

It's (Article) 50/50: UK Ratification, Revocation, Extension or Hard Brexit?

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Introduction

Now that UK Cabinet approval for the Brexit deal (in the form of the draft withdrawal agreement published by the EU and the UK on 14 November 2018) has been obtained, attention in the UK turns to its approval by Parliament. This revives the issue of the UK Parliament's so-called "meaningful vote" on the deal but also raises a number of questions as to what happens if Parliament votes down the deal. As widely discussed, having notified the European Council of its intention to leave the EU on 29 March 2017¹, the UK will crash out of the EU at 11pm (UK time) on 29 March 2019 if no withdrawal agreement has entered into force (unless an extension is agreed). This is referred to as a "Hard Brexit".

If Parliament does vote down the deal, a number of scenarios could arise including a general election, a further referendum, an extension to the Article 50 period, the revocation of the Article 50 notice or a Hard Brexit. Each of these possibilities (which are not all mutually exclusive) gives rise to fundamental legal and practical issues. Further, the question arises as to whether, if the UK Government refuses to pursue any of these options, Parliament can force the Government's hand.

We consider below the legal issues arising in relation to each of these options, with a view to helping clients assess how likely it is that a withdrawal agreement (whether in its current form or otherwise) will be ratified on the UK side, what the route to ratification might look like, and the likely timescales involved. Of course, the formal entry into force of a withdrawal agreement will also depend on the necessary approvals and ratifications being obtained on the EU27 side. The EU27 leaders are scheduled to meet on 25 November 2018 to kick off this process. In this publication, we focus on the position in the UK as the UK analysis is particularly fraught.

How does the "meaningful vote" work?

The "meaningful vote" is actually two votes in the form of motions to be put before the House of Commons. The first motion would be to approve the Brexit deal. The second would be required only if Parliament rejects the first motion, and would acknowledge that the House had considered the Government's proposals as to how it intends to proceed in light of the rejection of the first motion.

These motions are provided for in the UK legislation that sets out the initial process for withdrawal, Section 13 of the European Union (Withdrawal) Act 2018 (the **EUWA**). The EUWA provides that the Government is required to lay before Parliament the two documents that it has agreed with the EU: (1) the withdrawal agreement setting out the arrangements for the UK's withdrawal, and (2) the framework for the future relationship following withdrawal. The EUWA makes it clear that the withdrawal agreement can only be ratified if particular conditions are met, the first of which is that both documents have been approved by a resolution of the House of Commons on a motion moved by a Minister (the **Approval Motion**). In terms of

¹ pursuant to Article 50(2) of the Treaty of the European Union (**TEU**).

timing, “so far as practicable”² the Government must make arrangements for the Approval Motion to be debated and voted on in the UK Parliament before the European Parliament decides whether it consents to the withdrawal agreement.

If (a) the Approval Motion is passed, (b) a further motion taking note of the two documents is tabled and debated in the House of Lords (although there is no requirement that the House of Lords passes this motion), and (c) an Act of Parliament is passed providing for the implementation of the withdrawal agreement, then the UK Government would be in a position to ratify the withdrawal agreement.³

If, however, the House of Commons decides not to pass the Approval Motion, then the second motion becomes necessary. The Government must within 21 days of a rejection of the Approval Motion make a statement setting out how it proposes to proceed with the negotiations to withdraw,⁴ and arrange for a “motion in neutral terms” to be moved by a Minister in the House of Commons to the effect that the House of Commons has considered this statement (the **Neutral Motion**).⁵

Could Parliament amend the Approval Motion?

The Government appears to envisage that any Approval Motion will be a “take it or leave it” binary choice, but others have suggested that it might be used as an opportunity by Parliament to require the Government to take a different course, perhaps by seeking a different deal with the EU, or by holding a second referendum.

The starting point is that resolutions of Parliament have no binding legal effect unless this is provided for by statute. Here, under the EUWA the only legal effect of a resolution passing the Approval Motion would be to permit the Government to ratify the withdrawal agreement. Should Parliament seek to amend the terms of the proposed motion before approving it, any directions that Parliament inserted into the motion by way of amendment would not formally bind the Government as this is not contemplated by the EUWA. Moreover, there is a risk that any such amendments would lead the Government to conclude that Parliament had *not* given its approval and that it therefore could not ratify the withdrawal agreement. Alternatively, if the Government decided to proceed with ratification while ignoring requirements imposed by any amendments, then this could give rise to the risk of litigation as to whether the Government had the legal power to ratify.⁶ That said, if the voting on any amendments suggests that there is a majority in Parliament for an alternative deal, that could have significant political impact, and may embolden MPs to vote against approval, or at least seek concessions from the Government as the price of voting for it.

How else could Parliament use the approval process to influence the Government’s approach?

Another opportunity for Parliament to force the Government’s hand arises from the further condition for ratification: the fact that an Act of Parliament must be passed providing for the implementation of the withdrawal agreement. Any amendments to this Act would be binding on the Government, if passed. The draft legislation has not yet been published and it is unclear precisely how much scope there will be to make wide-ranging amendments. For example, it is unclear whether a proposed amendment requiring that there be a further referendum would be regarded as outside the scope of the Bill and therefore inappropriate to be debated. There would also be considerable political pressure not to undermine Parliament’s approval of the deal in the form of the Approval Motion, although this could be mitigated if the amendments were consistent with any

² Section 13(2) of EUWA.

³ Subject to also having complied with the requirements of Part 2 of the Constitutional Reform and Governance Act 2010.

⁴ Section 13(4) of EUWA.

⁵ Section 13(6) of EUWA.

⁶ R. Craig and G. Phillipson, ‘Could the ‘Meaningful Vote’ End up in Court?’, U.K. Const. L. Blog (24th Oct. 2018) (<https://ukconstitutionalaw.org/2018/10/24/robert-craig-and-gavin-phillipson-could-the-meaningful-vote-end-up-in-court/>).

amendments to the Approval Motion. Further, any changes that Parliament required the Government to make to the withdrawal agreement and the future framework in this Act would, of course, have to be agreed with the EU27. This would be difficult to achieve for a host of reasons, not least because at that point the EU27 may be part-way through the ratification process of the original draft of the withdrawal agreement.

What happens if the deal is not approved?

If Parliament votes down the Approval Motion, Parliament must first consider the Government's proposals as to what it will do next and vote on the Neutral Motion (see below). There is not much time to seek an alternative deal before the end of the two-year period prescribed by Article 50, particularly if a general election or a referendum has to be held first. Under the Article 50 timeline, the only ways to avoid a Hard Brexit on 29 March 2019 (assuming no withdrawal agreement has come into force by then) is for an extension to be agreed by the EU27 and UK or for the Article 50 notice to be withdrawn. We discuss the prospect of a general election, a further referendum, an extension to the Article 50 period and the withdrawal of the Article 50 notice below.

Can the Neutral Motion be used by Parliament to give the Government negotiating directions?

The original intention of the MPs who were pressuring the Government into providing for a further vote in the event that Parliament rejected the deal was that this would provide Parliament with an opportunity to give a binding direction as to how the Government should proceed. However, the Government strongly resisted this outcome, and the compromise position was the requirement for the Government to make a statement as to how it proposed to proceed, and to move a neutral motion noting that the House of Commons had considered the statement. In theory a neutral motion cannot be amended, but in any event any amendments would have no legal effect (although again they may well have a political impact) as the only statutory requirement is for a Minister to move the motion: there is no requirement for it to even be passed.

Could there be a general election?

As general elections are now governed by the Fixed Terms Parliaments Act 2011 (the **FTPA**), an early election can only be held in one of two scenarios.

The first is that a motion for an early general election is agreed either by at least two-thirds (a super-majority) of the whole House. This would require both Government and Opposition MPs to vote for such a motion.

The second scenario in which an early election can be held is if a motion of no-confidence in the Government is passed and no alternative government is confirmed by the House of Commons within 14 days. Under the terms of the FTPA, a set formula must be used for a no-confidence motion, meaning that it is no longer possible to use a Government defeat on a vote on other legislation as amounting to a vote of no-confidence. It is therefore not possible for the Government to table the vote on the withdrawal agreement as a no-confidence motion, and use this to pressure MPs to vote for the motion. However, it is possible that a no-confidence motion may follow shortly after any vote against the withdrawal agreement. A no-confidence motion may be tabled by any MP, subject to other business in the House. In order to defeat a no-confidence motion, the Government would need a simple majority, in this case of 326 MPs. If the no-confidence motion is passed, there is a 14-day period in which a new Government could be formed, which must be confirmed by a confidence motion, again on a simple majority. If a new Government is not formed within those 14 days, then Parliament is dissolved and a general election must be called under the terms of the FTPA.

The timing of any subsequent general election is not mandated by the FTPA. A general election is usually held around six weeks after it is called; for instance, the 2017 General Election was held 48 days after it was called.

Could the Prime Minister be replaced?

Whether Mrs May continues as leader of the Conservative Party, and thus as Prime Minister, would be decided by a separate process. Under Conservative Party rules, a leadership contest is triggered if 48 Conservative Party MPs write to the Chairman of the 1922 Committee (a Parliamentary group of the Conservative Party backbenchers), demanding a confidence vote in Mrs May. A vote would be held as soon as possible, and every Conservative MP would be able to vote for or against Mrs May. If Mrs May won the vote, she would remain in office and could not be challenged again for 12 months. If she lost the vote, she must resign and she would be barred from standing in the Conservative Party leadership contest that will follow her ouster. This process alone would not trigger a general election; it should simply result in a new Prime Minister being appointed. Alternatively, Mrs May may resign if the Approval Motion is rejected – and indeed she may use the threat of resignation to pressure her MPs to vote for the Approval Motion. If she resigns, then a leadership contest would be triggered.

Could there be a further UK referendum?

In the last six months, the political winds have been blowing more strongly in favour of a second UK referendum on Brexit. The ‘People’s Vote’ campaign has attracted significant attention, and voices from across the political spectrum have come out in favour of a second referendum; however, there are significant obstacles to a second referendum being held. As it stands, the policy of the Government is that a second referendum should not occur.

Putting politics to one side, timing is the primary obstacle to a second referendum taking place. Under the terms of the Political Parties, Elections and Referendums Act 2000 (the **Referendums Act**), certain requirements must be met for a referendum to take place. A second referendum would require primary legislation to set down the legal framework for the referendum i.e., the date, polling details and most importantly, the question to be voted on. This will take time. By way of example, it took over six months for the European Union Referendum Act 2015 to be passed. In theory, with sufficient political will, such legislation could be passed quickly – perhaps within a month – however, in practice the legislation would be controversial and likely to spend some time in Parliament.

That said, there is a Private Member’s Bill (a Bill introduced by an MP who is not a Government Minister) currently going through Parliament that provides that any withdrawal agreement shall not have any effect without a second referendum. This European Union Withdrawal Agreement (Public Vote) Bill is scheduled for a second reading on 23 November 2018.

However, even if the necessary legislation were to be passed in time, it is only one part of the process. The Referendums Act also requires (i) that the referendum question in the legislation be assessed by the Electoral Commission (which has previously taken around 12 weeks), (ii) time be allotted to allow the Electoral Commission and local councils to prepare for the poll and (iii) a ‘regulated referendum period’ be specified – in essence, this is the campaign period. The Electoral Commission has recommended a minimum ten-week regulated referendum period for future referendums.

There are uncertainties in each of the required timescales, but due to the legal requirements under the Referendums Act, it is unlikely that a second referendum could be held before 29 March 2019. Accordingly, for a second referendum to be held prior to Brexit, the two-year period mandated in Article 50 would need to be extended.

Could the Article 50 deadline be extended?

As has been widely discussed, assuming a withdrawal agreement does not come into force before 29 March 2019 then, unless an extension is agreed, the UK automatically exits the EU on 29 March 2019, two years after the date the UK gave notice of its intention to leave. However, Article 50(3) TEU expressly permits the EU and the exiting Member State to agree to an extension of time.

On the UK side, the Government is likely to consider that it can seek agreement to an extension of time even without the involvement of the UK Parliament on the basis that this is simply preserving the status quo, although if such an extension of time was agreed, the definition of “exit day” in the EUWA (currently fixed at 29 March 2019) would need to be amended. Of course, seeking an extension of time under Article 50(3) would represent a significant shift in UK Government policy. To date, Mrs May has appeared to rule out such a scenario, instead arguing that the alternative to any withdrawal agreement is a Hard Brexit. Again, as events develop, this assessment may shift.

On the EU side, any decision to extend this period must be taken by the European Council and its decision must be unanimous. Two points arise in this regard. First, European Council decisions are generally taken at summits by Governmental heads, which may take time to organise. Secondly, under these arrangements, any one of the EU27 could effectively veto the extension. It is difficult to predict whether there might be any divergence in views amongst the EU27 on this issue. To date, there has been relative unity in approach to Brexit issues among the EU27 block but conceivably this may change.

Ultimately, the decision by EU27 Member States as to whether or not to agree to any request by the UK for an extension would be a highly political decision. Earlier this year, senior EU diplomats and European officials were reported in the press as saying that the EU would require a “major realignment in British politics” to agree to an extension to the two-year period. The voting down of the withdrawal agreement by the UK Parliament, a proposal for a second referendum or even the loss of the UK Prime Minister, might each be considered a “major realignment” such as to warrant agreeing to an extension. Pragmatism may also enter into any assessment. As 29 March 2019 approaches, the EU27 may consider an extension preferable to the uncertainty of the UK crashing out of the EU.

A critical factor, again, is likely to be timing. As the EU27 heads of Government need to agree to such an extension, the complex mechanics of EU procedure dictate that this issue needs to be raised on the European Council’s agenda sooner rather than later, in order for any extension to be agreed prior to 29 March 2019. There would still appear to be time to secure such agreement by this deadline – a summit could, for example, be scheduled at short notice. But time is very tight.

Could the Article 50 notice be withdrawn?

There is no clear answer to this critical question. The text of Article 50 is silent on the right to revoke an Article 50 notice. Some commentators say this omission is intentional and means that there is no such right. On the other hand, it has been argued that, as a matter of construction and under customary international law, a withdrawing Member State can change its mind and revoke its Article 50 notice within the two-year period.

The *travaux préparatoires* of the EU Treaties lend some support to the argument that an Article 50 notice can be revoked, suggesting that Article 50 was inspired by customary international law, laid down in the Vienna Convention on the Law of Treaties (the **Vienna Convention**). Article 67(2) of the Vienna Convention provides that “Any actwithdrawing from a treaty pursuant to the provisions of the treaty....shall be carried out through an instrument communicated to the other parties”. Article 68 of the Vienna Convention provides that “[a] notification or instrument provided for in....Article 67 may be revoked at any time before it takes effect”. Although the UK’s Article 50 notice is strictly a notice of intention to withdraw, it may be argued

that it is the kind of withdrawing act envisaged in the Vienna Convention, meaning that that it can be revoked before it takes effect.

There are a number of other legal arguments that support the idea that an Article 50 notice could be withdrawn, although there are also counter-arguments. For example, it might be argued that construing Article 50(2) so as to permit revocation of an Article 50 notice would not sufficiently discourage Member States from serving ill-considered Article 50 notices; creating uncertainty among the other Member States, resulting in a significant wasted investment of time and costs and putting too many cards in the hands of the withdrawing state.

A legal challenge brought by Jolyon Maugham QC and certain Scottish politicians in the Scottish courts has been referred to the Court of Justice of the European Union (CJEU) for a ruling on this point. It is understood that an emergency hearing by CJEU judges has been set for 27 November 2018. In a recent development, the UK Government has now sought to appeal to the Supreme Court the ruling by the Scottish courts to refer this question to the CJEU, on the basis that the issue is at this stage a hypothetical one.

Of course, it may be that if the UK Government chose to withdraw its Article 50 notice, the EU27 would agree to this, but even in that scenario, a legal challenge may follow.

Conclusion

Many of our clients have indicated publicly they are continuing with their contingency planning for a Hard Brexit, notwithstanding last week's publication of the withdrawal agreement. Our analysis confirms that this is absolutely the prudent approach. If the withdrawal agreement is put before Parliament in its current form and approved in the next few weeks, this should give businesses comfort that a Hard Brexit will be avoided (assuming the EU ratification process goes smoothly). However, in any of the other scenarios outlined above, a prolonged period of uncertainty is likely, meaning the need for Hard Brexit planning will remain a priority.

Your Allen & Overy contacts



Andrew Denny
Partner
Litigation & Investigations
Head of UK Public Law Group
+44 020 3088 1489
andrew.denny@allenoverly.com



Sarah Garvey
Counsel
Litigation & Investigations
+44 020 3088 3710
sarah.garvey@allenoverly.com



Karen Birch
Counsel
Litigation Professional Support
+44 020 3088 3737
karen.birch@allenoverly.com



Thomas Cusworth
Associate
Litigation & Investigations
+44 020 3088 2453
thomas.cusworth@allenoverly.com

If you would like to discuss the issues raised in this paper in more detail, please contact any of the experts above or your usual Allen & Overy contact.