

# To Extend or Not to Extend? That is the Question (for the EU27)

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Last week I considered that an extension of the Article 50(3) notice period was inevitable, based on the impossibility of the legislative programme needed to finalise the legal requirements for the UK's exit from the EU on the 29<sup>th</sup> of March. This week has seen a series of motions voted upon by Parliament, culminating in an inevitability of extension of the notice period – or is it?

Tuesday's vote saw the second rejection by the Commons of the Government's Withdrawal Agreement and Political Declaration (commonly referred to as Meaningful Vote 2), followed by a vote on Wednesday where MPs rejected a deliberate exit with no deal. Finally, on Thursday night, a motion requiring the Government to request an Article 50(3) extension was passed, and therefore the inevitability that the Government will be requesting an extension to the Article 50(3) notice period in the European Council meeting next week.

However, even before Thursday night's vote on the extension to Article 50(3), EU leaders had already been making statements about the inevitable request that would be forthcoming from the UK Government. Because it is exactly that: a request. Article 50(3) states:

*“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.**”*  
(emphasis added)

Any extension to the Article 50(3) notice period must be unanimously approved by the EU27 states, unlike revocation, which is entirely at the discretion of the UK.<sup>[1]</sup> This has been emphasised in the last week, with Donald Tusk on Tuesday indicating that a request for extension must be “reasoned”<sup>[2]</sup>. This is a phrase often used in a legal sense in the European Union, with the European Commission

producing “reasoned opinions” when pursuing actions against Member States for breaching EU law,<sup>[3]</sup> and when EU legislation is enacted, it is always accompanied by a long preamble demonstrating the underlying policy because legislation must be “reasoned”.

What this means is effectively as I eluded to last week, that the European Council will not just automatically grant an extension to the Article 50(3) notice period, and will require a plan from the UK as to how the extension will end in resolution of the current impasse regarding the UK’s departure from the EU. To this end, the Thursday ‘extension request’ motion set out two possible scenarios for such a request.

The first of these relies upon an unprecedented third “meaningful vote”, in apparent contravention of the convention that the Executive cannot keep repeatedly tabling the same motion for approval in the same Parliament.<sup>[4]</sup> If the Withdrawal Agreement is approved by the Commons next week, then the Prime Minister will seek a short extension for the legislative programme to be completed. This will satisfy the European Council’s requirements because the main hurdle of Parliamentary approval will have been cleared,<sup>[5]</sup> and an extension will be with a view to completing an “orderly Brexit”, which has become the preferred outcome for the remaining Member States.

European Council approval becomes less certain with the alternative scenario. If the Withdrawal Agreement does not pass Meaningful Vote 3, then a short extension does nothing but move the cliff-edge a few weeks further away. No alternative to the Withdrawal Agreement, whether an alternative agreement, or a referendum to ratify or remain, is achievable in a few weeks, and the EU will not approve an extension which is likely to result in No Deal. A short extension with no plan merely kicks the can to an inevitable result. In this scenario the only extension on offer will be a more lengthy one, resulting in the situation I discussed last week of the UK’s participation in European Parliament elections.<sup>[6]</sup> Aside from the political device that the PM is wielding in making a lengthy extension a threat towards the more hard line Brexiters in her party to get them to approve her deal, a longer period of time is realistically required for Parliament to find a consensus on a way forward that will get Parliamentary approval, and therefore the “orderly Brexit” that the EU has stated it prefers. Whether this is a renegotiation based on changes in the

Government's red lines, a negotiation carried out by Labour after another General Election, or the time to conduct a public vote on ratification of the current deal, these will all take more than a few weeks.

## **Who has Taken Back Control?**

The legal position regarding what happens next is probably the clearest thing about the current situation. Parliament has control of what happens in the next week, and we know, if it does nothing, then in the words of David Allen Green, No Deal will happen by automatic operation of law. Therefore, some positive action is required if this is to be avoided. What that action will be is a political issue and is less clear. This week has been about what Parliament does not want. Next week must be about what it does want.

However, that will then most likely put the process into the hands of the European Council, because avoiding No Deal will require an extension. This will require European Council approval, which, despite encouraging statements from the main players, will not be unconditional. However, the conduct of the European Council throughout this process has shown that conditions will be in line with maintaining the rule of law, and protecting the interests of the EU and its remaining Member States. Speculation by Brexiters about abusive conditions to be imposed by the EU in return for extension are both unfounded and unhelpful.<sup>[7]</sup>

Whether the extension is short or long, it will have to be as a result of a clear plan from the UK about how that extension will be used. Because both the UK Parliament and the EU each have their own role to play in this, it will require that most European of solutions; a consensus between the parties involved.

<sup>[1]</sup> See *Wightman and others v Secretary of State for Exiting the European Union* Case C-621/18

<sup>[2]</sup> <https://www.theguardian.com/world/2019/mar/12/credible-justification-needed-to-delay-brexite-says-donald-tusk>

<sup>[3]</sup> See Article 258 TFEU

[4] The government would argue that because of additions to the documentation in the form of assurances and legal interpretations, that what is tabled is different each time, however it is debateable as to whether these differences are meaningful or merely “colourable”. This has yet to be tested in Parliament, and the Chris Bryant amendment attempting to do so on Thursday night was withdrawn.

[5] Although technically that approval can be tested once more in the passing of the European Union (Withdrawal Agreement) Bill, as this also has to be voted upon by both the Commons and the Lords

[6] Although opinions are divided about whether it would be legally possible to bypass the need for European Parliament elections, e.g. see this from Advocate General Eleanor Sharpston: <https://twitter.com/akulith/status/1105976757499367424>

[7] See, for example: <https://twitter.com/LordAshcroft/status/1104816988369702912>

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