, withdrawal from a treaty. It permits a party to give notice to the

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<sup>29</sup> The closest the EU Treaties come to a power of expulsion is Article 7(2) and (3) TEU, allowing the Council to suspend some of a Member State’s rights for a ‘*serious and persistent breach by a Member State of the values referred to in Article 2 [TEU]*’, i.e. ‘*...the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities*’.

<sup>30</sup> Paul Craig ‘*Brexit: Foundational Constitutional and Interpretive Principles: II*’ (OxHRH Blog, 28 Oct 2016).

other parties of a ground for withdrawing from a treaty or suspending its operation; Article 68 provides that such a notification may be revoked at any time before it takes effect. We agree with the view expressed by others that the structure of Article 50 seems to reflect these principles. It lends support to the view that a signatory to an international agreement may unilaterally revoke a notification that it has given to withdraw from that agreement, before the notification takes effect.<sup>31</sup> We consider that the position under the Vienna Convention may be taken into account in interpreting Article 50, although it is undoubtedly true that the rules applicable to withdrawal from the European Union are those laid down in Article 50 itself.

55. Accordingly, while we acknowledge that the point is not wholly free from doubt, in our opinion 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.
56. While Article 50(3) states that a withdrawing Member State ceases to be bound by the Treaties either from the date provided for in the withdrawal agreement or, failing that, two years after notification of its intention to withdraw, we do not consider that this was intended to cover a situation where a Member State does not maintain its decision to leave the Union, or where its constitutional requirements for that decision have not been met. Rather, it provides a longstop where, in the absence of unanimous consent of the European Council, the withdrawal negotiations will cease and a Member State that maintains its decision to leave, in accordance with its constitutional requirements, will be free from its obligations under the Treaties.
57. Similarly, the fact that Article 50 imposes a requirement for the unanimous consent of all remaining Member States to extend the negotiating period does not mean that the consent of the European Council would be required for a Member State to change its intentions. If such consent were not forthcoming, it could result in a Member State being forced out

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<sup>31</sup> See, e.g., C. Streeten, 'Putting the Toothpaste Back in the Tube: Can an Article 50 Notification Be Revoked?', UK Const. L. Blog (13 Jul 2016); A. Sari, 'Biting the Bullet: Why the UK Is Free to Revoke Its Withdrawal Notification under Article 50 TEU', UK Const. L. Blog (17 Oct 2016); Paul Craig 'Brexit: Foundational Constitutional and Interpretive Principles: II' (OxHRH Blog, 28 Oct 2016). Cf. J.W. Rylatt, 'The Irrevocability of an Article 50 Notification: *Lex Specialis* and the Irrelevance of the Purported Customary Right to Unilaterally Revoke' UK Const. L. Blog (27 Jul 2016); S. Smismans, 'About the Revocability of Withdrawal: Why the EU (Law) Interpretation of Article 50 Matters', UK Const. L. Blog (29 Nov 2016).

of the Union contrary to its own constitutional requirements, which would be inconsistent with Article 50(1). Moreover, there are good reasons why a decision to extend the two-year negotiating period should require unanimity: such an extension is likely to prolong a period of considerable uncertainty for the Member States and for affected individuals and businesses. By comparison, the withdrawal of a notification by a Member State of its own accord would tend to restore legal certainty.

58. Of course, Member States are obliged to act in good faith and in accordance with the principle of sincere cooperation. Accordingly, nothing we say in this Opinion should be taken to suggest that it is open to a Member State to trigger the Article 50 process in the absence of a genuine intention to leave the European Union, or with the ulterior aim of renegotiating the Treaties; nor that it is open to any Member State to threaten to leave the Union, or give or revoke a notification under Article 50 purely to achieve a negotiating advantage, for example to try to reset the two-year time limit in Article 50(3). We do not think it is realistic to suggest that any Member State would act in such a way: if it did so, its actions would have significant political consequences and would be likely to be regarded as an abuse of rights and contrary to the duty of sincere cooperation.
59. Similarly, while as a matter of law we think that a Member State may in good faith change its intention within the two-year period and revoke its previous decision, it is crucial that nothing should be said or done by that Member State in the course of the withdrawal negotiations that might damage mutual trust or be construed as a breach of the obligation of good faith. The ability of a Member State to have second thoughts, or to remain within the Union on the same terms as before if its constitutional requirements are not met, must be conditional, at least, on that Member State having continued, in the interim, faithfully to observe all of its obligations as a Member State, including the obligations under Art 4(3) TEU.<sup>32</sup>

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<sup>32</sup> Article 4(3) TEU provides: ‘Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union’s tasks and refrain from any measure which could jeopardise the attainment of the Union’s objectives.’

60. It follows, in our view, that Article 50 does not preclude:
- (i) the United Kingdom notifying, as authorised by Act of Parliament, its intention to leave the European Union subject to a further Act of Parliament consenting to the terms of a withdrawal agreement negotiated in accordance with Article 50(2), or authorising withdrawal in the absence of such agreement; and
  - (ii) Parliament deciding subsequently that the United Kingdom shall: (i) leave the Union on the basis of the negotiated agreement; (ii) leave in the absence of any agreement, or (iii) seek to negotiate different terms if possible and otherwise change its intention to leave.
61. If the intention expressed in the Article 50(2) notification is subject to the fulfilment of subsequent constitutional requirements, and if those conditions remain unsatisfied at the end of the Article 50 negotiation period, it seems clear that 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. We do not consider that Article 50 can have the effect of ejecting a Member State from the European Union contrary to its own constitutional requirements.
62. We would in any event expect the Member State in question to notify the European Council that the constitutional requirements applicable to its decision to leave the European Union had not been fulfilled and that the notification of its intention under Article 50(2) should therefore be treated as withdrawn.

**(iii) Providing for the contingency of a failure to reach agreement**

63. We are asked about the position if the United Kingdom and the European Union do not reach any agreement. That could arise if no acceptable terms of agreement can be negotiated by the Government, if the terms of a proposed agreement are rejected by Parliament or the European Parliament, or if the time limit expires either before the negotiators have completed their task or before the requisite formalities required to authorise or consent to the negotiated terms have been completed.

64. In the White Paper published on 2 February 2017 the Government has said:

*12.1 ...As set out in Article 50, the Treaties of the EU will cease to apply to the UK when the withdrawal agreement enters into force, or failing that, two years from the day we submit our notification, unless there is a unanimous agreement with the other 27 Member States to extend the process.*

*12.2 It is, however, in no one's interests for there to be a cliff-edge for business or a threat to stability, as we change from our existing relationship to a new partnership with the EU. Instead, we want to have reached an agreement about our future partnership by the time the two-year Article 50 process has concluded. From that point onwards, we believe a phased process of implementation, in which the UK, the EU institutions and Member States prepare for the new arrangements that will exist between us, will be in our mutual interest. ...The UK will not, however, seek some form of unlimited transitional status. That would not be good for the UK and nor would it be good for the EU.*

*12.3 We are confident that the UK and the EU can reach a positive deal on our future partnership, as this would be to the mutual benefit of both the UK and the EU, and we will approach the negotiations in this spirit. However, the Government is clear that no deal for the UK is better than a bad deal for the UK. In any eventuality we will ensure that our economic and other functions can continue, including by passing legislation as necessary to mitigate the effects of failing to reach a deal.*

65. The Government's ambition is to conclude, within two years, a withdrawal agreement and an agreement on the United Kingdom's future relationship with the European Union.<sup>33</sup> On the other hand, remarks made on the European Union side suggest that the negotiations under Article 50(2) will relate primarily to the terms of withdrawal but not necessarily to the terms of a new free trade agreement.<sup>34</sup> It therefore appears that the Government has a substantially different view from at least some parts of the European Union about the likely scope of the negotiations and any agreement(s) that will immediately follow.

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<sup>33</sup> HC Deb, 6 Feb 2017, vol. 621, col. 32: The Prime Minister: "We see the negotiations not as being separate but as going together. The arrangement that we aim to negotiate is a deal that will cover both the exit arrangements and the future free trade agreement that we will have the European Union..."

<sup>34</sup> See, e.g. "Barnier sticks to 'divorce first, trade talks later mantra'", *Financial Times*, 17 Jan 2017. Article 50(2) requires the Union to negotiate and conclude an agreement with the departing Member State 'setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union'. It does not oblige the European Union to agree a new trading relationship or to agree any 'transitional arrangements', although, since the terms of withdrawal will to some extent depend on the nature of the future relationship, we would expect a withdrawal agreement at least to take account of the proposed future arrangements.

66. Whatever the scope of the negotiations, there is a risk of: (i) the negotiations not resulting in any concluded and binding agreement within the two-year time limit; and (ii) the two-year time limit not being extended by mutual agreement.
67. As the Supreme Court's judgment makes clear, as a matter of constitutional law there has been no decision by the United Kingdom (i.e. by Parliament) to leave the European Union, whether with or without a concluded withdrawal agreement. The Bill empowers the Prime Minister to notify the United Kingdom's intention to withdraw from the European Union but, as we have set out above, the decision to leave the European Union must ultimately be taken by Parliament either legislating to approve the terms of a withdrawal agreement, or legislating to authorise the United Kingdom leaving without any agreement in place.
68. The White Paper asserts the Government's view that '*no deal for the UK is better than a bad deal for the UK*' and, as noted above, the Government's stated position is that, if no deal is agreed (or if the deal is rejected by Parliament), the United Kingdom will automatically leave the European Union and fall back on WTO trading rules, without any further decision by Parliament.<sup>35</sup>
69. We do not agree. Given the impact on our laws and on existing rights, a decision to leave the European Union without any agreement or transitional arrangements in place must be one for Parliament to take, if and when that choice arises. Article 50 does not override foundational constitutional requirements in the Member States. Article 50(3) therefore cannot have the effect of ejecting the United Kingdom from the European Union contrary to our constitutional requirement that such a fundamental change to our laws, and abrogation of rights, can be given effect only by Parliamentary consent expressed in an Act of Parliament.
70. There is in our view no conflict between Article 50(3) and a constitutional requirement that Parliament must approve the terms of withdrawal, or withdrawal in the absence of agreement. Article 50(3) must be read subject to Article 50(1). A Member State cannot

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<sup>35</sup> See paragraph 6 and footnote 8 above.

be forced out of the European Union otherwise than pursuant to a voluntary decision taken in accordance with its own constitutional requirements.

71. Accordingly, if there is no agreement reached with the European Union, or if Parliament is unwilling to consent to any agreement the Government negotiates, we do not consider that Article 50(3) would automatically bring to an end the United Kingdom's membership of the Union.
  
72. Under our constitutional requirements the United Kingdom can withdraw from the European Union only when Parliament has unambiguously decided that it should do so, pursuant to a withdrawal agreement, or without any withdrawal agreement or transitional arrangements in place. Parliament will at that time be squarely faced with the consequences of that decision for the rights of British citizens and businesses, and nationals of other Member States lawfully resident or established here. Given the very severe economic impact and interference with rights that is likely to arise if the United Kingdom decides to leave the European Union without any agreement in place, Parliament has a clear interest in establishing that adequate measures will be put in place in good time to deal with that contingency, should it arise.

## **CONCLUSION**

73. Our conclusions are summarised at paragraph 2 above.

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**10 February 2017**