



Law Society
of Scotland

Briefing by The Law Society of Scotland

The Legislative Consequences of the Amendments
to the Motion under Section 13 of the European
Union (Withdrawal Agreement) Act 2018

January 2019



Introduction

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

The Society's Constitutional Law Sub Committee welcomes the opportunity to comment on the legal consequences of the possible options following rejection of the Withdrawal Agreement and has the following comments to put forward for consideration.

General Comments

The European Union (Withdrawal) Act 2018

The European Union (Withdrawal) Act 2018 section 13 governs the process for parliamentary approval of the negotiated Withdrawal Agreement, and the framework for the future relationship.

The Withdrawal Agreement may be ratified only if the Withdrawal Agreement and the framework for the future relationship or "political declaration" have been approved by a resolution of the House of Commons and a motion to take note of the Withdrawal Agreement and the political declaration has been debated in the House of Lords, and an Act of Parliament has been passed which implements the Withdrawal Agreement.

If the House of Commons decides not to pass the resolution a Minister of the Crown must, within 21 days a statement setting out how Her Majesty's Government proposes to proceed in relation to negotiations for the United Kingdom's withdrawal from the EU under Article 50(2) of the Treaty on European Union. Section 13 also contains provision for the statement under subsection (4) must be made in writing and published and that a Minister of the Crown must make arrangements for –

- (a) a motion in neutral terms, to the effect that the House of Commons has considered the matter of the statement mentioned in subsection (4), to be moved in that House by a Minister of the Crown within the period of seven Commons sitting days beginning with the day on which the statement is made, and
- (b) a motion for the House of Lords to take note of the statement to be moved in that House by a Minister of the Crown within the period of seven Lords sitting days beginning with the day on which the statement is made.

Recent Parliamentary Process

These formal legal requirements should now be read alongside the terms of the Business Motion of 4 December 2018 as amended on 9 January 2019 which states that “In the event of a motion under Section 13(1)(b) being negatived or amended so as to be negatived, a Minister of the Crown shall table within three sitting days a motion under Section 13 considering the process of exiting the European Union under Article 50”.

The motion under Section 13(1)(b) was negatived on 15 January and the Prime Minister tabled a motion on 21 January as required under the motion as amended.

The Article 50 Process

The Withdrawal Agreement and the Political Declaration agreed between the UK and the EU on 23 November 2018 were laid in the House of Commons on 26 November. The Withdrawal Agreement and the Political declaration fulfil the terms of Article 50 and the European Union (Withdrawal) Act 2018 section 13(1). Although the Withdrawal Agreement has been rejected by the House of Commons it remains the Agreement which has been agreed between the UK and the EU. If as a result of any renegotiation which takes place between the UK and the EU an amended Withdrawal Agreement is concluded it will still need to follow the Section 13 process and be approved by the House of Commons. Then in the same way as any treaty it will require implementation by an act of Parliament.

As detailed in the White Paper *Legislating for the Withdrawal Agreement* if an Agreement is approved the Government intends to introduce the European Union (Withdrawal Agreement) bill with the intention that this measure will receive the Royal Assent before 29 March.

Article 50 TEU provides that:

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.

Accordingly the default option is that unless a Withdrawal Agreement is in place on 29 March 2019 the treaties cease to apply to the UK on that date and the UK will leave the EU. The European Union (Withdrawal) Act 2018 was enacted to provide a UK legal framework for leaving the EU. The Act's explanatory notes confirm that:

The European Union (Withdrawal) Act repeals the [European Communities Act 1972](#) (ECA) on the day the United Kingdom leaves the European Union.

The Act ends the supremacy of European Union (EU) law in UK law, converts EU law as it stands at the moment of exit into domestic law, and preserves laws made in the UK to implement EU obligations. It also creates temporary powers to make secondary legislation to enable corrections to be made to the laws that would otherwise no longer operate appropriately once the UK has left, so that the domestic legal system continues to function correctly outside the EU. The Act also enables domestic law to reflect the content of a Withdrawal Agreement under Article 50 of the Treaty on European Union once the UK leaves the EU, subject to the prior enactment of a statute by Parliament approving the final terms of withdrawal.

However, leaving the EU without an agreement in place will, notwithstanding the implementation of the European Union (Withdrawal) Act 2018 and the enactment of retained EU law, create legal uncertainty, particularly where EU law which does not fall within the category of retained EU law ceases to have effect. Advisors and their clients will need to be aware of the new category of retained EU Law and its implications as well as the impact of those parts of EU law which are not being transposed into domestic law. Advisers in particular will need to be aware of the implications of moving to a WTO basis and applying private international and public international rules in a way which they have not done before. This legal uncertainty is apart from any financial or economic impact.

For some clients the implications of leaving without an agreement will be more serious than others. For example, the EU has published a “Notice to Stakeholders” on EU rules in the field of civil justice and private international law which sets out the repercussions which need to be thought of when the UK becomes a third country without a Withdrawal Agreement being in place. The notice can be consulted at

https://ec.europa.eu/info/sites/info/files/notice_to_stakeholders_brexit_civil_justice_rev1_final.pdf.

Constitutional Reform and Governance Act 2010

It should be noted that the Withdrawal Agreement is also subject to the approval process under the Constitutional Reform and Governance Act 2010.

The Current Motion, the Proposed Amendments and their Legal Consequences

The Motion which has been tabled by the Prime Minister has attracted a significant number of amendments. We attempt to analyse these amendments to identify how they would be put into effect in law. We only analyse the main amendments and not the amendments to those amendments. We also consider the amendments in the order in which they appear in Order Paper 239.

The Prime Minister’s Motion states “*That this House, in accordance with the provisions of section 13(6)(a) of the European Union (Withdrawal) Act 2018, has considered the Written Statement titled “Statement under Section 13(4) of the European Union (Withdrawal) Act 2018” and made on 21 January 2019.*”

Amendment (a)

Amendment (a) seeks to amend the Prime Minister's motion by deleting from "House" to end and adding: *"requires ministers to secure sufficient time for the UK Parliament to consider and vote on options to prevent the UK leaving the EU without a ratified Withdrawal Agreement and Political Declaration, and that those options should include:*

- i. Negotiating changes to the draft Withdrawal Agreement and Political Declaration so as to secure a permanent customs union with the EU, a strong relationship with the single market underpinned by shared institutions and obligations, and dynamic alignment on rights and standards, in order to command a majority in the House of Commons;*
- ii. Legislating to hold a public vote on a deal or a proposition that has commanded the support of the majority of the House of Commons".*

Our Comment

This amendment would require Ministers to secure an extension of the 2 year period under Article 50. However this can only be done under Article 50 if the European Council and the UK unanimously agree to extend that period.

The UK could seek an extension of the negotiation period but there would have to be a specific reason for the application bearing in mind that the European Council has approved the Withdrawal Agreement and the Political Declaration, and as Michel Barnier stated in his address to the European Parliament on 29 November 2018, *"The time for negotiating the Withdrawal Agreement and the Political Declaration is over. It is now time for ratification by the British Parliament and by the European Parliament and Council"*.

It would be for Parliament to agree the basis on which such an application could be made bearing in mind the following factors:

- a) European Parliament
 - i. Last scheduled meeting of present Parliament 18 April 2019
 - ii. Parliament elections 23-26 May 2019 (current MEPs continue in office until 1 July 2019)
 - iii. New Parliament inaugural session 2 July 2019
- b) The current European Council presidency is held by Romania January-June 2019
- c) The current European Commission term ends on 31 October 2019

An extension would only be likely to be agreed for persuasive political purposes such as those in the amendment, namely renegotiation of aspects of the Withdrawal Agreement and Political Declaration in respect of a Customs Union, holding a second referendum, or indeed holding a general election.

Whether an extension would be granted and for how long that extension would last would depend on what agreement the UK and the European Council could reach.

Negotiation of a Customs Union and the single market with shared institutions, alignment on rights and standards would be a matter for negotiation between the UK and the EU.

The amendment also requires a second referendum to approve any Agreement which has been approved by Parliament. But a second referendum would require specific legislation building on the framework under the Political Parties, Elections and Referendums Act 2000 which sets out restrictions on the referendum period, regulation of the administration of the referendum and the role of the Electoral Commission in referendums. The specific legislation might be expected to contain details such as who is entitled to vote, regulation of the conduct of the referendum, and campaigning and financial rules which may be controversial. It is worth noting that the 2016 referendum campaign period was designated in regulations as running from 15 April to 23 June 2016, a period of 10 weeks.

These legal issues would need to be taken into account when negotiating an extension for the purposes of conducting a second referendum.

Amendment (c)

This seeks to amend the Prime Minister's motion by deleting from "House" to end and adding : "Instructs the Government to take all necessary steps to rule out a no-deal scenario and prepare for a People's Vote in which the public will have the option to remain in the European Union on the ballot paper".

We have already commented on the legal requirements of a second referendum in relation to amendment (a).

Amendment (b)

Amendment (b) seeks to amend the Prime Minister's motion by adding at the end:

"and is conscious of the serious risks arising for the United Kingdom from exit without a Withdrawal Agreement and political declaration and orders accordingly that -

(1) On 5 February 2019 -

(a) Standing Order No. 14(1) (which provides that government business shall have precedence at every sitting save as provided in that order) shall not apply;

- (b) *a Business of the House Motion in connection with the European Union (Withdrawal) (No. 3) Bill in the name of at least 10 Members, including at least four Members elected to the House as members of at least four different parties and at least two backers of that Bill shall stand as the first item of business;*
- (c) *that motion may be proceeded with until any hour though opposed, shall not be interrupted at the motion of interruption, and, if under discussion when business is postponed, under the provisions of any standing order, may be resumed, though opposed, after the interruption of business; and Standing Order No. 41A (Deferred divisions) will not apply;*
- (d) *at the conclusion of debate on that motion, the questions necessary to dispose of proceedings on that motion (including for the purposes of Standing Order No. 36(2) (Questions to be put following closure of debate)) shall include the questions on any amendments selected by the Speaker which may then be moved; and*
- (e) *the second reading of the European Union (Withdrawal) (No. 3) Bill shall stand as the first order of the day; and*
- (2) *In respect of the European Union (Withdrawal) (No. 3) Bill, notices of Amendments, new Clauses and new Schedules to be moved in Committee may be accepted by the Clerks at the Table before the Bill has been read a second time.”*

Our Comment

This amendment seeks to ensure that the business of the House on 5 February will focus on the European Union (Withdrawal) (No. 3) Bill providing that second reading would take place on 5 February.

This Bill provides that if, before 26 February 2019, the House of Commons has not passed a resolution approving the Withdrawal Agreement and the Political Declaration section 13(1)(b) of the European Union (Withdrawal) Act 2018, the Prime Minister must, not later than 26 February, move a motion “that this House directs the Prime Minister to seek an extension of the period of two years specified in Article 50(3) of the Treaty on European Union to a period ending on 31 December 2019.”

If the amendment is agreed to, the Prime Minister must seek an extension of the period of the two years negotiation period to 31 December 2019. This will be subject to negotiation with the EU and would depend on the willingness of the EU to agree to such an extension.

We appreciate that time is short but such an important Bill requires adequate scrutiny and the approach in the amendment may impact on that scrutiny.

Furthermore the Bill will also need to be considered by the House of Lords where timetabling is not possible. The objective of the Bill might not be met if, due to the Parliamentary process, the Bill becomes law after exit day.

Amendment (d)

At end add “*and, in order to resolve the present impasse and bring to a conclusion negotiations with the EU over the withdrawal of the United Kingdom, orders that –*

- (1) An EU Withdrawal Negotiations Business of the House Committee be established;*
- (2) The Committee be comprised of no more than seventeen Members appointed on a quota basis based on the proportional vote share of the parties at the last general election and ensuring representation from all parts of the United Kingdom;*
- (3) The Committee members be nominated by the Selection Committee in accordance with paragraph (2) no later than Wednesday 6 February;*
- (4) The motion to appoint the members shall stand as an order of business on Monday 11 February and the proviso to Standing Order No. 15(1)(c) shall apply to proceedings on that motion as if it had been opposed at or after the moment of interruption on a preceding day;*

The Committee shall have power –

- (i) To determine the business of the House related to the UK’s withdrawal from the EU;*
 - (ii) To send for persons, papers and records, to assist in carrying out in functions under sub-paragraph (i);*
 - (iii) To sit notwithstanding any adjournment of the House;*
 - (iv) To report from time to time;*
 - (v) To appoint specialist advisers; and*
 - (vi) To adjourn from place to place within the United Kingdom and to visit Brussels;*
- (6) On any day on which the Committee determines that business determined in accordance with paragraph (5)(i) shall have precedence, Standing Order No. 14 (Arrangement of public business) shall not apply”.*

Our Comment

This Amendment requires no additional legislation. If the amendment is agreed and such a Committee is created we will contribute to any consultations which it issues.

Amendment (e)

At end, add “*and insists that the EU Withdrawal Agreement be amended so that the backstop shall expire on 31 December 2021”.*

Our Comment

This Amendment requires no additional legislation. If however, it were agreed it would require amendment of the Withdrawal Agreement which is a matter for negotiation between the UK and the EU.

Amendment (f)

Amendment (f) seeks to amend the Prime Minister's motion by adding at the end "*and calls on the Government to hold a series of indicative votes on the options set out in the Exiting the European Union Committee's Eleventh Report of Session 2017-19 in the order in which they are listed in paragraphs 15 to 19 in that Report.*"

Our Comment

The *Exiting the European Union Committee's Eleventh Report of Session 2017-19* sets out the options which it considered would be open to the House. These are:

Option 1

To hold another vote in Parliament on the draft Withdrawal Agreement and Framework for the Future Relationship. Without any material change it is hard to see how this might produce a different result. However, if the deal was agreed and ratified by subsequent legislation, the UK would leave the EU on 29 March 2019 on that basis, with a transitional / implementation period as set out in the Withdrawal Agreement.

Option 2

To leave the EU with no deal on 29 March 2019 with no agreement on future relations in place and with no transition / implementation period. There would also need to be enacted and in place on exit day the suite of related Brexit bills some of which are still in the Parliamentary process e.g. the Trade Bill and Agriculture Bill. This might involve some sector- specific arrangements. This is the default if the House of Commons is unable to ratify the agreement, or unless the UK applies to extend or decides to revoke Article 50.

Option 3

The House could call on the Government to seek to re-negotiate the deal to achieve a specific outcome, be it a variation of the terms of the separation set out in the Withdrawal Agreement or providing greater clarity about the end state of future relations as set out in the Political Declaration. This option is not entirely within the UK's hands as any agreement to re-negotiate and any extension of Article 50 would only be possible with the consent of the EU 27 (unanimous consent in respect of an extension). There is, of course, also no guarantee of the success of any re-negotiation in meeting the House's objectives.

The three main renegotiation possibilities would be:

3(a) Seeking changes to the text in the Withdrawal Agreement on the backstop arrangements;

3(b) Seeking a Canada-style deal

3(c) Seeking to join the EEA through the EFTA pillar and remaining in a customs union with the EU or a variation on this.

Option 4

In addition to these policy choices about the UK's future relationship, Parliament could decide to hold a second referendum to allow the British people to decide either which kind of Brexit deal they want or whether they wish to remain in the EU.

The options in the Report are a good summary of those options which could be considered.

Options 1 and 2 have significant legislative consequences as set out above.

Option 3 and its various components if adopted would result in an amended Withdrawal Agreement which would be subject to the legislative process which we have set out above.

We have already commented on the legal requirements of a second referendum in relation to amendment (a).

Amendment (g)

Amendment (g) seeks to amend the Prime Minister's motion by adding at the end: *"and orders that on 12 and 26 February and 5, 12, 19 and 26 March 2019 -*

- (a) Standing Order No. 14(1) which provides that government business shall have precedence at every sitting save as provided in that order) shall not apply;*
- (b) a Motion in the name of the Chairman of Ways and Means "That this House has considered the United Kingdom's departure from, and future relationship with, the European Union" shall stand as the first item of business;*
- (c) Standing Order No. 24B (Amendments to motions to consider specified matters) shall not apply to such motions;*
- (d) Proceedings on the motion may continue for up to six and a half hours after its commencement, though opposed, and shall not be interrupted at the moment of interruption; and Standing Order No. 41A (Deferred divisions) will not apply; and*
- (e) at the conclusion of those proceedings, the Speaker shall put the questions necessary to dispose of proceedings on the motion, which shall include the questions on any amendments selected by the Speaker, which may then be moved."*

Our Comment

This amendment requires the Government to provide parliamentary time to debate a motion set out in (b) above for 6 days between 12 February and 26 March.

This amendment would not require any legislative action.

Amendment (h)

Amendment (h) seeks to amend the Prime Minister's motion by adding at the end: *“requires the Government to request the European Council to extend the period under Article 50(3) of the Treaty on European Union to ensure that a Citizens' Assembly can be part of a democratic decision-making process; requires the Corporate Officer of the House of Commons to commission a Citizens' Assembly of 250 members comprising a representative sample of the population to consider the process in connection with the withdrawal of the United Kingdom from the European Union, to make recommendations and to report to the House of Commons; requests the Secretary of State for Exiting the European Union to provide such assistance to the Citizens' Assembly that it may request; orders that the Liaison Committee of the House of Commons shall appoint an expert advisory group to assist the work of the Assembly in preparing information and advice; orders that the Citizens' Assembly shall publish its recommendations within 10 weeks of commencement; and requests the Government to respond in writing to all recommendations made by the Assembly no later than two weeks after they are presented and, if accepting the recommendations, to set out by a report to Parliament how it intends to ensure that those recommendations can be implemented in full, including the timescales for implementation”.*

Our Comment

The UK Parliament website contains some useful information about Citizen Assemblies. It states that *“Citizens' assemblies give members of the public the time and opportunity to learn about and discuss a topic, before reaching conclusions. Assembly Members are asked to make trade-offs and arrive at workable recommendations.*

Citizens' assemblies, and other similar methods, have been used in the UK and other countries – including Australia, Canada, and the United States – to address a range of complex issues. A citizens' assembly is currently taking place in the Republic of Ireland – established by the Irish Parliament – to address a number of important legal and policy issues facing Irish society. These have included equal marriage, abortion and the opportunities and challenges of an ageing population.”

<https://www.parliament.uk/business/committees/committees-a-z/commons-select/housing-communities-and-local-government-committee/citizens-assembly-faq-17-19/>

Whether a Citizen's Assembly should be established is a political question but it raises issues about accountability, scrutiny and the nature of parliamentary democracy. It might require legislation to establish the Assembly and to provide the powers necessary to conduct its work (notwithstanding the terms of the motion) and would certainly require public funds. The motion does not take into account the nature of devolution and the role of the devolved legislatures in connection with Brexit.

Amendment (i)

At end, add *“and rejects the United Kingdom leaving the European Union without a Withdrawal Agreement and a Framework for the Future Relationship”*.

Our Comment

This amendment requires no additional legislation. The terms of Article 50 are, however, clear on this point. Article 50 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...”*. Therefore the only way mandated in the TEU to avoid leaving without a Withdrawal Agreement is to have a Withdrawal Agreement which is ratified according to our constitutional principles or to revoke the Article 50 notice of intention to leave.

Amendment (j)

Amendment (j) seeks to amend the Prime Minister’s motion by adding at the end: *“and, in the event that the House of Commons has not passed a resolution approving the negotiated Withdrawal Agreement and the framework for the future relationship for the purposes of section 13(1)(b) of the European Union (Withdrawal) Act 2018 by 26 February 2019, requires the Prime Minister to seek an extension to the period of two years specified in Article 50(3) of the Treaty on European Union.”*

Our Comment

This amendment has no immediate legislative consequences but as we have noted above it is likely that an extension could only be agreed for a persuasive political reason. The consequences of a failure to secure such an extension or to pass the resolution approving the Withdrawal Agreement and Political Declaration is that the default position applies and the treaties cease to apply on 29 March 2019.

Amendment (k)

At end, add *“and will not approve a Withdrawal Agreement which includes a Northern Ireland backstop”*.

Our Comment

This Amendment requires no additional legislation. If however, it were agreed it would require amendment of the Withdrawal Agreement which is a matter for negotiation between the UK and the EU.

Amendment (l)

At end, add *“and will not approve a Withdrawal Agreement which includes a Northern Ireland backstop lasting any longer than six months”*.

Our Comment

This Amendment requires no additional legislation. If however, it were agreed it would require amendment of the Withdrawal Agreement which is a matter for negotiation between the UK and the EU.

Amendment (m)

At end, add *“and will not approve a Withdrawal Agreement unless it includes the right of the UK to terminate a Northern Ireland backstop without having to secure the agreement of the EU”*.

Our Comments

This Amendment requires no additional legislation. If however, it were agreed it would require amendment of the Withdrawal Agreement which is a matter for negotiation between the UK and the EU.

Amendment (n)

At end, add *“and requires the Northern Ireland backstop to be replaced with alternative arrangements to avoid a hard border; supports leaving the European Union with a deal and would therefore support the Withdrawal Agreement subject to this change”*.

Our Comments

This Amendment requires no additional legislation. If however, it were agreed it would require amendment of the Withdrawal Agreement which is a matter for negotiation between the UK and the EU.



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