



Library Note

Leaving the EU: Parliament's Role in the Process

Following a vote in the referendum on 23 June 2016 in favour of the UK leaving the European Union, the Prime Minister said that this decision “must be accepted”, adding that “Parliament will clearly have a role in making sure that we find the best way forward”. Drawing on parliamentary material and recent legal and constitutional comment, this Library briefing examines what Parliament's role would be in the process of withdrawing from the European Union in several key areas:

Invoking Article 50—The Prime Minister has said it would be for his successor and his or her Cabinet to decide whether the House of Commons should have a vote on the decision to trigger Article 50, the formal process set out in the Treaty on European Union for member states to follow should they decide to leave the EU. Some legal commentators agree that prerogative powers would enable a Prime Minister to take this decision; some have suggested that Parliament could have a role, and others have gone further, arguing that prior parliamentary approval would be required before Article 50 could be invoked.

Overseeing the Negotiation Process—Formal negotiations between the UK and the European Union would not begin until the UK made a notification under Article 50 of its decision to withdraw from the EU. Parliament's involvement in overseeing or scrutinising such negotiations has not yet been set out in great detail. The chair of the House of Lords European Union Committee has called for Parliament to be “fully involved” in the process.

Ratifying Agreements—Parliament would have a statutory role in ratifying an eventual withdrawal agreement and any other international agreements arising from the negotiations if they were subject to the usual procedure for ratifying treaties. The House of Commons potentially has the power to block the ratification of a treaty indefinitely; the House of Lords does not. Under the terms of Article 50, the UK's membership would cease two years after it gave formal notification of its intention to leave, if no withdrawal agreement had come into force by that point, although the two-year period could be extended on the unanimous agreement of all EU member states.

Repealing and Reviewing Domestic Legislation—As part of the process of leaving the EU, decisions would need to be made about how to deal with existing domestic legislation passed to enable EU law to have effect in the UK, a process which the House of Lords European Union Committee has described as “domestic disentanglement from EU law”. Parliament would have an important role to play in reviewing, repealing, amending and replacing legislation, a process which is predicted by many to be complex and time-consuming. Once the UK had formally triggered Article 50, its timescales would apply independently of Parliament approving domestic legislative changes associated with leaving the EU.

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1. Introduction

Speaking in the House of Commons on 27 June 2016, David Cameron, the Prime Minister, said that the decision of the British people to leave the European Union “must be accepted, and the process of implementing the decision in the best way possible must begin”, adding that “Parliament will clearly have a role in making sure that we find the best way forward”.¹ Baroness Stowell of Beeston, Leader of the House of Lords, said that she believed there was “a particular role for the House of Lords in this period as we deliver on the clear instruction of the British people”.² She referred to the “stability” the Lords could provide by “lending our experience, knowledge and expertise to the challenges we face”, as well as the fact that the European Union Committee and its sub-committees would be “well-placed to assist the House”.

This Library briefing examines what Parliament's role would be in the process of withdrawing from the European Union in several key areas: invoking Article 50 to begin formal withdrawal negotiations with the EU; scrutinising and overseeing the withdrawal negotiations; ratifying any international agreements to come out of the negotiation process; and reviewing existing legislation. It does not specifically address the question of whether there is a case to be made for a second referendum. Nor does it cover the related question of the role of the devolved legislatures and governments; discussion of this issue is available in the House of Commons Library briefings on [Brexit: What Happens Next?](#) (24 June 2016); [EU Referendum: The Process of Leaving the EU](#) (8 April 2016); and [Exiting the EU: UK Reform Proposals, Legal Impact and Alternatives to Membership](#) (12 February 2016).

2. Invoking Article 50

Article 50 of the [Treaty on European Union](#) sets out a process for member states to follow should they decide to leave the EU. In its paper on [The Process for Withdrawing from the European Union](#), published prior to the referendum, the Government took the view that Article 50 is “the only lawful way to withdraw from the EU”, and that any action to withdraw unilaterally, such as by repealing the domestic legislation that gives EU law effect in the UK “would be a breach of international and EU law”.³ Following its inquiry into the process for leaving the EU, the House of Lords European Union Committee agreed that “the process described in Article 50 is the only way of doing so consistent with EU and international law”.⁴

¹ [HC Hansard, 27 June 2016, col 22](#) and [col 27](#).

² [HL Hansard, 27 June 2016, col 1382](#).

³ HM Government, [The Process for Withdrawing from the European Union](#), February 2016, Cm 9216, p 13. Section 3 of the House of Commons Library briefing [Brexit: What Happens Next?](#), 24 June 2016, considers arguments that have been put forward as to whether Article 50 is the only route to leaving the EU.

⁴ House of Lords European Union Committee, [The Process of Withdrawing from the European Union](#), 4 May 2016, HL Paper 138 of session 2015–16, p 5.

The terms of Article 50 are 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.
 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.

Differing views have been expressed about how a decision to invoke Article 50 should be taken and what the UK's "constitutional requirements" are in this regard. While some maintain that prerogative powers would enable the Prime Minister to take this decision, some legal commentators have suggested that Parliament could have a role, and others have gone further, arguing that prior parliamentary approval would be required before Article 50 could be invoked.

In his first statement in response to the referendum result, David Cameron said he thought it was "right" that a new Prime Minister "takes the decision about when to trigger Article 50 and start the formal and legal process of leaving the EU".⁵ Mr Cameron told the House of Commons on 27 June 2016 that "the triggering of Article 50 is a matter for the British Government", and "a national sovereign decision".⁶ He said he could not guarantee that there would be a vote in the House of Commons, as the arrangements put in place would be for the new Prime Minister and his or her Cabinet to decide.⁷

⁵ Prime Minister's Office, '[EU Referendum Outcome: PM Statement](#)', 24 June 2016.

⁶ [HC Hansard, 27 June 2016, col 36](#) and [col 51](#).

⁷ [ibid, col 40](#).

Dr Alan Renwick, Deputy Director of University College London's Constitution Unit, agreed that "Parliament has no formal say over whether or when Article 50 is invoked, as this lies within the royal prerogative powers that are exercised by government".⁸ However, he also suggested that if Parliament were to pass a motion calling on the Prime Minister not to invoke Article 50, "we might nevertheless expect him (or perhaps, by then, her) to respect that", although the Prime Minister "could claim the authority of the popular vote to justify ignoring such pressure".

David Allen Green (a lawyer and writer who blogs as 'Jack of Kent') suggested that, given the UK's lack of prescriptive constitutional requirements setting out explicitly how to make a decision to exercise a power under an existing treaty, a 'decision' under Article 50(1) could take place in a number of ways in the UK context, some of which would involve a role for Parliament:

- A decision by the Prime Minister in accordance with the 'royal prerogative' (that is, in accordance with the legal fiction that the Prime Minister can exercise powers on behalf of the Crown);
- As above, but the decision being made by the Prime Minister either in consultation with his or her cabinet, or after a vote of Cabinet (or conceivably the same but with consulting the Privy Council instead);
- A decision by the Prime Minister following a resolution or motion in either House of Parliament or by both houses;
- A decision not by the Prime Minister but one embedded somehow in a new act of parliament (or a special statutory instrument or 'order in council'), or a decision made in compliance with an existing statutory instrument or similar regime; or
- Any of the above following consultation with—or even the consent of—the devolved governments of Scotland, Wales and Northern Ireland.⁹

Sionaidh Douglas-Scott, Anniversary Chair in Law at Queen Mary University of London, noted "the assumption so far" that it would be the Prime Minister who would give formal notification under Article 50, using prerogative powers.¹⁰ However, she pointed out that Parliament has a formal role in the ratification of treaties under the Constitutional Reform and Governance Act 2010 and that there would "inevitably" be a role for Parliament in the repeal of the European Communities Act (ECA) 1972. Although the "constitutional requirements are unclear", Douglas-Scott suggested that there would be at least a political requirement for Parliament to have a role:

As there is a large majority of MPs who wish to remain in the EU, the question of who determines whether/when Article 50 should be triggered is certainly relevant.

⁸ Alan Renwick, '[The Road to Brexit: 16 Things You Need to Know About the Process of Leaving the EU](#)', Constitution Unit Blog, updated 24 June 2016.

⁹ David Allen Green, '[Article 50: Where Are We Now?](#)', Jack of Kent Blog, 26 June 2016.

¹⁰ Sionaidh Douglas-Scott, '[Brexit, the Referendum and the UK Parliament: Some Questions about Sovereignty](#)', UK Constitutional Law Association Blog, 28 June 2016.

A couple of factors suggest that Parliament may need to be involved at an early stage. First, we can see a growing constitutional convention that prerogative powers are subject to parliamentary approval, as was evidenced by the Commons vote on Syria in August 2013 [...] Second, given that a Parliamentary majority will be needed to repeal/amend the ECA in any case, and that it may be some time until formal negotiations are opened, by which time there may be a new government, there will at the very least be a political requirement for parliamentary approval—a resolution, or preferably a majority vote. A parliamentary committee such as the European Scrutiny Committee might also wish to take evidence on the matter, thus delaying formal notification.¹¹

Nick Barber (Fellow in Law at Trinity College Oxford), Tom Hickman, (barrister and Reader in Law at University College London), and Jeff King (Senior Lecturer in Law at University College London) have taken the view that the Prime Minister would be unable to issue a declaration under Article 50 “without having first been authorised to do so by an Act of the United Kingdom Parliament”.¹² They argued that where the royal prerogative and statute “are in tension, statute beats prerogative”, and that “the Government cannot take away rights given by Parliament and it cannot undermine a statute”. In their analysis, triggering Article 50 would “cut across” the European Communities Act 1972 and “render it nugatory”, and would remove British citizens’ rights under the European Parliamentary Elections Act 2002 to vote and stand in elections to the European Parliament. They asserted that the Government “cannot remove or nullify these rights without parliamentary approval” as “prerogative power cannot be used to overturn statutory rights”. Barber, Hickman and King therefore concluded that: “Before an Article 50 declaration can be issued, Parliament must enact a statute empowering or requiring the Prime Minister to issue notice under Article 50 of the Treaty of Lisbon, and empowering the Government to make such changes as are necessary to bring about our exit from the European Union”.

Kenneth Armstrong, Professor of European Law at the University of Cambridge, questioned Barber, Hickman and King’s analysis, countering that “surely once you depart from parliamentary sovereignty by holding a referendum, direct democracy trumps representative democracy”.¹³ In his view, “that the withdrawal decision will have an effect on rights and duties which the UK Parliament has enacted by statute does not give Parliament the right to authorise or not to authorise a government to trigger Article 50”, but rather “it simply means that it will be for Parliament to make the necessary domestic legislative changes to give effect to changes in the UK’s international obligations”.

However, others have also argued that the principle of parliamentary sovereignty means that there would have to be parliamentary approval for a decision to invoke Article 50. In a letter to the *Times*, Charles Flint QC drew a contrast between the assumption that notification under Article 50 of the Treaty on European Union could be given without parliamentary approval and the terms of the European Union Act 2011 that “a change to the Treaty on European Union, agreed between member states, would have required approval by both referendum and by act of parliament”.¹⁴ Sir Malcolm Jack, Clerk of the House of Commons between 2006 and 2011,

¹¹ Sionaidh Douglas-Scott, [‘Brexit, the Referendum and the UK Parliament: Some Questions about Sovereignty’](#), UK Constitutional Law Association Blog, 28 June 2016.

¹² Nick Barber, Tom Hickman and Jeff King, [‘Pulling the Article 50 ‘Trigger’: Parliament’s Indispensable Role’](#), UK Constitutional Law Association Blog, 27 June 2016.

¹³ Kenneth Armstrong, [‘Push Me, Pull You: Who’s \[sic\] Hand on the Article 50 Trigger?’](#), UK Constitutional Law Association Blog, 27 June 2016.

¹⁴ *Times*, [‘EU Referendum Question Yields No Answer’](#), 27 June 2016.

endorsed Charles Flint's point, arguing that "prior to any action taken by the Government on Article 50 there should be a decision in Parliament and members should exercise their judgment, as our representatives, on a free vote".¹⁵

Lord Lester of Herne Hill, (Liberal Democrat) also argued in a letter to the *Times* that Article 50 made clear that "the decision to leave is subject to the UK's constitutional arrangements", which "in this case do not envisage ministers acting under the prerogative without parliamentary authority".¹⁶ In his view, Article 50 "could only be triggered in accordance with the will of Parliament expressed in an act of parliament". He suggested that if the Government disagreed, "the constitutional issue would need to be resolved by the courts". Writing in the *Guardian*, Geoffrey Robertson QC agreed that "the UK's most fundamental constitutional requirement is that there must first be the approval of its Parliament".¹⁷ He suggested that "MPs have every right, and indeed a duty if they think it best for Britain, to vote to stay".¹⁸

During the House of Lords debate on the Prime Minister's parliamentary statement about the referendum outcome, Lord Wallace of Tankerness, (Leader of the Liberal Democrats), Lord Lester of Herne Hill and Lord Elystan-Morgan (Crossbench) all asked what Parliament's role would be in any decision to trigger Article 50.¹⁹ Baroness Stowell said that it was "too early" for her to say, but that she saw it as "an important part of the process that Parliament has a serious opportunity in this House to debate and express its views".²⁰

It has been suggested that the UK could withdraw from the EU without activating the Article 50 process if Parliament repealed the European Communities Act 1972.²¹ Bernard Jenkin, Conservative MP for Harwich and North Essex, and chair of the House of Commons Public Administration and Constitutional Affairs Committee, wrote that in his view, "to leave the EU, there has to be an act of parliament: to repeal the 1972 European Communities Act (ECA)".²² He regarded a decision about how and when to use Article 50 as "a secondary matter", and said that "it is at least debateable that it is necessary at all", since he believed that "no international court is going to insist that the UK government must submit the UK to a process laid down in a treaty the voters have just rejected in a referendum".

Both political and legal objections to this line of argument have been advanced. The Government argued, in its paper on the withdrawal process published prior to the referendum, that "simply repealing the domestic legislation that gives the EU law effect in the UK" would be a breach of the UK's international obligations which would create a "hostile environment" in which to begin negotiating the UK's future relations with EU and non-EU states.²³ Dominic Grieve (Conservative MP for Beaconsfield and former Attorney General) suggested that such a course of action would mean that "no reliance could henceforth be placed on our honouring

¹⁵ *Times*, '[Parliamentary Sovereignty and Article 50](#)', 28 June 2016.

¹⁶ *ibid.*

¹⁷ Geoffrey Robertson, '[How to Stop Brexit: Get Your MP to Vote it Down](#)', *Guardian*, 27 June 2016.

¹⁸ Robertson suggested that a vote could take place on repealing the European Communities Act 1972, which he argued would have to happen "before Brexit can be triggered".

¹⁹ *HL Hansard*, 27 June 2016, cols 1385, 1396 and 1397.

²⁰ *ibid.*, col 1387.

²¹ The House of Lords European Union Committee noted such suggestions in its report, [The Process of Withdrawing from the European Union](#), 4 May 2016, HL Paper 138 of session 2015–16, p 4.

²² Bernard Jenkin, '[Using Article 50 to Quit the EU Risks Making a Mockery of Britain's Decision](#)', *Civil Service World*, 29 June 2016.

²³ HM Government, [The Process for Withdrawing from the European Union](#), February 2016, Cm 9216, p 13.

any international obligation".²⁴ Sionaidh Douglas-Scott argued that an attempt to use national legislation to revoke membership of the EU would rely on a mistaken concept of sovereignty:

It conflates parliamentary sovereignty with external sovereignty, suggesting that the UK can use Parliament and domestic law to govern its relationships with other states and international organisations under treaties, because of some misplaced idea of parliamentary sovereignty. That is not how national sovereignty functions in the international arena. States observe treaties and join international organisations because they know that in ceding some freedom in certain areas, they are actually gaining a greater benefit from pooling sovereignty or accepting certain obligations. There are rules set out in international law, and in treaties, as to how these obligations function and states cannot simply assert parliamentary sovereignty to circumlocute them.²⁵

3. Overseeing the Negotiation Process

Formal negotiations between the UK and the European Union would not begin until the UK had made a notification under Article 50 of its decision to withdraw from the EU. Article 50 provides for a withdrawal agreement to be negotiated, but it has been suggested that other negotiations—to agree on the UK's future relationship with the EU, and to agree trade deals with countries outside the EU—might also run in parallel, or could follow the conclusion of a withdrawal agreement.²⁶ Parliament's involvement in overseeing or scrutinising such negotiations has not yet been set out in great detail.

David Cameron announced the creation of a new EU unit in Whitehall on 27 June, bringing together officials and policy expertise from across government departments and reporting to the Cabinet.²⁷ He explained that Oliver Letwin, Chancellor of the Duchy of Lancaster, would listen to the views and representations of MPs and "make sure that they are fully put into this exercise". Yvette Cooper (Labour MP for Normanton, Pontefract and Castleford) dismissed the Prime Minister's suggestion that MPs "should just go and have an informal chat" with Mr Letwin as "extremely weak".²⁸ She recommended that broader arrangements should be put in place, including a cross-party Joint Committee to look at the UK's future relationship with the EU. Liam Byrne (Labour MP for Birmingham, Hodge Hill) also argued that parliamentary arrangements should be strengthened to provide oversight of the arrangements for leaving the EU.²⁹ In response, Mr Cameron agreed that there was a role for Parliament and the House of Commons in "set[ting] out and examin[ing], in an objective and fact-based way, the alternative models for leaving the European Union", and said that he was open to ideas from members about whether a new Joint Committee was needed, or whether it suited existing select committees.³⁰

Prior to the referendum, the House of Lords European Union Committee took evidence about Parliament's role in overseeing any future withdrawal negotiations. Sir David Edward, a former

²⁴ Dominic Grieve, '[Brexiters are Proposing an Illegal EU Exit](#)', *The Brief*, 17 June 2016.

²⁵ Sionaidh Douglas-Scott, '[Brexit, the Referendum and the UK Parliament: Some Questions about Sovereignty](#)', UK Constitutional Law Association Blog, 28 June 2016.

²⁶ eg HM Government, '[The Process for Withdrawing from the European Union](#)', February 2016, Cm 9216, p 8; and Alan Renwick, '[The Road to Brexit: 16 Things You Need to Know About the Process of Leaving the EU](#)', Constitution Unit Blog, updated 24 June 2016.

²⁷ [HC Hansard, 27 June 2016, col 23](#).

²⁸ *ibid*, [col 34](#).

²⁹ *ibid*, [col 41](#).

³⁰ *ibid*.

judge of the Court of Justice of the European Union and Professor Emeritus at the School of Law, Edinburgh University, said it would be for the UK to determine “what degree of say Parliament has over the acceptability or non-acceptability of the agreement”.³¹ Professor Derek Wyatt, Emeritus Professor of Law, Oxford University, told the Committee that a political argument could be made “for a high degree of parliamentary involvement in the withdrawal process”.³² The Committee concluded that: “Should the UK decide to withdraw from the EU, the UK Parliament should have enhanced oversight of the negotiations on the withdrawal and the new relationship, beyond existing ratification procedures”.³³ The Committee said it would “consider how best to achieve that, should the need arise”.

Following the referendum result, Lord Boswell of Aynho, chair of the Committee, said that Parliament “must be fully involved” in the withdrawal process, to make sure that it was “transparent” and that “the Government’s long-term goals have real democratic legitimacy”.³⁴ He asked Baroness Stowell to confirm that both Houses of Parliament would be “informed and enabled so that they may make a full and constructive contribution” to the process of negotiating withdrawal and developing a future relationship with the EU.³⁵ Baroness Stowell agreed that the “expertise and knowledge” in the House of Lords would make “a strong contribution” to the process, but said she was “not in a position” to provide detail on how this would work.³⁶

Alan Renwick, of the Constitution Unit, stated that Parliament would “expect to be updated regularly on the negotiations and to have its views heard, perhaps through votes on specific issues”.³⁷ Lord Lisvane (a Crossbench Member of the House of Lords, who as Sir Robert Rogers, was Clerk of the House of Commons from 2011 to 2014) speculated prior to the referendum on what the triggering of Article 50 might mean in terms of parliamentary time and activity:

A senior cabinet minister would need to be appointed to lead the negotiation process. There would be ministerial statements most days and there would probably be one or two urgent questions each day [...] because of course the issues being negotiated would cover every aspect of the work of Parliament. There may also be pressure for a dedicated question time on the whole business of negotiating the exit deal.

The immediately relevant select committees—Foreign Affairs, BIS, European Scrutiny—will, of course, swing into action. But all the departmental committees will want a finger in the pie and there may be some calls, certainly in the Commons, to set up a sort of super-committee to oversee the whole thing.

³¹ House of Lords European Union Committee, [The Process of Withdrawing from the European Union](#), 4 May 2016, HL Paper 138 of session 2015–16, p 18.

³² *ibid.*

³³ *ibid.*, p 19.

³⁴ House of Lords European Union Committee, [‘EU Committee Chairman Comments on EU Referendum Result’](#), 24 June 2016.

³⁵ [HL Hansard, 27 June 2016, col 1389](#).

³⁶ *ibid.*

³⁷ Alan Renwick, [‘The Road to Brexit: 16 Things You Need to Know About the Process of Leaving the EU’](#), Constitution Unit Blog, updated 24 June 2016.

There will also be quite a lot of pressure to have parliamentary approval at different stages of the process. This could complicate the negotiations if they had to pause for the approval of Parliament at each stage.³⁸

The Constitution Unit added that in the absence of a super-committee of the type suggested by Lord Lisvane, the House of Commons European Scrutiny Committee and the House of Lords European Union Committee would “face substantial additional burdens in ensuring effective scrutiny”.³⁹

Ruth Fox of the Hansard Society echoed several of Lord Lisvane's points about the use of questions in the Chamber to hold ministers to account, and about parliamentary committees' involvement in scrutiny:

The scrutiny work that lies ahead will be detailed, complex and technical. MPs already struggle to effectively scrutinise financial and delegated legislation and this will add to the burden. Serious consideration therefore needs to be given to a bi-cameral solution to the scrutiny process given that peers tend to have greater appetite for and experience of such scrutiny. It would be in both Houses' interest not to duplicate work.

In the Commons a regular ministerial question time may well be demanded, debates about the way ahead will be a regular feature and the urgent question is likely to be a key tool as backbenchers try to hold ministers to account. Similar provisions for question time and debates are likely to be requested in the House of Lords.

A stand-alone select committee or a joint committee of both Houses may be required to monitor the negotiations and decision-making, although existing departmental select committees will want to oversee their own particular departmental policy area. As a consequence we will likely see greater efforts at joint working across committees. Consideration will need to be given to how to knit together the new scrutiny work with that of existing committees that are tasked with scrutinising EU legislation, specifically the European Scrutiny Committee in the Commons and the EU Committee in the Lords.⁴⁰

4. Ratifying Agreements

Parliament would have a statutory role in ratifying an eventual withdrawal agreement and any other international agreements arising from the negotiation process(es) if they were subject to the usual procedure for ratifying treaties. Under section 20 of the Constitutional Reform and Governance Act 2010, a treaty may not be ratified unless the Minister responsible has:

- Laid a copy before Parliament;
- Published it;

³⁸ Lord Lisvane, '[In the Event of a Leave Vote Brexit Would Dominate Westminster for Years](#)', Constitution Unit Blog, 28 April 2016.

³⁹ Nicholas Wright and Oliver Patel, '[The Constitutional Consequences of Brexit: Whitehall and Westminster](#)', Constitution Unit, 4 May 2016.

⁴⁰ Ruth Fox, '[It's Brexit... So What Now for Parliament?](#)', Hansard Society Blog, 24 June 2016.

- Allowed a period of 21 sitting days (beginning with the day after that on which the treaty was laid) during which either House may resolve that the treaty should not be ratified.⁴¹

The Minister may extend the scrutiny period by up to 21 sitting days by publishing and laying before Parliament a statement to that effect before the original period expires; this can be done more than once.⁴²

After 21 sitting days (or the extended scrutiny period if applicable) has elapsed, the treaty may be ratified if neither House has resolved that the treaty should not be ratified. If the House of Commons resolves against the ratification of the treaty, the minister must lay a statement before Parliament explaining why the Government believes the treaty should nevertheless be ratified. This marks the start of a further period of 21 sitting days. The treaty can be ratified at the end of this period, unless the House of Commons has resolved again that ratification should not happen. In this case, the Government can lay its statement again, triggering a further period of 21 sitting days. The House of Commons Library has observed that this process could continue to be repeated, “potentially blocking a treaty indefinitely”.⁴³ The same does not apply if the House of Lords passes a resolution that the treaty should not be ratified. In this case, unless the House of Commons has also resolved against ratifying the treaty, the Government can proceed with ratification after laying a statement before Parliament explaining why the minister believes the treaty should be ratified. Neither House can amend a treaty as part of this process.

Under section 22 of the 2010 Act, the normal procedure outlined in section 20 “does not apply to a treaty if a Minister of the Crown is of the opinion that, exceptionally, the treaty should be ratified without the requirements of that section having been met”. In such a case, either before or as soon as practicable after the treaty has been ratified, it must be published and laid before Parliament by the minister, along with a statement explaining why the treaty is being ratified outside this process.⁴⁴ However, this exceptional procedure cannot be used if either House has already passed a resolution against ratifying the treaty (section 22(2)).

In the assessment of Dr Alan Renwick of University College London's Constitution Unit, the House of Commons would have to take account of political factors, public opinion and timing when weighing up whether to block the ratification of an eventual agreement:

[...] The large majority of MPs currently favour staying in the EU. If they want a post-Brexit deal involving substantial integration with the EU—perhaps akin to Norway's arrangements—they could potentially have the power to reject any deal that does not provide that. Whether they will do so will depend in part on the political situation and the state of public opinion at the time, both of which are highly unpredictable. It will depend also on the withdrawal timetable: if the two-year window is near to closing, rejecting the deal on the table could be very risky.⁴⁵

⁴¹ House of Lords, [Companion to the Standing Orders and Guide to the Proceedings of the House of Lords](#), 2015, para 0.58.

⁴² *ibid*, para 10.59.

⁴³ House of Commons Library, [Parliament's New Statutory Role in Ratifying Treaties](#), 8 February 2011, p 2.

⁴⁴ House of Lords, [Companion to the Standing Orders and Guide to the Proceedings of the House of Lords](#), 2015, para 10.61.

⁴⁵ Alan Renwick, [The Road to Brexit: 16 Things You Need to Know About the Process of Leaving the EU](#), Constitution Unit Blog, updated 24 June 2016.

He has also suggested that a scenario in which the Government and Parliament were “at loggerheads over the terms of the deal” could be one in which a second referendum became “conceivable”, although he maintained that “we should presume that leave means leave”.⁴⁶

Under the terms of Article 50, the UK’s membership would automatically cease two years from the date that the UK gave formal intention of its notification to leave the EU if no withdrawal agreement had come into force by that point, although the two-year period could be extended on the unanimous agreement of all EU member states.

The treaty ratification procedure outlined above does not apply to treaties which amend the Treaty on European Union (TEU) or the Treaty on the Functioning of the European Union (TFEU). The European Union Referendum Act 2011 provides that an act of parliament would be required in the case of any treaty which sought to amend or replace TEU or TFEU.⁴⁷ In addition, a referendum would have to be held if a proposed amendment of TEU or TFEU sought to transfer power or competence from the UK to the EU. As noted above, in a letter to the *Times*, Charles Flint QC pointed out the contrast between, on the one hand, the assumption that the UK could launch the process to withdraw from the treaties without parliamentary approval, and on the other hand, the requirement under the European Union Act 2011 that the treaties cannot be amended without parliamentary approval.⁴⁸

5. Repealing and Reviewing Domestic Legislation

As part of the process of leaving the EU, decisions would need to be made about how to deal with existing domestic legislation passed to enable EU law to have effect in the UK, a process which the House of Lords European Union Committee has described as “domestic disentanglement from EU law”.⁴⁹ Parliament would have an important role to play in this process. Prior to the referendum, the Government stated that:

Withdrawal would involve considerable implications for UK domestic legislation. The UK Parliament and the devolved administration would need to consider how to replace EU laws, including how to maintain a robust legal and regulatory framework where that had previously depended on EU laws. Sanctions against countries such as North Korea, and for some terrorist groups or individuals, are generally adopted at the EU level rather than domestically. Many financial regulations, such as those governing prudential requirements for banks and investment funds, have direct effect from EU law.⁵⁰

⁴⁶ Alan Renwick, ‘[The Road to Brexit: 16 Things You Need to Know About the Process of Leaving the EU](#)’, Constitution Unit Blog, updated 24 June 2016.

⁴⁷ Foreign and Commonwealth Office, [European Union Act 2011: Explanatory Notes](#), July 2011, para 20. The European Union (Amendment) Act 2008 had previously required that any amendment to TEU, TFEU or the Treaty Establishing the European Atomic Energy Community should be approved by an Act of Parliament before the UK could ratify the amendment concerned. The 2008 Act still applies in respect of the Treaty Establishing the European Atomic Energy Community.

⁴⁸ *Times*, ‘[EU Referendum Question Yields No Answer](#)’, 27 June 2016.

⁴⁹ House of Lords European Union Committee, [The Process of Withdrawing from the European Union](#), 4 May 2016, HL Paper 138 of session 2015–16, p 19.

⁵⁰ HM Government, [The Process for Withdrawing from the European Union](#), February 2016, Cm 9216, p 20.

It is the European Communities Act 1972 (ECA) that “defines the legal relationship between the two otherwise separate spheres” of national and EU law.⁵¹ The House of Commons European Scrutiny Committee summarised its effects as follows:

[...] section 2(1) means that provisions of EU law that are directly applicable or have direct effect, such as EU Regulations or certain articles of the EU Treaties, are automatically and “without further enactment” incorporated and binding in national law without the need for a further Act of Parliament.

[...] Section 2(2), by contrast, applies to measures of EU law that are neither directly applicable nor have direct effect. This provision makes it possible to give effect in national law to such measures by secondary, or delegated, legislation, such as statutory instruments; importantly, such secondary legislation can amend an Act of Parliament (section 2(4)) since the delegated legislative power includes the power to make such provision as might be made by Act of Parliament.

[...] Section 2(4) and 3(1) give effect to the doctrine of the supremacy of EU law, as interpreted by the Court of Justice, over national; and where EU law is in doubt, requires UK courts to refer the question to the Court of Justice.⁵²

Some EU law measures have been given effect in national law through statutory instruments made under section 2(2) of the ECA; other measures have been transposed into national law through other legislation, for example through secondary legislation made under parent acts other than the ECA. Repealing the ECA would mean that all directly applicable and directly effective provisions of EU law would automatically cease to apply, as would all secondary legislation implementing EU law via ECA section 2(2), but all primary legislation transposing EU law into domestic law would remain unaffected.⁵³ Richard Gordon QC and Rowena Moffatt of the Constitution Society have stated that, given the variety of different routes by which EU law has been incorporated into domestic law, “there will, to say the least, be some complexity in devising legislative drafting that is adequate to enable proper scrutiny to be given to the myriad amendments and repeals that will be needed [...] to retain those parts of EU law that the government wishes to retain”.⁵⁴ Likewise, Ruth Fox of the Hansard Society warned of the need to avoid “mistakes and anomalies that plunge people into grey areas of legal uncertainty”.⁵⁵

In its investigation into the process for leaving the EU, the House of Lords European Union Committee concluded that: “The Government of the day might well wish to maintain a significant amount of EU law in force in national law, because it would be in the national interest to do so”.⁵⁶ Equally, as Lord Lisvane has pointed out: “there will be a huge menu of policy areas [...] that will be up for discussion. In all sorts of areas, the question will be

⁵¹ House of Commons European Scrutiny Committee, [The EU Bill and Parliamentary Sovereignty](#), 7 December 2010, HC 633-I of session 2010–12, para 11.

⁵² House of Commons European Scrutiny Committee, [The EU Bill and Parliamentary Sovereignty](#), 7 December 2010, HC 633-I of session 2010–12, paras 12–16.

⁵³ Richard Gordon QC and Rowena Moffatt, [Brexit: The Immediate Legal Consequences](#), Constitution Society, 20 May 2016, p 23.

⁵⁴ *ibid*, p 22.

⁵⁵ Ruth Fox, [‘It’s Brexit... So What Now for Parliament?’](#), Hansard Society Blog, 24 June 2016.

⁵⁶ House of Lords European Union Committee, [The Process of Withdrawing from the European Union](#), 4 May 2016, HL Paper 138 of session 2015–16, p 19.

asked: 'Just because something is done in a particular way already, do we want to go on doing it that way?'.⁵⁷

The House of Commons Library briefing [Exiting the EU: Impact in Key UK Policy Areas](#) considers in greater detail how different policy areas would be affected by the UK's leaving the EU, and what the legislative impact might be. In summary, it suggests that: "In some areas, the environment for example, where the UK is bound by other international agreements, much of the context of EU law would probably remain. In others, it might be expedient for the UK to retain the substance of EU law, or for the Government to remove EU obligations from UK statutes".⁵⁸ Depending on the nature of the UK's future relationship with the EU, there might be a requirement to keep some EU measures in place. For example, members of the European Economic Area implement EU legislation covering the four freedoms—the free movement of goods, services, persons and capital.⁵⁹

It has also been suggested that legislation might be necessary regarding "the precedent value of European court case law and its status in areas where a particular area of EU law was sought to be preserved in a domestic context".⁶⁰

The House of Commons Library has summarised various options for dealing with the ECA and other legislation:

There might be some over-arching legislation saying, for example, that all UK laws implementing any EU Directive were repealed (perhaps with specified exceptions) or that they would all remain in force (again perhaps with exceptions). If the ECA were repealed, any secondary legislation based on s2(2) ECA would need to be saved from lapsing if it was to continue in force. EU Regulations, which are directly applicable (ie they do not need further implementation in the UK to come into force) will cease to have effect if the UK were to repeal the ECA.

There is no reason why EU-based UK law could not remain part of UK law, but the Government would have to make sure it still worked without the UK being in the EU.

The Government would probably come up with a mechanism for allowing changes to be made to secondary legislation (statutory instruments) made under the ECA or other 'parent' acts. There could also be general amendments such as replacing references to 'the Commission' or 'Council' with references to 'the Secretary of State'.⁶¹

A number of observers have commented on the size and complexity of this task, and the amount of parliamentary, ministerial and civil service time likely to be required. The House of Lords European Union Committee suggested that the "review of the entire corpus of EU law as it applies nationally and in the devolved nations" would "take years to complete".⁶² The Constitution Unit has expressed the view that "the size of the task [...] could overwhelm

⁵⁷ Lord Lisvane, '[In the Event of a Leave Vote Brexit Would Dominate Westminster for Years](#)', Constitution Unit Blog, 28 April 2016.

⁵⁸ House of Commons Library, [Exiting the EU: Impact in Key UK Policy Areas](#), 12 February 2016, p 11.

⁵⁹ European Free Trade Association, '[EEA Agreement](#)', accessed 5 May 2016.

⁶⁰ Richard Gordon QC and Rowena Moffatt, [Brexit: The Immediate Legal Consequences](#), Constitution Society, 20 May 2016, p 8.

⁶¹ House of Commons Library, [Brexit: What Happens Next?](#), 24 June 2016, p 13.

⁶² House of Lords European Union Committee, [The Process of Withdrawing from the European Union](#), 4 May 2016, HL Paper 138 of session 2015–16, p 19.

Parliament's capacity to exercise effective legislative control".⁶³ In a separate blog post, Alan Renwick of the Constitution Unit estimated that the "task of reviewing 40 years of EU and domestic legislation could take five or ten years".⁶⁴ Sir Paul Jenkins, former Treasury Solicitor and Head of the Government Legal Service between 2006 and 2014, described the process of "unravelling 40 years of an entrenched constitutional position" as the "largest legal, legislative and bureaucratic project in British history except for a world war".⁶⁵

Baroness Smith of Basildon, Leader of the Opposition in the House of Lords, asked whether the Government had considered a timescale for the new legislation required, and whether the current legislative programme would be withdrawn.⁶⁶ She also raised the fact that some legislation currently before Parliament, such as the Investigatory Powers Bill, was "linked to our co-operation with other EU countries". In response, Baroness Stowell said that the Government "must very much continue with [its] legislative programme", for which it had a mandate from the 2015 general election.⁶⁷

Ruth Fox of the Hansard Society has speculated that this work could once again place Parliament's procedures for scrutinising and approving delegated legislation under the spotlight:

Given the volume of legislation involved, in practice much of the heavy lifting will probably have to be done via delegation and through statutory instruments. This will empower the executive not Parliament and, given the complete inadequacies of Commons procedures for scrutinising delegated legislation, will frustrate MPs, not least because they do not currently have the power of amendment. The passage of this legislation may also be unduly complicated and time consuming given the need to determine the EVEL [English votes for English laws] designation of each new SI for scrutiny purposes.

The process may give rise, once again, to questions about the relationship between the Commons and the Lords. As things stand, the Upper House retains its right to reject statutory instruments, but does so very rarely. If the government does not enact the proposals in the Strathclyde Review then it is not inconceivable that the two Houses could clash on the detail of these SIs in future if peers feel that errors are being made in the review and amendment process. Delegated legislation, unlike primary legislation is also subject to judicial review so the door will remain open to potential legal challenges if problems arise.⁶⁸

As mentioned above, if the UK had triggered Article 50, then its membership of the EU would automatically cease two years from the date that the UK gave formal intention of its notification to leave the EU if no withdrawal agreement had come into force by that point, although the two-year period could be extended on the unanimous agreement of all EU member states. These provisions of Article 50 do not depend on Parliament approving domestic legislative changes associated with leaving the EU.

⁶³ Nicholas Wright and Oliver Patel, [The Constitutional Consequences of Brexit: Whitehall and Westminster](#), Constitution Unit, 4 May 2016.

⁶⁴ Alan Renwick, [The Road to Brexit: 16 Things You Need to Know About the Process of Leaving the EU](#), Constitution Unit Blog, updated 24 June 2016.

⁶⁵ Matt Ross, [Brexit Will Be "Largest Legal, Legislative and Bureaucratic Project in British History", Says Former UK Treasury Solicitor](#), Global Government Forum, 24 June 2016.

⁶⁶ [HL Hansard, 27 June 2016, cols 1383–4.](#)

⁶⁷ [ibid, col 1387.](#)

⁶⁸ Ruth Fox, [It's Brexit... So What Now for Parliament?](#), Hansard Society Blog, 24 June 2016.

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