

## Extending Article 50: Legal and Political Considerations

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### Introduction

After voting against Theresa May's Brexit deal (for the second time) on Tuesday 12 March 2019, against no-deal on Wednesday 13 March, and against a second referendum on Thursday 14 March, MPs have voted in favour of a motion to extend Article 50, by 412 votes to 202. Although this does not automatically mean extension will happen, it is a politically and constitutionally decisive expression of the will of the UK Parliament.

The motion instructs the UK government to seek an extension of Article 50 in two possible ways. If the PM's deal is approved on its third attempt, scheduled for 20 March, the UK will ask for a three-month 'technical' extension to ratify the deal and pass necessary legislation. However, if MPs have not approved the deal by 20 March, they will need to decide for how long and with what objective to request the extension from the EU.

MPs' real motivation for seeking an Article 50 extension is to avoid no-deal. No-deal can only be averted if Article 50 is revoked (i.e. Brexit is cancelled) or if there is ratified agreement between the EU and the UK. Extending Article 50 would delay the decision, buying time to figure out a new way forward. However, no-deal could still come about if no agreement has been reached by the end of the extension period.



This paper explores the legal and political considerations relating to Article 50 extension. It asks:

- **How can Article 50 be extended?**
- **What are the likely extension scenarios?**
- **Will the EU grant the UK an extension?**
- **How long would extension be for?**
- **Could Article 50 be revoked?**

### How could Article 50 be extended?

From a legal perspective, Article 50 can only be extended if the UK government submits an official request to the European Council. This request must then be unanimously approved by the 27 EU Member States. Consideration of such a request would most likely happen at the European Council Summit on 21-22 March.

Crucially, there would need to be a change to UK law too. The European Union (Withdrawal) Act 2018 sets the date of Brexit as 11.00pm 29 March 2019 in law. It also repeals the European Communities Act 1972 (at that exact time), which is the legislation that brought the UK into the EU. For an extension of Article 50 to have legal effect in the UK, the exit day would need to be amended. This can be done via statutory instrument, and Prime Minister Theresa May has indicated her government will do this.

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## How would the EU consider an extension request?

The EU is under no clear legal obligation to accept the UK's request and grant an extension, and Article 50 does not outline what the EU should consider in such a scenario. However, there are both legal and political reasons to believe an extension would be granted in most conceivable scenarios.

### *The EU has wider legal and constitutional obligations*

A constitutionalist reading of Article 50, which places Article 50 in the wider context of the EU's treaties, fundamental principles and values throws caution to the idea that the EU would refuse a UK request for extension.<sup>2</sup> Article 50 does not operate in a constitutional vacuum. Arguably, the EU's obligation to respect the constitutional requirements of a withdrawing State, the rights of individuals, and its very own values mandates a cooperative, non-punishing approach towards withdrawal.

Furthermore, a no-deal withdrawal clearly offends all that EU constitutional law holds dear, in terms of rights protection, the rule of law, and the duty of cooperation. Indeed, Article 50 imposes a 'best endeavours obligation' on the EU to negotiate and reach an agreement, and embodies an exceptionally strong preference for a negotiated, orderly withdrawal.<sup>3</sup> As such, if the UK's request for extension was reasonable, it would not be cooperative nor in the spirit of the EU's values to refuse an extension.

### *The EU has expressed political will to support a "justified" extension*

Nonetheless, the EU's decision will primarily be driven by political rather than legal considerations. There has been much debate as to whether EU leaders would grant the UK an extension. Although the message from EU leaders has been broadly consistent, there has been some variation.

European Council President Donald Tusk said: "I will appeal to the EU27 to be open to a long extension if the UK finds it necessary to rethink its Brexit strategy and build a consensus around it".<sup>4</sup> Prior to this Tusk said that when faced with the choice of a "chaotic no-deal and extension of Article 50", the latter would be a "rational

solution".<sup>5</sup>

The line from France is slightly tougher. French President Emmanuel Macron said: "We could examine a request for an extension, if it is justified by new choices by the British. But under no circumstances would we accept an extension without a clear perspective on the objective pursued."<sup>6</sup> This suggests that France might oppose extension unless the UK has a concrete and workable new plan of action.

European Parliament Brexit Coordinator Guy Verhofstadt echoed Macron's sentiments, stating: "I am against any extension of Article 50, even for just 24 hours, if it is not based on a clear opinion from the House of Commons in favour of something."<sup>7</sup>

Similarly, Michel Barnier, the EU's Chief Brexit Negotiator, stated: "Why would we extend these discussions? The discussion on Article 50, that is done and dusted. We have the withdrawal agreement, it is there [...] For the EU to decide on further extension, the UK has to come up with a plan to build a constructive majority in the House of Commons".<sup>8</sup>

Irish Taoiseach Leo Varadkar said that: "If there is going to be an extension, it has to be an extension with a purpose. Nobody across the European Union wants to see a rolling cliff edge where tough decisions just get put off until the end of April, then to the end of May and then maybe till the end of July."<sup>9</sup>

Finally, German Chancellor Angela Merkel said that: "If the UK needs a little bit more time we will not oppose it but of course we are seeking an orderly exit"<sup>10</sup> Merkel is also reported to have said that securing an Article 50 extension should be 'easy'.<sup>11</sup>

The consistent message is that extension is an option which is on the table. However, EU approval of an extension is not guaranteed, and will only be forthcoming if the UK offers a valid justification for such a request. But what exactly would constitute a valid justification? Thus far, the messaging has been mixed. The key question is how much detail and clarity does the UK need to provide for its extension request to be considered justified by the EU.

2 Piet Eeckhout and Eleni Frantziou, 'Brexit and Article 50 TEU: A Constitutionalist Reading' (2017) *Common Market Law Review*

3 *Ibid*, p.703.

4 Donald Tusk official statement, 14 March 2019.

5 'Donald Tusk: article 50 extension would be a 'rational solution' – video' (2019) *The Guardian*.

6 Rym Momtaz, 'Macron: We need a 'clear' reason to grant Brexit extension' (2019) *Politico*.

7 'Guy Verhofstadt 13 Mar 2019 plenary speech on UK's withdrawal from the EU' (2019) *ALDE Group*.

8 Jon Stone, 'Michel Barnier questions Brexit delay: 'Why would we extend Article 50 when negotiations are over?' (2019) *Independent*.

9 'Taoiseach: Any Article 50 extension must have a purpose' (2019) *Irish Examiner*.

10 Rym Momtaz, 'Macron: We need a 'clear' reason to grant Brexit extension' (2019) *Politico*.

11 Daniel Boffey, 'Angela Merkel 'said it would be easy to get EU to extend article 50' (2019) *The Guardian*.

## Different types of Article 50 extension and the EU's likely response

This table outlines the different types of justification (A-F) which the UK could provide for its extension request, and the EU's likely response.

| EXTENSION SCENARIO | UK JUSTIFICATION FOR EXTENSION  | TIME NEEDED      | POTENTIAL EU RESPONSE (positive >>> negative)  |
|--------------------|---|------------------|--|
| <b>A</b>           | The UK wants to hold a further referendum on Brexit, with the option to remain in the EU on the ballot paper.   | <b>5+ months</b> | The EU would almost certainly grant an extension in this scenario.   |
| <b>B</b>           | The UK wants to hold a general election.  | <b>3+ months</b> | The EU would almost certainly grant an extension in this scenario.   |
| <b>C</b>           | The deal is approved in a meaningful vote and the UK needs to complete ratification procedures and pass the implementing legislation.                           | <b>3 months</b>  | The EU would almost certainly grant an extension in this scenario.   |
| <b>D</b>           | The UK wants to pursue a softer version of Brexit, based on the Single Market and/or Customs Union. Negotiations continue.                                      | <b>3+ months</b> | The EU would probably grant an extension in this scenario, but it would want to see some evidence that this is a workable plan.  |
| <b>E</b>           | The UK wants more time for its Parliament to figure out and agree on a hitherto unknown new way forward (e.g. through indicative votes). Negotiations continue. | <b>3+ months</b> | The EU would not be happy with such a vague request, as it would not embody proof of a workable plan. However, it would probably grant an extension in this scenario as the prospect of no-deal looms large. |
| <b>F</b>           | The UK wants more time for negotiations on the current deal so that Theresa May can secure changes and continue attempting to get it approved.                  | <b>3 months</b>  | The EU would likely refuse this, as they would say that there can be no more negotiations on the Withdrawal Agreement. They may also have little faith that Theresa May could get the deal approved.         |

### *The EU would grant an extension in almost all conceivable scenarios*

The more clarity the UK provides, the more likely it is that its request will be granted. Scenarios A-C are likely to be approved as they are concrete plans which could result in highly favourable outcomes for the EU. Scenario F is perhaps the only one where it can be argued that the EU would be reluctant to grant an extension, as the EU would have little faith in Theresa May's strategy. Given previous unsuccessful attempts to renegotiate, it is in any case the most unlikely scenario.

Scenarios D and E are more complicated. The EU should, and probably would, grant the UK an extension in both scenarios. This is because the necessity of avoiding no-deal on 29 March outweighs the need to have precise clarity on what the UK wants to do. It would be better for all parties if the UK could prove that there is parliamentary support for a different (i.e. softer) form of Brexit, but until this is voted on no one can be sure.

Avoiding no-deal must be the priority. As such, the EU should grant such a request, even if there was no concrete evidence that doing so would permanently avert no-deal. As argued above, there is also a constitutional obligation on the EU to work to avoid no-deal. It would not be in the spirit of cooperation to deny such a request. The EU has emphasised the importance to ensure an orderly withdrawal throughout the process, and refusing an extension would be in tension with this.

Finally, EU leaders have repeatedly stated that they want the UK to be in a customs union with the EU and to remain closely aligned to the EU's Single Market. As such, it would be surprising for the EU to deny the UK the chance to achieve this, even if prolonged uncertainty was the cost.

### *The threat of no-deal would trump other concerns*

Of course, an extension is not unproblematic. The prolongation of uncertainty followed by a deferred no-deal outcome could be more damaging, not least to businesses and the economy, than no-deal on 29 March. Also, EU leaders might be justifiably exasperated with the UK and seek to cut their losses and move on to other matters. They might also fear the consequences of UK participation in the European Parliament elections, not least due to the gains which could be made by populist Eurosceptic parties.

A more radical idea is that the EU could refuse such an extension on the basis that they want to persuade MPs to back the deal or pursue a referendum or general election. If EU leaders refused an extension at the 21-22 March European Council summit, UK MPs would then have one week to decide whether to accept no-deal on 29 March, approve the current deal or ask for another extension with the explicit objective to hold a referendum or general election. This would be an extremely high stakes and ultimately unlikely move by the EU. It might also, paradoxically, favour Theresa May, as she has always sought to narrow down the choice to one between her

deal, no-deal or no Brexit.

However, none of these arguments are more powerful than the necessity of avoiding no-deal. Extending Article 50 reduces this risk of no-deal; perhaps not by much, but enough to justify extension. Therefore, most EU leaders will take a pragmatic approach and favour granting an extension to avoid no-deal, and they would certainly want to bear no responsibility for a no-deal outcome.

However, they could impose conditions, for instance by contending that only an extension of a certain length should be considered. Insisting on a much longer extension than the UK asks for could complicate matters politically. Even this, however, could work in Theresa May's favour, as she might use it to persuade rebel Brexiteer MPs to back the deal.

### *Unity and internal cohesion first*

The EU's core strategy throughout the Brexit process has been to maintain unity and cohesion. EU leaders will not want this unity to be broken by the UK's request for an extension. Despite slight differences in tone at present, the EU's official response is likely to be coordinated and unified. Vetoes by individual member states are highly unlikely: objecting and eroding the EU's unity might not be considered worth it, even if states disagree with the idea of extension.

## **How long could extension of Article 50 be for?**

There is no legal limit to the length of an Article 50 extension.

Extending Article 50 prolongs the UK's membership of the EU, which otherwise ends by automatic operation of the law on 29 March 2019, two years to the day after the UK triggered it. Thus far, the UK's MEPs have remained in the European Parliament, working in Committees and voting in plenary sessions. The UK's Commissioner Julian King continues to lead his Directorate-General. And UK Ministers work on all EU policy issues, save Brexit, in the Council. This would continue if Article 50 is extended.

### *The obstacle of the European Parliament elections*

Time is a major stumbling block to Article 50 extension. The European Parliament elections are due to be held on 23-26 May 2019. If the UK extended Article 50 beyond 22 May it might have to participate in those elections. If it extended Article 50 beyond 1 July – necessary for every extension scenario save ratification of an approved deal – it would almost certainly have to participate in those elections. This is because the new cohort of MEPs will officially assume their posts on 2 July. It is currently open to debate whether, should the UK remain a Member State but have no representation, Parliament might be 'illegally composed'. While European Commission President Jean-Claude Juncker stated that an extension beyond 23

May would legally oblige the UK to participate in those elections<sup>12</sup>, several EU lawyers disagree.<sup>13</sup>

Even though the UK's seats have already been reallocated to other Member States, there may be short-term fixes. For example, keeping the current UK MEPs in post, granting UK MEPs observer status with no voting rights, or even appointing national representatives.<sup>14</sup> There have been previous situations where a solution has been found (e.g. the accession of Croatia).<sup>15</sup> The only necessity would be to ensure that the EU27 could elect a new Parliament as scheduled, and to arrange for a temporary 'Brexit' fix for the UK. Nonetheless, these options are all legally and politically controversial, and could be rejected by the EU or challenged in the courts.

Although the European Parliament elections are a major obstacle, they are more likely to be used by the EU to influence the length and timing of extension rather than as a reason to refuse an extension.

A short extension comes with other risks. Three months would provide insufficient time for MPs to find a majority for a different (i.e. softer) form of Brexit, negotiate substantive changes to the deal (i.e. the Political Declaration) with the EU, and pass all the necessary legislation, such as the European Union (Withdrawal Agreement) Bill and other Brexit-related bills.<sup>16</sup> As such, if MPs do want time to coalesce around a new Brexit plan, they may have to stomach UK participation in the European Parliament elections.

#### *Extension is likely to be a one-off offer*

There is no legal reason why Article 50 cannot be extended multiple times. However, politically, the EU will not want this. As such, they may grant the UK's request for an extension, but insist that it can only be a one-off move. However, if the UK requested an extension for scenario D or E, it is plausible to imagine the EU granting a further extension for scenarios A-C at the end of the initial extension period.

## How can Article 50 be revoked?

It is reasonable to argue that extending Article 50 will not help much, especially if it is not evident that there is a version of Brexit which MPs can support. It is perfectly plausible that even with a few more months MPs could fail to agree upon a new approach, whilst simultaneously continuing to reject the current deal. In this scenario, no-deal remains a possibility at the end of the extension period.

If Article 50 is extended, and no agreement is approved and ratified in the extension period, MPs might begin to consider revocation. To revoke the Article 50 notification would bring Brexit to a complete halt. This is highly unlikely to happen without a new mandate from the public, in the form of a referendum or election result.<sup>17</sup>

Article 50 itself does not say whether the departing state requires the consent of the remaining EU Member States to revoke its notification. However, the European Court of Justice (CJEU) found, in its ruling on 10 December 2018, that a country could unilaterally revoke Article 50. The ruling emphasised that such a revocation would reflect the state's 'sovereign decision'.<sup>18</sup> It also clarified that the state would be able to remain in the EU on its current membership terms.

This means the UK would be able to revoke Article 50 without the rest of the EU having to agree to it. Doing so would also be relatively straightforward from a legal perspective.

Revocation can occur at any point until the end of the Article 50 period, and must be unequivocal and unconditional. The CJEU judgement stipulated that the right to revoke cannot be abused. For example, the UK could not revoke Article 50 and then trigger it again, to restart the two-year negotiation clock. However, the CJEU's judgement has been criticised for lacking detail as to how this potential abuse would be enforced. Some have argued that it could be unenforceable, and that it would be unclear what the legal remedy would be if the UK revoked Article 50 and then triggered it again.<sup>19</sup>

A revocation of Article 50 would have to be initiated by the UK. It is anticipated that parliamentary approval, via an Act of Parliament, would also be required to revoke Article 50.

12 'Letter from President Juncker to President Tusk', 11 March 2019.

13 Mehreen Khan and Alex Barker, 'UK can delay Brexit without holding Europe elections, say lawyers' (2019) *Financial Times*.

14 'Article 50 Extension Explainer', (2019) *Institute for Government*.

15 In March 2012 twelve Croatian observer MEPs were appointed. They participated in the work of the Parliament but did not have the right to vote or assume official positions.

16 Meg Russell and Alan Renwick, 'How long an extension to Article 50 does the UK need?' (2019) *UCL Constitution Unit*.

17 Oliver Patel, 'Brexit: is it possible to stop it?' (2019) *The Conversation*.

18 Court of Justice of the European Union, 'The United Kingdom is free to revoke unilaterally the notification of its intention to withdraw from the EU' 10 December 2018.

19 Ronan McCrea, 'Brexit II? The legal issues of revoking the notification to leave the EU but then notifying to leave again' (2019) *EU Law Analysis*.

Even if parliamentary approval was not legally required, it is difficult to imagine the government revoking Article 50 without Parliament's backing, which would have to repeal the European Union (Withdrawal) Act 2018, in any case.

## Summary points

- Article 50 can only be extended if the UK government submits an official request to the European Council which is unanimously approved, and changes relevant domestic law.
- There are legal – and more importantly political – reasons to believe an extension would be granted by the EU in almost every conceivable scenario.
- However, the EU will push for the request of extension to be justified, and will want as much detail as possible.
- There is no legal limit to how long an extension could be or how many times the UK could extend, but the May European Parliament elections are a stumbling block.
- Extension prolongs the UK's membership of the EU. Unilateral revocation of Article 50 is legally possible at any time prior to withdrawal.

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