

Extension of Article 50 – How Long is a Piece of String?

By Dr. Ewan Kirk, Senior Lecturer in Law at Birmingham City University

At the time of writing this, it appears that, if anything other than a No-Deal outcome is to result from Brexit, then an extension of the 2 year departure timescale in Article 50(3) of the Treaty on European Union (TEU) is required.^[1] That 2 year timescale is due to expire, in accordance with the European Union (Withdrawal) Act 2018 at 11pm GMT on 29th March 2019.

The TEU itself provides for the possibility of extension – the European Council, acting unanimously, may grant an extension of the 2 year Article 50(3) deadline if the departing Member State requests it.^[2] However, Article 50(3) is silent on how long such an extension can be, and also on whether there can be more than one extension of the Article 50(3) period.^[3]

The reason why this is an issue is that the UK Government, in taking so long over the negotiation of the Withdrawal Agreement in Article 50(2), is behind schedule with a number of pieces of key legislation that need to be passed in order to exit the EU. The main piece of legislation has been passed, namely the European Union (Withdrawal) Act 2018, which provides for the repeal of the European Communities Act 1972, provides powers to ministers to amend legislation, and a number of other issues. However, crucially, in order to ratify the Withdrawal Agreement, an Act of Parliament, most likely titled the European Union (Withdrawal Agreement) Act also needs to be passed. There are also several pieces of primary legislation that have yet to pass Parliament^[4] as well as at least 178 Statutory Instruments.^[5] Passing these pieces of legislation is not a quick job, as a significant amount of parliamentary time is required for proper scrutiny of this legislation.

The Government could have requested an extension before now, as the current delays with the Meaningful Vote would have made it obvious that time was not on their side. Theresa May had consistently ruled out an extension of time, although this changed last week with

the announcement of a vote on it on the 14th of March, and Liam Fox has recently made comments to the media such that an extension is now necessary.

So, now that it has been established that an extension is needed, there are 2 issues that will dictate whether it is likely, and what type of extension it is likely to be:

1. European Council Approval

Under Article 50(3) an extension will only be granted if the European Council “unanimously agrees to extend this period.” Extension cannot be considered to be available to the departing state as of right, and the European Council is likely to only extend the period for a valid reason. Unlike revocation, which is entirely at the discretion of the departing member state,^[6] power to approve extensions gives the other member states the ability to set conditions upon approval. The tone of public statements since the Salzburg meeting^[7] in autumn 2018 suggested that the EU27 were losing patience with the UK’s inability to articulate what type of agreement it wanted, and so in the light of this an extension is likely to only be granted for a purpose, not just as a general extension because the UK has been unable to complete the process in the 2 year timescale allowed for in Article 50(3).

This does lead to the question about what such a reason might be. The Government have spoken about a short extension, which may be in order to get an agreement finalised in Parliament, or more likely in order for the legislative programme needed for Brexit to be completed after the approval of the Withdrawal Agreement by Parliament. However, this appears no more likely than last time it was voted upon in the Commons due to ongoing political disagreements. There is a very distinct possibility that a short extension would just move the No-Deal cliff edge to the end of the extended period, after Parliament’s failure to agree on the means of exit of the EU for a further period of time. For this reason, the European Council’s approval is only likely to be given to a short extension for the legislative programme, as this would lead to a deal being agreed and an ‘orderly Brexit’. No Deal is not in the UK’s interests, and although it will have a lesser impact on the EU than the UK, it is still something that the EU would want to avoid.

A longer extension period has been suggested, most recently by Leo Varadkar, the Irish Taoiseach, at the Egypt summit last week. This has been proposed as working as a replacement to the transition period the UK is due to enter upon passing of the Withdrawal Agreement, and would therefore expire at the end of December 2020. It has a number of advantages; firstly that it would resolve the arguments regarding the Northern Ireland backstop, because as a continuation of membership as opposed to a transition period, the *status quo* would prevail. For the same reason it would also prevent any anticipated disruption in trade. It would also to a large extent reset the countdown that we are nearly at the end of, and this is likely to help business in the short term, which requires certainty one of its main concerns.

There are also disadvantages; it delays the ability of the UK to negotiate its own trade deals with non-EU countries as it remains an EU state, although to a certain extent this remains unchanged from the transition period situation as trade deals negotiated during this period could only come into effect at the end of transition anyway. There is also the problem that this might just be perceived as more ‘can-kicking’ by the UK Government, and on current track record might result in negotiations being no further forward than they are now. It would also have to be predicated upon the EU agreeing to negotiate the future relationship with the UK whilst the UK is still a member state, something it has previously said it would not do – however without this, it would not be a realistic replacement for the transition period.

1. European Parliament Elections

Which of these two possible extensions could be applied here is also dependent upon a very large elephant in the room: the 2019 European Parliament elections. The rest of the EU has been preparing for these elections for some time; there has been a campaign by the EU to encourage a larger turnout,^[8] and some of the seats currently occupied by UK MEPs have been reallocated to the remaining EU27 member states in anticipation of the UK’s withdrawal.^[9] Article 14 TEU requires that the European Parliament is composed of representatives of the EU’s citizens, which if the UK is still a member state, will include UK citizens and other EU citizens living in the UK. Although the EP’s own Legal Service has indicated

that there is “no rule hindering” the European Parliament from being constituted without UK MEPs,[\[10\]](#) a European Parliament that does not include UK representatives could be challenged in the Court of Justice as being improperly constituted, and therefore any decision-making by the EP could also be similarly challenged. This would have a significant impact upon the business of the EU in any year, however it is also worth bearing in mind that the new Parliament that is elected in 2019 will have the task of approving the appointment of new European Commission, including the President of the Commission. They will also be responsible for approving the UK’s Withdrawal Agreement if this has not taken place already; the current Parliament’s term ends on the 18th of April.[\[11\]](#)

Therefore, to avoid UK involvement in the EP elections would suggest a short extension can go no further than 1st July 2019, after which the above legal issues with the validity of the European Parliament would arise. However, this can be avoided by the UK’s participation in the elections. The European Parliament is prepared for such contingency, and has passed a resolution allowing for the continuation of the current MEP allocations into the new Parliament.[\[12\]](#) There is some indication of compromise available from politicians however, as Leo Varadkar has called the issue of European Parliament elections “a small complication relative to the impact on our economy” of a disorderly Brexit.[\[13\]](#)

For the UK to be involved in the European Parliament elections, legislative action needs to be taken, as the European Union (Withdrawal) Act 2018 repealed the European Parliamentary Elections Act 2002, however as the UK Electoral Commission has reportedly set aside funding for the EP elections,[\[14\]](#) this would suggest that holding such elections would not be impossible, and political parties in the UK are most likely to have their own contingency plans just in case an election needs to be fought.

Long or Short?

All of the above leads to the conclusion that extension beyond the start of a new Parliament would be difficult, but not impossible. If the EU27 member states are convinced that it would lead to an orderly Brexit based upon a deal, then they would most likely approve it, and this is more likely with a longer extension as it would take the

pressure of a short timescale off the process and allow for the current impasse to be resolved. However, the longer extension is most likely to have to involve UK participation in the European Parliament elections, as the possibility of legal challenge of the new Parliament without UK MEPs would mean that Brexit's negative effect on the rest of the EU is likely to grow. We should be concerned about this because it affects the extent of the goodwill that the UK has with the remaining EU member states, something which is in short supply yet is crucial to the ongoing relationship between the UK and the EU moving forward.

[1] Article 50(3) TEU: "The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2..."

[2] Article 50(3) TEU continues: "...unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period."

[3] This is in contrast to the Withdrawal Agreement, which does limit to one extension period for the transitional period, and a maximum length of extension.

[4] The Trade Bill is due in the House of Lords Report Stage this week, and the Financial Services Bill is due to go to the House of Commons Report Stage but this has been postponed

[5] The Hansard Society's Brexit Statutory Instrument Tracker, available at: <https://www.hansardsociety.org.uk/insight/statutory-instrument-tracker>, accessed 4th March 2019

[6] See *Wightman and others v Secretary of State for Exiting the European Union* Case C-621/18

[7] <https://www.consilium.europa.eu/en/meetings/european-council/2018/09/19-20/>

[8] See <https://www.thisimeinvoting.eu>

[9] See <http://www.europarl.europa.eu/news/en/press-room/20180607IPR05241/number-of-meps-to-be-reduced-after-eu-elections-in-2019>. Although 46 of the seats will be kept back for future enlargement

[10] See <https://commonslibrary.parliament.uk/brexit/legislation/extend-ing-article-50-and-european-parliament-elections/>

[11] European Parliament's rules allow it to be recalled any time before the new Parliament takes its seats on 2nd July. <https://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+RULES-EP+20180731+TOC+DOC+XML+V0//EN&language=EN>

[12] See Resolution 2017/2054(INL) – 2017/0900(NLE)

[13] See <https://www.independent.co.uk/news/uk/politics/brexit-delay-ireland-article-50-varadkar-theresa-may-deal-commons-vote-a8795681.html>

[14] See <https://www.irishnews.com/news/northernirelandnews/2019/02/18/news/brexit-electoral-commission-making-preparations-for-european-elections-1553770/> although this suggests Northern Ireland only, it would also include the rest of the UK

The Centre for Brexit Studies Annual Conference 'B-Day: Making a Success of Brexit?' takes place on March 29 2019 at The RSA in London. Speakers include Sir Vince Cable, Sir Bernard Jenkin, John Mills, Vicky Pryce, Professor Vernon Bogdanor CBE and many more. [Find out more and register for your FREE ticket here.](#)