

Briefing by the Law Society of Scotland

On Legislative Consequences of Proposed
Amendments to the Prime Minister's Motion 2 on
Order Paper 274

25 March 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 and legislative consequences of the possible options for indicative votes 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 make 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—

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- (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.

These formal legal requirements should now be read in the light of the political developments since the business statement of 4 December 2018 which have resulted in Motions to agree the Withdrawal Agreement being negated on two occasions (15th January and 12th March 2019).

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. The European Council statement of conclusions dated 21 March confirms this:

The European Council reiterates that there can be no opening of the Withdrawal Agreement that was agreed between the Union and the United Kingdom in November 2018. Any unilateral commitment, statement or other act should be compatible with the letter and the spirit of the Withdrawal Agreement.

Attempts at renegotiation of the Withdrawal Agreement between the UK and the EU have not resulted in an amended Agreement which has been approved by the House of Commons. Therefore the Section 13 process remains unsatisfied.

As soon as possible following agreement at the EU level we will bring forward the necessary legislation to amend the definition of exit day in domestic legislation. This statutory instrument will be laid, before it is made, under section 20(4) of the EU (Withdrawal) Act 2018.

After the European Council on 21 March the Council made a statement which contained the following paragraph:

The European Council agrees to an extension until 22 May 2019, provided the Withdrawal Agreement is approved by the House of Commons next week. If the Withdrawal Agreement is not approved by the

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House of Commons next week, the European Council agrees to an extension until 12 April 2019 and expects the United Kingdom to indicate a way forward before this date for consideration by the European Council.

Accordingly if the Withdrawal Agreement is agreed this week exit day will be 22 May 2019 rather than 19 March.

This additional time will be used to bring forward the necessary legislation to implement the Withdrawal Agreement and to fulfill the processes under the Constitutional Reform and Governance Act 2010 and the remaining EU processes under Article 50.

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. Presumably in this scenario the Government's intention is that this measure will receive the Royal Assent before 22 May.

However, the alternative option is that if the Withdrawal Agreement is not agreed by 29 March 2019, exit day is extended to 12 April for the UK to indicate a way forward for consideration by the European Council. If the Council agree on whatever way forward is proposed presumably a further extension to achieve that objective will be agreed. If the Council does not agree then it would appear that as soon as possible following agreement at the EU level we will bring forward the necessary legislation to amend the definition of exit day in domestic legislation. This statutory instrument will be laid, before it is made, under section 20(4) of the EU (Withdrawal) Act 2018. The treaties will cease to apply to the UK on that date and the UK will leave the EU on 12 April.

As soon as possible following agreement at the EU level we will bring forward the necessary legislation to amend the definition of exit day in domestic legislation. This statutory instrument will be laid, before it is made, under section 20(4) of the EU (Withdrawal) Act 2018. As soon as possible following agreement at the EU level we will bring forward the necessary legislation to amend the definition of exit day in domestic legislation. This statutory instrument will be laid, before it is made, under section 20(4) of the EU (Withdrawal) Act 2018. As soon as possible following agreement at the EU level we will bring forward the necessary legislation to amend the definition of exit day in domestic legislation. This statutory instrument will be laid, before it is made, under section 20(4) of the EU (Withdrawal) Act 2018.

The Current Motion, the Proposed Amendments and their Legal Consequences

The Motion which has been tabled by the Prime Minister has attracted a number of amendments. We attempt to analyse these amendments to identify how they would be put into effect in Law.

The Prime Minister

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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 Friday 15 March 2019.

Amendment (d)

Line 1, leave out from “House” to end and add “notes the Government’s Withdrawal Agreement and Framework for the Future Relationship have been defeated for a second time; further notes the alternative proposals being proposed across this House including Her Majesty’s Opposition’s plan, Common Market 2.0, for a customs union, and for a public vote; and calls on the Government to provide sufficient parliamentary time this week for this House to find a majority for a different approach.”

Our Comment

It this amendment is agreed it would require no legislative action.

Amendment (g)

Line 1, leave out from “House” to end and add “requires the Government to seek an extension of the period of two years specified in Article 50(3) of the Treaty on European Union for the purpose of holding a referendum on whether to exit the European Union under the terms of the negotiated Withdrawal Agreement or to stay in membership of the European Union”.

Our Comment

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

Amendment (a)

At end, add “and, given the need for the House to debate and vote on alternative ways forward, with a view to the Government putting forward a plan for the House to debate and vote on, orders that –

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- (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 on Wednesday 27 March;
- (b) precedence on that day shall be given to a motion relating to the Business of the House in connection with matters relating to the United Kingdom's withdrawal from the European Union other than any Business of the House motion relating to the consideration by the House of a motion under Section 13(1)(b) of the European Union (Withdrawal) Act 2018, and then to motions relating to that withdrawal and the United Kingdom's future relationship with the European Union other than any motion moved under Section 13(1)(b) of the European Union (Withdrawal) Act 2018;
- (c) if more than one motion related to the Business of the House is tabled, the Speaker shall decide which motion shall have precedence;
- (d) the Speaker shall interrupt proceedings on any business before the Business of the House motion having precedence at 2.00 pm on Wednesday 27 March and call a Member to move that motion;
- (e) debate on that motion may continue until 3.00 pm on Wednesday 27 March at which time the Speaker shall put the questions necessary to dispose of proceedings on the motion including the questions on amendments selected by the Speaker which may then be moved;
- (f) when those proceedings have been concluded, the Speaker shall call a Member to move one of the other motions having precedence;
- (g) any proceedings interrupted or superseded by this order or an order arising from the Business of the House motion may be resumed or (as the case may be) entered upon and proceeded with after the moment of interruption on Wednesday 27 March."

Our Comment

It this amendment is agreed it would require no legislative action.

Amendment (b)

At end, add "and recalls that this sovereign Parliament gave the choice about whether the UK should remain in, or leave, the European Union to the British people in the 2016 referendum, and that in the 2017 election 85 per cent of votes were cast for political parties which committed to abiding by that decision in their manifestos, and therefore reaffirms its commitment to honour the result of the referendum that the UK should leave the European Union."

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It this amendment is agreed it would require legislative action in terms that would satisfy section 13 of the European Union (Withdrawal) Act 2018.

Amendment (c)

At end, add “notes the House’s resolution of 13 March 2019, that this House rejects the United Kingdom leaving the European Union without a Withdrawal Agreement and a Framework for the Future Relationship; further notes that the Chancellor of the Duchy of Lancaster and Minister for the Cabinet Office told the House on 14 March 2019 that “the Government are giving a commitment that, if it is not possible to secure support ahead of the European Council for our withdrawal under the negotiated deal, we would have to come back to the House in the two weeks following the Council to consult through the usual channels the political parties across the House to agree on the process by which the House could then seek to find a majority”; further notes the European Council’s conclusions of 21 March 2019 that “the European Council agrees to an extension until 22 May 2019, provided the Withdrawal Agreement is approved by the House of Commons next week and that if the Withdrawal Agreement is not approved by the House of Commons next week, the European Council agrees to an extension until 12 April 2019 and expects the United Kingdom to indicate a way forward before this date for consideration by the European Council”; and therefore instructs Her Majesty’s Government, if the Withdrawal Agreement and Framework for the Future Relationship are not approved by the House of Commons by 28 March 2019, to set out by the rising of the House on Thursday 28 March 2019 how the Government will ensure the UK does not leave the European Union on 12 April 2019 without a Withdrawal Agreement and a Framework for the Future Relationship, including by seeking an extension to Article 50 to take account of any conclusions reached by the House.”.

Our Comment

It this amendment is agreed to it would require no legislative action.

Amendment (e)

At end, add “and instructs the Prime Minister to immediately make all necessary preparations for the purposes of legislating for and conducting a public vote in which the people of the United Kingdom may give their consent for either leaving the European Union on terms to be determined by Parliament or retaining the United Kingdom’s membership of the European Union.”.

Our Comment

See our comments on amendment (g) above.

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Amendment (f)

At end, add “and orders that, in the event that the UK comes within seven calendar days of leaving the European Union without a deal, the Government must make arrangements within two sitting days, or if this House has been adjourned for more than four days to arrange for the House to be recalled under Standing Order No. 13 (Earlier meeting of the House in certain circumstances) for this purpose, for a Minister of the Crown to move a motion on whether this House approves the UK leaving the EU without a deal and on whether the UK Government should be required to request an extension of the period in Article 50(3) of the Treaty on European Union in order to avoid a no-deal Brexit and to give time for Parliament to determine a different approach.”.

Our Comment

It this amendment is agreed to it would require no legislative action.

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