

Our reference: JHL

Date: 8 July 2016

Oliver Gilman
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Government Legal Department
One Kemble Street, London, WC2B 4TS

Initially by fax to 0207 210 3480
and e mail to:

Dear Sir

RE: ARTICLE 50 OF THE TREATY ON THE EUROPEAN UNION AND THE EUROPEAN REFERENDUM ACT 2015

1. We are instructed to advise a number of private individuals with a strong personal interest in the proper mechanism by which the United Kingdom might exit the European Union ('EU'). We are acting with some limited funding raised from the crowdfunding website, Crowdfunder. Over 400 individuals have made donations, with the maximum contribution capped at £100. Our funders represent a cross-section of ordinary people who are likely to be significantly affected by the UK's departure from the EU and believe that their elected representatives should control the timing and manner of any departure.
2. This letter seeks clarification from the Government that the process for withdrawal from the European Union under Article 50 of the Treaty on European Union ('TEU') will not commence until it is authorised by those representatives through primary legislation. We understand from public statements that the Government has been advised the process may be begun by an incoming Prime Minister alone, using the prerogative, without the need for Parliament's explicit approval. Together with a team of constitutional law experts, including three QCs, we have advised that it would be unlawful for the Prime Minister, or any other Minister, to purport to start the Article 50 process without primary legislation. We set out below the legal basis for that advice and invite you to respond, by 4 pm next Friday 15th July, either: (a) confirming that the Article 50 decision will not be taken without Parliament's express authorisation by primary legislation; or (b) fully explaining the reasons why you disagree with our position.

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3. In providing the clarification that we seek we also request that you set out the Government's position on the question of whether the Article 50 process, once begun, can be stopped or reversed by the UK without the agreement of the other 27 EU Member States (see paragraphs 14-17, below).
4. We will be advising as to the next appropriate steps in the light of your response. We recognise that the timeframe within which we have requested a response is a tight one. The matter is urgent, however, and we are aware that you have already been asked by others to confirm the Government's position. It follows that you will have already given, or will shortly give, legal advice on the issues we raise.

SUMMARY

5. We have advised that only Parliament may make the decision for the UK to withdraw under Article 50(1) TEU because that decision, once notified to the Council, will trigger the UK's *automatic* withdrawal from the EU Treaties. Article 50(3) provides that at the end of the two year period the EU Treaties will automatically cease to apply to the UK. Article 50 contains no express provision allowing a departing Member State to stop or reverse the process, once begun, but even if Article 50 were reversible, a future government may decide not to take that step. It follows that if the Prime Minister, or another Minister lawfully could, and did, evoke Article 50 using the prerogative, the UK would automatically leave the EU at the end of the two year process without Parliament having authorised that outcome. All the rights currently enjoyed by UK citizens under the European Communities Act 1972 ('**ECA 1972**'), including rights of citizenship of the EU and free movement within it, would be automatically abrogated.
6. We accept that there are circumstances where the making (and breaking) of treaties will be a matter for the executive under prerogative powers without the need for Parliamentary authorisation. However, the prerogative may not be used if the effect is to modify or abrogate rights that are enforceable in domestic law (the constitutional principle of legality), nor can it be used if its use is expressly or impliedly ousted by statute. The withdrawal of the UK from the EU under Article 50(3) will automatically abrogate rights which were conferred by Parliament under the 1972 Act, and which cannot be removed save by Parliament itself acting through primary legislation. Beyond that general constitutional principle, the language of the ECA 1972 and the European Union Act 2011 ('**EUA 2011**') themselves, properly construed, require that a major change to the UK's treaty rights and obligations be authorised by Parliament. The consequence is that Article 50 TEU cannot lawfully be triggered without advance Parliamentary authority, in the form of a statute.

BACKGROUND

7. On 23 June 2016, the population of the United Kingdom (and Gibraltar) voted by majority in an advisory referendum to leave the EU. The referendum was conducted pursuant to the European Union Referendum Act (“**the 2015 Act**”). In an election the legal consequence of a vote is that a candidate is declared to have been elected to a particular position or office. By contrast, the referendum has no legal consequences. It is simply a reflection of the view of the electorate, at that particular moment, on the referendum question identified in section 1 of the 2015 Act. Unlike an election, there is no legal mechanism like an election petition to ‘set aside’ the result of a referendum tainted by third party acts, even if these are unlawful. A referendum can only be set aside by way of judicial review on the basis of some public law error in the mechanism by which the electorate was asked to express a view (schedule 3 paragraph 19 of the 2015 Act). It is perhaps for these reasons that, notwithstanding widespread public criticism of some of the factual assertions made and campaigning in the referendum period, there is presently no question of a legal challenge to the outcome of the referendum. None of this obviates the need for proper Parliamentary oversight of the steps to be taken in response to the referendum, however. If anything, that need is increased.
8. In order to leave the EU, Article 50(1) TEU provides that the United Kingdom must ‘decide’ to withdraw from the European Union and notify that decision to the European Council (Article 50(2)). Article 50 sets out the procedure for withdrawal but is silent on the question of who makes the decision to withdraw, providing only that “[a]ny Member State may decide to withdraw from the Union in accordance with its own constitutional requirements”. The United Kingdom as a state has yet to “*decide to withdraw*”, as the referendum does not constitute that decision. The question, then, is what are the “*constitutional requirements*” of the United Kingdom that must be met for a valid decision to be taken and a valid notification to be given under Articles 50(1) and (2).
9. The Government has apparently adopted the position that the giving of notification of the decision to withdraw under Article 50(2), and so by implication the Article 50(1) decision to withdraw itself, is a matter for the executive in the exercise of prerogative powers. In his resignation speech, on 23 June 2016, the Prime Minister stated “[a] negotiation with the European Union will need to begin under a new Prime Minister, and I think it is right that this new Prime Minister takes the decision about when to trigger Article 50...”. The position of the Government was clarified by the Prime Minister’s statement to 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*”. Most significantly, as you will be aware, the Foreign Affairs Committee is holding evidence sessions as part of its new inquiry

on the implications of the vote to leave the EU for the UK's global role and for the Foreign and Commonwealth Office and on 5 July 2016, Rt Hon Oliver Letwin MP, Chancellor of the Duchy of Lancaster, stated

"It is entirely a matter for the new administration to take how to conduct the entire negotiations, and obviously part of that decision is about when to trigger Article 50 ... I am advised that the government lawyer's view is that it clearly is prerogative power. No doubt that will be heard in court".

10. If that statement represents the considered view of the Government then, with respect, we consider it to be incorrect. In our view triggering Article 50 is a matter for Parliament, for the reasons that follow.

ARTICLE 50 AND ITS CONSEQUENCES

11. Article 50 TEU was introduced by the Lisbon Treaty in 2007 and came into force in 2009. It provides the only mechanism by which a Member State can leave the EU but has never been used. It states:

"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.”

12. There are a number of significant features of Article 50 which we take to be not in dispute. First, the process can only be initiated by the departing Member State, not the other Member States. Second, a formal *decision* must be taken under Article 50(1) which must then be *notified* to the Council under Article 50(2) to commence the process. Third, once the process has begun, by Article 50(3) the EU treaties will automatically cease to apply to the departing Member State after a period of two years or on such other date as may be agreed between the Member State and the EU.
13. Accordingly, once the United Kingdom has made a decision to withdraw and notified it to the Council then unless some agreement is reached as to the United Kingdom’s future relationship with the EU within two years, and if no extension is agreed to the time limit, the UK will automatically cease to be a part of the EU. EU law will no longer operate in the UK, its Crown Dependencies and overseas territories and the rights of British citizens (among others) to be treated as EU citizens under Article 20(1) of the Treaty on the Functioning of the European Union (‘TFEU’) will be extinguished. These include rights to move, settle and work freely in other EU countries. In the absence of any new international agreement between the UK and the EU or some other body such as the European Economic Area (‘the EEA’), the single market in goods and services will be closed to the UK and its territories and WTO rules of trade will apply by default resulting in the introduction of trade tariffs between the UK and EU and the loss of access to preferential trading agreements between the EU and other parts of the world. The terms upon which the UK seeks to leave the EU are therefore critical to its economic, social and political future.
14. Differing views have been expressed as to whether the Article 50 process can be reversed unilaterally by a Member State after it has given notification under Article 50(2). For example, Professor Derek Wyatt QC gave evidence to the House of Lords Select Committee on the European Union on 8 March 2016 that, in his opinion, Article 50 could be reversed. Other equally distinguished lawyers consider that it cannot. For instance, Sir David Edward, a

former judge of the European Court of Justice, when giving evidence to the Select Committee, stated:

“It does not seem to me that you can necessarily say, ‘Right; I have put you to all this trouble; we have negotiated for two years and now I do not actually like the terms you are offering so I want to go back to zero’. My hunch is that many of them might say, ‘Right, back to zero. No more optouts’.”

15. A Briefing note prepared by the European Parliamentary Research Service for the European Parliament in March 2016 also states that the process is not reversible at the suit of the departing Member State without the agreement of the other 27 Member States (our emphasis):

“Furthermore, it should be noted that the *event triggering the withdrawal is the unilateral notification* as such and not the agreement between the withdrawing state and the EU. The merely declaratory character of the withdrawal agreement for cancellation of membership derives from the fact that the withdrawal takes place even if an agreement is not concluded (Article 50(3) TEU). *This does not mean, however, that the withdrawal process could not be suspended, if there was mutual agreement between the withdrawing state, the remaining Member States and the EU institutions, rather than a unilateral revocation.*”

16. For Article 50 to be unilaterally reversible would, moreover, be inconsistent with the express requirement in Article 50(3) that the two year negotiation period can only be extended by the unanimous agreement of the other 27 Member States. That rule would be otiose if the departing Member State could simply change its mind and walk away, thereby avoiding the consequences of Article 50.
17. The position has never been tested and the reversibility of Article 50 as a matter of EU law is consequently uncertain. The ultimate arbiter of that question is the CJEU. It is not necessary to establish conclusively that Article 50 is irreversible to make good our argument that only Parliament may authorise the process to be commenced. Nonetheless, it would appear to be in the UK’s interests for that issue to be resolved before the Article 50 process is commenced and we ask that you clarify the Government’s position on this important question.

DOMESTIC STATUTORY FRAMEWORK

18. The ECA 1972 and the EUA 2011 require that before any new EU Treaty can be given effect in domestic law, or before any of the existing EU Treaties to which effect is given domestically are amended or replaced, Parliament must give its explicit authorisation by three separate mechanisms:
- (a) section 2(1) of the EUA 2011 requires that any new Treaty that amends or replaces the TEU or TEU be laid before and approved by Act of Parliament (and, in some cases, also by a referendum) before it is *ratified*;
 - (b) following ratification, any new EU Treaty must be specified as such by way of Order in Council and then approved by both Houses of Parliament under the positive resolution procedure (s. 1(2) of the ECA 1972); and
 - (c) an Act of Parliament is then necessary in order to amend the definition of “the Treaties” in s. 1(1) of the ECA 1972 to include the new EU Treaty before effect is given to it in domestic law by s 2(1) of the ECA 1972.
19. While neither the ECA 1972 nor the EUA 2011 make express provision for the UK’s departure from the EU or the activation of Article 50, for the reasons developed below such a major treaty change also requires the authorisation of Parliament.

ANALYSIS

20. Under our constitution only Parliament can authorise an act that repudiates the EU Treaties to which effect is given by the ECA 1972. Denning LJ in *Blackburn v AG* [1971] 1 WLR 1037 at 1040 said this:
- “If her Majesty’s Ministers sign this treaty and Parliament enacts provisions to implement it, I do not envisage that Parliament would afterwards go back on it and try to withdraw from it. But, if Parliament should so, then I say we will consider that event when it happens. We will then say whether Parliament can lawfully do it or not.”
21. In *Macarthy’s Ltd v Smith* [1979] 3 All ER 325 Denning LJ said, to similar effect:
- “If the time should come when our Parliament deliberately passes an Act with the intention of repudiating the Treaty or any provision in it or intentionally of acting inconsistently with it and says so in express terms then I should have thought that it

would be the duty of our courts to follow the statute of our Parliament.”

22. A unanimous Court of Appeal in *R (Shindler) v Chancellor of the Duchy of Lancaster* [2016] EWCA Civ 469 also proceeded on the assumption that only Parliament had the power to decide whether or not to withdraw from the EU. Per Lord Dyson MR (§19):

“I accept that Parliament is sovereign and that it does not need the mandate of a referendum to give it the power to withdraw from the EU. But by passing the 2015 Act, Parliament has decided that it will not withdraw from the EU unless a withdrawal is supported by referendum. In theory, Parliament could decide to withdraw without waiting for the result of the referendum despite the passing of the 2015 Act. But this is no more than a theoretical possibility. The reality is that it has decided that it will withdraw only if that course is sanctioned by the referendum that it has set in train. In other words, the referendum (if it supports a withdrawal) is an integral part of the process of deciding to withdraw from the EU. In short, by passing the 2015 Act, Parliament decided that one of the constitutional requirements that had to be satisfied as a condition of a withdrawal from the EU was a referendum.”

23. We accept that the point now under consideration was not argued in any of those cases but it is instructive that these very senior and distinguished constitutional law judges assumed that Parliament, rather than the executive, would need to authorise withdrawal from the EU treaties themselves. They are right as a matter of principle, for the reasons that follow.

First reason: the principle of legality prohibits use of the prerogative to modify or abrogate existing rights

24. The exercise of the prerogative to make treaties does not permit the creation, modification or abrogation of domestic rights without an Act of Parliament:

“the Royal Prerogative, whilst it embraces the making of treaties, does not extend to altering the law or conferring rights upon individuals or depriving individuals of rights which they enjoy in domestic law without the intervention of Parliament” (*Rayner (Mincing Lane) Ltd v DOT* [1990] 2 A.C. 418, 500B-C, per Lord Oliver).

25. As Sir Edward Coke stated in *The Case of Proclamations* (1610) 12 Co. Rep 74: “...the King by his proclamation ... cannot change any

part of the common law, or statute, or the customs of the realm." This is an early formulation - and only one instance - of what has since become known as the principle of legality, which mandates that Parliament alone may override or abrogate domestic rights: see, for example, *HM Treasury v Ahmed* [2010] 2 A.C. 534.

26. A decision under Article 50(1) followed by notification under Article 50(2) is the 'event triggering the withdrawal' from the EU treaties (see above, para 15), which by Article 50(3) will occur automatically once the two year negotiation period has expired. That will deprive individuals of the rights which they currently enjoy under the EU Treaties by virtue of the 1972 Act including the EU law right of citizenship and the right to vote in elections to the European Parliament, conferred domestically by the European Parliamentary Elections Act 2002. While that deprivation will not be immediate it will be inevitable once the two year negotiation period elapses. Notification under Article 50(1) is therefore '*self-executing*' in domestic law (see *Rayner*, *ibid*) because all the rights arising under the EU treaties, as given effect domestically by the 1972 Act, will be abrogated or modified in that event, without the need for any further Act of Parliament. The principle of legality means that primary legislation alone can authorise such a decision.
27. This is supported by observations of Lord Mance in the Supreme Court in *Pham v Secretary of State for the Home Department* [2015] UKSC 19. Considering that the conferral of rights as an EU citizen was the consequence of the passage of the ECA 1972, he observed at [82] (our emphasis):

"For a domestic court, the starting point is, in any event, to identify the ultimate legislative authority in its jurisdiction according to the relevant rule of recognition. The search is simple in a country like the United Kingdom with an explicitly dualist approach to obligations undertaken at a supranational level. European law is certainly special and represents a remarkable development in the world's legal history. But, unless and until the rule of recognition by which we shape our decisions is altered, we must view the United Kingdom as independent, *Parliament as sovereign and European law as part of domestic law because Parliament has so willed*. The question how far Parliament has so willed is thus determined by construing the 1972 Act."

28. Lord Mance cited support from Dicey for the proposition that citizenship conferred by Parliament cannot be removed save by a subsequent act of Parliament. See paragraph 97:

"The present appeal concerns a status which is as fundamental at common law as it is in European and

international law, that is the status of citizenship. Blackstone (Commentaries on the Laws of England Book I, p 137) states the position as follows: “A natural and regular consequence of this personal liberty is, that every Englishman may claim a right to abide in his own country so long as he pleases; and not to be driven from it unless by the sentence of the law. The king indeed, by his royal prerogative, may issue out his writ ne exeat regnum, and prohibit any of his subjects from going into foreign parts without licence. ... But no power on earth, except the authority of parliament, can send any subject of England out of the land against his will; no, not even a criminal. For exile, and transportation, are punishments at present unknown to the common law; ...”

29. While Blackstone (and the other constitutional authorities cited by Lord Mance in *Pham*) were considering the extinction of a right of citizenship of the United Kingdom, once citizenship has been conferred on UK citizens as an incident of that national citizenship (as has happened by Parliament endorsing the EU treaties which confer rights of citizenship including article 20 TFEU), there is no prerogative power to remove the fundamental rights of citizenship and free movement thereby conferred. Only Parliament can do so, by means of primary legislation.

Second reason: the prerogative is ousted by statute

30. Royal prerogatives that remain today do so only to the extent that Parliament has not abolished or curtailed them (whether expressly or impliedly). The prerogative is therefore ousted or fettered to the extent that its use is inconsistent with statute (see: Lord Atkinson in *Attorney-General v De Keyser's Royal Hotel Ltd* [1920] AC 508 at 539-540, Lords Pearce and Reid in *Burmah Oil Co Ltd v Lord Advocate* [1965] AC 75 at 143 and 101 respectively, Lord Browne-Wilkinson in *R v SSHD, ex p Fire Brigades Union* [1995] 2 AC 513 at 552D and *Laker Airways Ltd. v Department of Trade* [1977] Q.B. 643, at 707 A-B, 722E-H, 728A-D).
31. As outlined above, the carefully crafted statutory framework of the ECA 1972 and the EUA 2011 requires Parliamentary authority for major treaty changes. Although neither Act makes specific provision for the repudiation or withdrawal of the UK from the EU Treaties, it would be wholly inconsistent with that statutory framework if all the rights under the 1972 Act could be lost by executive fiat without the need for any Parliamentary authorisation. The use of the prerogative to make the decision to withdraw from the EU Treaties under Article 50 would (or, at least, could) have that effect and is therefore inconsistent with and contrary to the objects and purposes of those Acts.

32. In particular, s 2(1) EUA 2011 requires that any amendment or replacement of the TEU or TFEU can only be authorised by Act of Parliament. By Article 50(3), however, those treaties will cease to apply to the UK automatically without the need for any such legislative act. It is an unavoidable conclusion that Parliament intended the UK's withdrawal from the TEU or TFEU also to be authorised by an Act of Parliament and did not intend the prerogative to be used for a purpose that frustrates the careful statutory framework it has established.

33. This is reinforced by section 18 EUA 2011, which provides:

“18 Status of EU law dependent on continuing statutory basis

Directly applicable or directly effective EU law (that is, the rights, powers, liabilities, obligations, restrictions, remedies and procedures referred to in section 2(1) of the European Communities Act 1972) falls to be recognised and available in law in the United Kingdom only by virtue of that Act or where it is required to be recognised and available in law by virtue of any other Act.”

34. Section 18 affirms the principle of Parliamentary sovereignty: EU law is only ‘*recognised and available in law*’ by virtue of an Act of Parliament, the ECA 1972. However, the effect of Article 50(3) is that EU law will automatically *cease* to be ‘*recognised and available in law*’ at the end of the two year period following notification under Article 50(2), despite the continuing existence of the ECA 1972. In the absence of legislation authorising the Article 50 process to begin, Parliament will have played no part in the decision that EU law is no longer ‘*recognised and available*’ under UK law, contrary to section 18 and the principle of Parliamentary sovereignty that it enshrines.

35. We accept that one purpose of the EUA 2011 was to limit any further transfer of powers *to* the EU without the approval of Parliament and, in some cases, the electorate. However, it is also clear the Act represented a shift in power from Ministers (acting by way of prerogative powers) to Parliament and the electorate in determining what is in the UK's national interest on European issues, *including* any decision to depart from the EU. This was made clear by the Foreign Secretary, William Hague MP, when introducing the EUA for second reading as a Bill on 7 December 2010 (Hansard, HC Volume 520, Col. 193) (emphasis added):

“The Bill makes a very important and radical change to how decisions on the EU are made in this country. It is the most important change since we joined what was then called the European Economic Community. *It*

marks a fundamental shift in power from Ministers of the Crown to Parliament and the voters themselves on the most important decisions of all: who gets to decide what...

As in all matters, the Government's policy on European issues should be based on *the pursuit of our enlightened national interest*. Our ability to advance our goals by working with European partners is crucial to that. *Ensuring that our role is based on democratic consent is equally necessary, and that is what the Bill is about.*"

36. In conclusion, the use of the prerogative for the purpose of withdrawing from the EU Treaties is incompatible with the objects and purposes of the ECA 1972 and the EUA 2011 and has been impliedly ousted or fettered to that extent. It follows that any decision by the executive which has the effect of rendering an EU Treaty ineffective in UK law requires explicit sanction by Parliament.

DEADLINE FOR RESPONSE

37. Please acknowledge receipt of this letter by return. Given the urgency and importance of this matter, we ask for a response within 5 working days of this letter. We therefore look forward to hearing from you substantively by 4 pm next Friday, 15th July 2016.

Yours faithfully,

Bindmans LLP

Bindmans LLP