

### Can the UK Government keep its promise that the UK will leave the EU on 31 October?

16 October 2019

#### Introduction

At the start of September we published a paper looking at the options available to Members of the UK Parliament (**MPs**) seeking to prevent a no-deal Brexit on 31 October 2019.<sup>1</sup> We discussed the prorogation of the UK Parliament (**Parliament**), the potential legal challenges to it and what at that stage was an emerging plan led by MP Hillary Benn to pass legislation to require the UK Prime Minister (the **Prime Minister**) to seek an extension of the Article 50 period if no Brexit deal was reached at the EU Council meeting on 17 October. Since our paper was published, the Supreme Court has ruled that the Prime Minister's advice to the Queen to prorogue Parliament for five weeks from 9 September to 14 October was unlawful. As for legislation, MPs quickly passed the legislation proposed by Mr Benn (the European Union (Withdrawal) (No. 2) Act 2019, known as the **Benn Act**). In early October, the UK Government made a further proposal to the EU aimed at securing a deal, which appears to have led to UK and EU27 representatives "*entering the tunnel*" of negotiations with a view to finalising the terms of a withdrawal agreement. Despite this, both sides concede that fundamental challenges remain to securing a deal.

If a Brexit deal is agreed, the Government will still need to get it approved by Parliament in order to avoid being required to seek an extension of the Article 50 period under the Benn Act. However, as explained below, in order for a deal to be ratified (and thus avoid a no-deal exit on 31 October), it will also be necessary for Parliament to approve the political declaration which sets out the framework for the future relationship between the UK and the EU27, and to pass an Act which implements the withdrawal agreement into UK law. Accordingly, even if a deal is agreed and approved by Parliament, it looks likely that an extension would be required in order to take these further steps.

If no Brexit deal is agreed and approved by Parliament by 31 October 2019, there has been speculation that the Government will try to use a loophole to get around the obligation in the Benn Act for the Prime Minister to seek an Article 50 extension. The Prime Minister has declared he would rather "*be dead in a ditch*" than seek an extension. However, our conclusion is that it is difficult to see how he can legally circumvent the central obligation in the Benn Act. Furthermore, if he were to try to avoid this obligation, he faces the possibility of an attempt to remove him from office, although that is also subject to the significant caveat that it would first be necessary to identify an alternative candidate who could command the confidence of the House.

#### What happens if there is a deal?

The Government could in theory avoid the obligation to seek an extension of the Article 50 period if it reaches a deal with the EU27 prior to 19 October and can persuade MPs to approve it. This is because the Benn Act requires the Prime Minister to request an extension of the Article 50 deadline to 11 pm on 31 January 2020 only if, by 19 October, Parliament does not either approve a withdrawal agreement concluded with the EU27 or

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<sup>1</sup> [http://www.allenoverly.com/Brexit-Law/brexit-law-the-way-ahead-macro/Documents/Updated\\_Can\\_the\\_UK\\_Parliament\\_stop\\_a\\_no-deal\\_Brexit\\_.PDF](http://www.allenoverly.com/Brexit-Law/brexit-law-the-way-ahead-macro/Documents/Updated_Can_the_UK_Parliament_stop_a_no-deal_Brexit_.PDF)

agree to the UK leaving without a deal. However, approval of a withdrawal agreement under the Benn Act would not constitute Parliamentary approval for the UK to *ratify* that withdrawal agreement, which is the step required to make such an agreement formally binding in the UK. Under the European Union (Withdrawal) Act 2018, any withdrawal agreement may be ratified only if Parliament approves the withdrawal agreement and the political declaration setting out the “framework for the future relationship” between the UK and the EU27, and passes an Act which implements the withdrawal agreement. This means that even if the withdrawal agreement is approved under the Benn Act on or prior to 19 October, if it was then not possible to get approval of the political declaration and pass the Withdrawal Agreement Bill by 31 October, the UK would automatically leave the EU without a deal on 31 October, unless an extension was agreed.

At this stage no Withdrawal Agreement Bill has been published, nor is it clear what changes the current Government will have sought to make to the political declaration that Theresa May’s administration agreed with the EU (for example, reports are emerging that the Government is seeking greater regulatory divergence in key manufacturing sectors). It is by no means certain that the draft Bill and any revisions to the political declaration will be available by 19 October, even if a withdrawal agreement has been agreed by then. It seems unlikely that MPs would be willing to grant the Government a blank cheque by approving the withdrawal agreement and removing the obligation to seek an extension, without these details being known. Even if a revised political declaration and a Withdrawal Agreement Bill are published prior to 19 October, we anticipate MPs will demand time to scrutinise and debate these documents. This is particularly the case with the Withdrawal Agreement Bill, a crucial piece of constitutional legislation. It will not be just a case of transposing the text of the withdrawal agreement into UK law.<sup>2</sup> And of course any withdrawal agreement will also require ratification on the EU27 side.

Accordingly, even if a deal is agreed in principle between the UK and the EU27 negotiating teams by 19 October and MPs are willing to support it, there are still strong legal, political and practical reasons why the UK Government will probably need to seek a further extension of the Article 50 period. One possibility is that MPs sitting in Parliament this Saturday (Super Saturday) may be asked to amend the Benn Act to allow the Government to seek a shorter extension to the Article 50 process than the Benn Act currently contemplates. Whether such an amendment passes is another matter as, given the importance of the Withdrawal Agreement Bill, MPs may prefer to have more time to scrutinise it, and some MPs may also want to use that additional time to try and pass legislation requiring a further referendum.

## Can the Benn Act be circumvented if there is no deal?

The Government has stated repeatedly that the UK will leave on 31 October, with or without a deal. It has also stated it will “obey the law”. These two apparently contradictory statements have fuelled speculation and press reports as to options the Government may be considering to circumvent the Benn Act if there is no deal.

The initial reports focussed on possible ways in which the Government might avoid sending the letter required by the Benn Act requesting an extension. There were various suggestions that the Government might seek to suspend the Benn Act through an Order of Council or other secondary legislation passed under the Civil Contingencies Act, or even seek to argue that the Benn Act was invalid on the basis that it was unconstitutional or breached EU law. However, these arguments were weak legally and appear to have fallen by the wayside in the context of proceedings brought in the Scottish courts seeking an order requiring the Prime Minister to comply with the Benn Act. To head off such an order being made, the Prime Minister’s legal team confirmed to the court that, if Parliament did not approve a deal or a no-deal exit by 19 October, he will send a letter requesting an extension in the form set out in the schedule to the Benn Act.

The Scottish Inner House has deferred until 21 October its decision on whether to allow the appeal against the refusal of the lower court to grant the order sought (as well as a decision on a separate but related case seeking

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<sup>2</sup> See Hansard Society paper, “Retained EU law: issues for the Withdrawal Agreement Bill”, Swee Leng Harris, May 2019, <https://www.hansardsociety.org.uk/publications/briefings/retained-eu-law-issues-for-the-withdrawal-agreement-bill>

an order requiring the letter to be signed by the Court if the Prime Minister failed to do so). Accordingly, the Prime Minister has a legal sword of Damocles potentially hanging over his head if he fails to send the letter.

That then leaves various theories as to how a no-deal Brexit on 31 October could still occur even if the Government requests an extension. The most obvious answer would be if the EU27 were to refuse to agree to an extension. This has led to the idea that the Prime Minister could send two letters, the first in the form required by the Benn Act requesting the extension, and the second seeking, in effect, to dissuade the EU27 from agreeing to the extension. Further, an unattributed press briefing from No. 10 Downing Street claimed that the UK Government would withdraw co-operation with Member States who agree to the extension and would seek to obstruct EU governance if it remains in the EU beyond 31 October.

The problem with this approach is that, as the Prime Minister's legal team acknowledged before the Scottish court, the Prime Minister is subject to the public law principle that he cannot seek to frustrate the purpose of a statute.<sup>3</sup> The Government's lawyers have sought to confine that purpose to just sending the letter in the form required. However, section 1(4) of the Benn Act states that “[t]he Prime Minister must seek to obtain from the European Council an extension... by sending to the President of the European Council a letter in the form set out in the Schedule to this Act” indicating that the purpose of this provision is to seek to obtain an extension, not just request it. Sending a second letter which contradicted the required letter would probably constitute frustrating that statutory purpose, as would threatening the EU27 and its Member States with adverse consequences if they agree to an extension (although obtaining evidence of the latter may be more difficult).

On a similar note, if the Government were to encourage another Member State to refuse the request, such a move probably would be unlawful for the reasons set out above. It has even been suggested that, if such a request was made in secret, it could be characterised as misconduct in public office, a criminal offence.<sup>4</sup>

There remains a fundamental tension between the Government's statements that the UK will leave the EU on 31 October with or without a deal and its assurances to the Scottish court that it will comply with the requirements of the Benn Act. At this stage it is difficult to see how the Government could avoid seeking an extension if it is not possible to agree (and ratify) a deal with the EU27 by 19 October.

## What if the Prime Minister refuses to seek an extension?

If no agreement is reached with the EU27 by 19 October but, notwithstanding the Benn Act, the Prime Minister refuses to seek an extension, then the Scottish court may well issue an order requiring him to do so under threat of contempt, or even order that the Court signs the letter on his behalf, under its *nobile officium* jurisdiction.

Commentators have also discussed the Parliamentary response to such a scenario. One plan discussed is for MPs to seek to force the Prime Minister to resign, and then form a temporary government for the purposes of seeking an extension with a General Election to follow once the extension has been obtained. The traditional route for MPs to remove a Government was via a Vote of No Confidence (**VONC**), whereby under constitutional convention a Prime Minister was expected to resign if a motion expressing no confidence in the Government was passed by a majority of MPs, unless confidence was restored within a reasonable time or Parliament was dissolved for the purposes of an election.<sup>5</sup>

The circumstances in which an early election may be held are now governed by the Fixed-term Parliaments Act (**FTPA**). Under the FTPA, there is a 14 day period following a VONC under the Act in which “Her Majesty's Government” may attempt to pass a confidence motion, but if no such confidence motion is passed, a General Election will automatically be called and the Prime Minister will set the date. The Cabinet Manual states that, during that 14 day period, “an alternative government can be formed from the House of Commons as presently

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<sup>3</sup> See *Padfield v Minister of Agriculture, Fisheries & Food* [1968] AC 997

<sup>4</sup> See Jeff King article, section 3 <https://ukconstitutionallaw.org/2019/10/09/jeff-king-the-prime-ministers-constitutional-options-after-the-benn-act-part-i/>

<sup>5</sup> Anne Twomey, ‘The Veiled Sceptre: Reserve Powers of Heads of State in Westminster Systems’, Ch 4.

*constituted or the incumbent government can seek to regain the confidence of the House.*<sup>6</sup> However, in order for an alternative government to be formed to try and obtain the confidence of the House, the Prime Minister must first resign. The Cabinet Manual explicitly states that *“The Prime Minister is expected to resign where it is clear that he or she does not have the confidence of the House of Commons and that an alternative government does have the confidence.”*<sup>7</sup>

Press reports have suggested that even if there is a VONC and a proposed alternative government demonstrably has the confidence of Parliament, the Prime Minister would not resign and instead would wait out the 14 day period and seek to set a date for an election. The basis for this argument appears to be the idea that the FTPA has supplanted the convention which requires the Prime Minister to resign in the event that a VONC was passed and an alternative Government could demonstrate that it had the confidence of the House. However, not only would this conflict with the view set out in the Cabinet Manual, it would also be contrary to the explanatory notes to section 2(3) of the FTPA which state that the intention of that section *“... is to provide an opportunity for an alternative Government to be formed without an election.”*<sup>8</sup>

If the Prime Minister were to seek to “squat” in No. 10 Downing Street in this manner, this would lead to calls for the Queen to dismiss him. There is some controversy over whether the Queen retains this reserve power, but the view from some leading constitutional scholars is that she does.<sup>9</sup> Perhaps the biggest disincentive to the Prime Minister taking such a step would be that it would breach the further convention that politicians should avoid drawing the monarch into an intensely political situation. That said, such a situation could only arise if there were an alternative candidate for Prime Minister who could command the confidence of the House. Given the level of disagreement amongst opposition parties on this issue, that remains far from clear.

## Conclusion

In our earlier papers, we reached the conclusion that there was no certainty that a no-deal Brexit on 31 October could be prevented by MPs or the courts. With the passing of the Benn Act, and the pending judgment from the Scottish courts, that possibility appears to have receded somewhat. Given this Government’s strategy regarding the prorogation of Parliament, however, we cannot discount the possibility that it may use unconventional means to achieve its objective of leaving the EU on 31 October. Leaving aside whatever route the UK may take domestically, the possibility that the Governments of the 27 EU Member States cannot unanimously agree to an extension also cannot be discounted. This uncertainty may well continue up until the end of the month. Businesses should therefore continue with their no-deal planning and preparations.

## 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.

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<sup>6</sup> Cabinet Manual, para 2.19

<sup>7</sup> Cabinet Manual, para 2.19

<sup>8</sup> See Jeff King: ‘The Prime Minister’s Constitutional Options after the Benn Act: Part II’, U.K. Const. L. Blog (10th Oct. 2019)

<sup>9</sup> See Twomey, FN 4 above, and King, FN 7 above. There are rumours in the press that she has taken advice on this issue.