

Extending Article 50: European Union (Withdrawal) Act 2018 (Exit Day) (Amendment) Regulations 2019

Debate on 27 March 2019

Summary

In response to the UK's formal request to the EU to extend the two-year article 50 period beyond 29 March 2019, the European Council agreed last week to an extension until 22 May 2019 if the House of Commons approves the withdrawal agreement before 29 March 2019, and to 12 April 2019 if the House of Commons does not approve the withdrawal agreement by 29 March 2019. The terms of this extension were adopted as a legally binding European Council Decision on 22 March 2019, and the UK will not be leaving the EU on 29 March 2019.

The European Union (Withdrawal) Act 2018 (the EUWA) sets the date of 'exit day' in domestic law as 29 March 2019. Under powers contained in the EUWA, the Government has laid draft regulations before Parliament to change the date of exit day in domestic law to reflect what has been agreed with the EU about the UK's departure date. It is the operation of article 50 and EU law which govern when the UK's membership of the EU will cease. 'Exit day' as specified in the EUWA can only have an effect in domestic law—failing to change the date of exit day in domestic law will not affect the agreement the UK has made with the EU about extending the article 50 period. However, the Government is seeking to ensure that the date of exit day in domestic law matches the date on which the EU Treaties cease to apply to the UK in order to avoid "serious problems and uncertainty with regard to the domestic statute book".¹

The statutory instrument (SI) to change the date of exit day cannot come into force unless it is approved by both Houses of Parliament. Neither House can amend the SI. Both Houses have the power to reject SIs, but they have used this power only rarely. The House of Lords is due to debate the SI on 27 March 2019. This briefing provides background information about the legal context in EU and domestic law and parliamentary procedures relating to debate on this SI.

UK Request to Extend Article 50

Under the terms of article 50, if a withdrawal agreement between the UK and the EU is not ratified, the original default legal position was that UK would leave the EU on 29 March 2019 without a deal, unless an extension to the two-year article 50 period was agreed unanimously with all 27 EU member states, or unless the UK revoked its article 50 notification and remained an EU member. On 20 March, Theresa May wrote to Donald Tusk, President of the European Council, to inform him that the UK was seeking an extension to the article 50 period until 30 June 2019.² This followed votes by the House of Commons on 12 March 2019 not to approve the negotiated deal, on 13 March 2019 to reject leaving without a deal and on 14 March 2019 to agree that the Government should seek an extension of the article 50 period.³

European Council Decision

At the European Council meeting on 21 March 2019, the leaders of the EU27 member states agreed to an extension of the article 50 period until 22 May 2019, provided the withdrawal agreement is approved by the House of Commons before 29 March 2019.⁴ If the withdrawal agreement is not approved by the House of Commons before 29 March 2019, the European Council agreed to an extension until 12 April 2019, and stated its expectation that the UK would indicate before this date a way forward for consideration by the European Council. The EU did not agree to Mrs May's proposed date of 30 June because elections to the European Parliament are due to take place on 23–26 May 2019 and there are concerns about the legal complications that could arise if the UK was still a member of the EU on that date but did not take part in the elections.⁵

Sir Tim Barrow, the UK's Permanent Representative to the European Union, wrote to Donald Tusk on 22 March 2019 to confirm the UK's agreement to the extension.⁶ Later that day, a European Council Decision was published in the Official Journal of the European Union setting out the terms of the extension.⁷ Article 1 of the Decision provides that:

In the event that the withdrawal agreement is approved by the House of Commons by 29 March 2019 at the latest, the period provided for in article 50(3) TEU [Treaty on European Union] is extended until 22 May 2019.

In the event that the withdrawal agreement is not approved by the House of Commons by 29 March 2019 at the latest, the period provided for in article 50(3) TEU is extended until 12 April 2019. In that event, the United Kingdom will indicate a way forward before 12 April 2019, for consideration by the European Council.

Article 2 states that the Decision enters into force on the date that it is adopted. The recitals at the beginning of the Decision note the legal implications of the extension for the UK:

This extension will have the consequence that the United Kingdom will remain a member state with all the rights and obligations set out in the Treaties and under Union law. If the United Kingdom is still a member state on 23–26 May 2019, it will be under the obligation to hold the elections to the European Parliament in accordance with Union law.

Under EU law, a Decision is a binding legal act.⁸ European Council Decisions may be referred to as “non-legislative acts” because they are not adopted using one of the EU's legislative procedures, but they are legally binding.⁹ Since the European Council Decision was adopted, the UK will not be leaving the EU on 29 March 2019 but, as things stand, will leave on either 12 April 2019 or 22 May 2019.

Exit Day in Domestic Law

In domestic law, the date of exit day is set as 11.00pm on 29 March 2019 by section 20(1) of the European Union (Withdrawal) Act 2018 (the EUWA), the same date and time at which the UK's membership of the EU was due to end by default under article 50. It is the operation of article 50 and EU law which govern when the UK's membership of the EU will cease. ‘Exit day’ as specified in the EUWA can only have an effect in domestic law.

The concept of ‘exit day’ works in domestic law to enact changes to the statute book necessary as a result of the UK leaving the EU. Section 1 of the EUWA provides that the European Communities Act 1972—the ‘conduit pipe’ through which EU law flows into domestic law—is repealed on exit day.¹⁰ By converting existing EU law into domestic law and preserving domestic law that was originally made in order to implement EU obligations in UK law, the EUWA establishes a new legal category in domestic law called ‘retained EU law’. The EUWA provides that this body of retained EU law will continue to apply after exit day, in order to avoid gaps in the statute book. Section 8 of the EUWA gives ministers and the devolved administrations powers to make regulations to deal with ‘deficiencies’ in domestic law arising from the UK’s withdrawal from the EU (eg correcting references to the UK as a member state or reassigning to UK bodies functions currently carried out at EU level). Many of the regulations that have now been made under this power are drafted so that they will come into force on exit day. By making these changes in the domestic legal order at the moment the UK’s membership of the EU ends, it ensures the UK can fulfil its obligations under the EU Treaties until the point of its departure and that there will be domestic legal certainty thereafter.

The EUWA contains provision for the definition of exit day to be changed by secondary legislation. Sections 20(3) and 20(4) state:

(3) Subsection (4) applies if the day or time on or at which the Treaties are to cease to apply to the United Kingdom in accordance with article 50(3) of the Treaty on European Union is different from that specified in the definition of “exit day” in subsection (1).

(4) A Minister of the Crown may by regulations—

- (a) amend the definition of “exit day” in subsection (1) to ensure that the day and time specified in the definition are the day and time that the Treaties are to cease to apply to the United Kingdom, and
- (b) amend subsection (2) in consequence of any such amendment.

The power to change the date of exit day by regulations is drafted so that it can be used only to ensure that the definition used in the EUWA matches the date on which the EU Treaties will cease to apply to the UK. Using this power, the Government laid a draft affirmative instrument before Parliament on 25 March 2019 to amend the date of exit day in domestic law—the [European Union \(Withdrawal\) Act 2018 \(Exit Day\) \(Amendment\) Regulations 2019](#). The regulations need to be approved by both Houses of Parliament before they can come into force; the procedure for this is discussed further below. Making reference to the European Council Decision, the regulations are drafted to provide for both the possible new exit dates, 12 April 2019 and 22 May 2019.

In a document published the same day as the regulations were laid in draft, the Government set out what the consequences would be of not changing the date of exit day in domestic law to reflect the extension agreed with the EU:

The extension of article 50 has been agreed with the EU, and is therefore legally binding in international law. This means that the UK will remain a member state until at least 11pm on 12 April 2019, regardless of the passage of the SI [statutory instrument] to amend ‘exit day’ at the domestic level. The Government will now also delay commencement of the repeal of the European Communities Act 1972, and other provisions of the EU (Withdrawal) Act that likewise require commencement.

However, a rejection of the ‘exit day’ SI would cause serious problems and uncertainty with regard to the domestic statute book from 11pm on 29 March. A large volume of EU exit legislation preparing the domestic statute book for the moment EU law ceases to apply is due to enter into force automatically on ‘exit day’. A rejection of the SI would therefore create a clash in domestic law; contradictory provisions would apply both EU rules and new UK rules simultaneously, and in some cases new UK rules would replace EU rules prematurely. This could generate confusion and uncertainty for businesses and individuals, resulting in litigation. In some cases, it could restrict the rights of individuals or impair the ability of public bodies to operate within the framework of EU rules.¹¹

If Parliament did not approve the SI to change the date of exit day in domestic law, the UK would nevertheless be bound by the European Council Decision changing exit day from 29 March 2019. Baroness Evans of Bowes Park, Leader of the House of Lords, stated on 25 March 2019 that:

[...] I can only restate that 29 March is no longer a date on which we can leave the EU. The agreement made is a matter of international law. It has always been the case that agreements at an international level take precedence. The House of Commons voted to seek an extension to article 50, which is what has been done. Rejecting the SI would not stop the extension being agreed or coming into force because it is a matter of international law.¹²

In the event that a rejection of the SI caused a clash in domestic law between the EU rules and the new UK rules that came in on 29 March 2019 because the date of exit day had not been changed in domestic law, Mark Elliott, professor of public law at the University of Cambridge, has explained that EU law would have supremacy while the UK remained an EU member state:

[...] to the extent that Brexit-inspired domestic law and EU law conflicted, EU law would necessarily take priority. This would follow because, after 29 March, the UK would remain a member state of the EU. It would therefore be subject (as a matter of EU law) to the principle of the supremacy of EU law and the European Communities Act 1972 (in domestic law) would continue to assign priority to EU law over inconsistent domestic law. Faced with conflicting sets of laws, ie EU law proper and domestic legislation enacted in the expectation of Brexit, courts would therefore give priority to EU law between 29 March 2019 and the date of the UK’s actual departure from the EU. The scope for uncertainty and confusion, however, would be profound.¹³

Parliamentary Procedure

Paragraph 14 of schedule 7 of the EUWA provides that regulations to change the date of exit day “may not be made unless a draft of the instrument has been laid before, and approved by a resolution of, each House of Parliament”. This is known as the draft affirmative procedure.

Neither House has the power to amend delegated legislation, except in the very small number of cases where the parent Act specifically provides for such an amendment.¹⁴ There is no such provision in the EUWA. Regulations to change the date of exit day therefore have to be approved by both Houses before they can come into force; neither House can amend the regulations, and both Houses would have the ability to reject them.

Although both Houses have the power to veto delegated legislation, it is rare for them to use it. The House of Lords has rejected delegated legislation five times since 1968.¹⁵ In addition, on 26 October 2015, the Government was defeated in the House of Lords after Members voted to support two

amendments to an approval motion, both of which sought to delay consideration of the Tax Credits (Income Thresholds and Determination of Rates) (Amendment) Regulations 2015 until specific conditions had been met.¹⁶ The House of Commons has not rejected an affirmative statutory instrument since 1978.¹⁷

The House of Lords *Companion to the Standing Orders* notes that: “Opposition to or concern about an affirmative instrument may be expressed in a number of ways (in addition to speaking in the debate in Grand Committee or on the approval motion [in the Chamber]”.¹⁸ It gives the following examples:

- Members may give notice of direct opposition by means of an amendment to the approval motion, the effect of which would be to withhold the agreement of the House;
- Members may, by means of an amendment or separate motion, call upon the Government to take specified action (but which will not, even if agreed, prevent the approval of the instrument);
- Members may, by means of an amendment or a separate motion, invite the House to put on record a particular point of view relating to the instrument, but without calling on the Government to take any specific action.¹⁹

Different procedural rules apply in each House for the consideration of delegated legislation. In the House of Commons affirmative instruments are usually debated in a delegated legislation committee, with the formal decision on whether to approve taken later without debate in the Chamber.²⁰ Less commonly, an affirmative instrument can be debated in the Commons Chamber.²¹ Wherever the debate takes place, as a proceeding under an Act, the debate is limited to 90 minutes unless the Commons agrees to set aside standing order 16(1).²² The Prime Minister said on 25 March 2019 that the SI would be debated in the Commons on Wednesday 27 March 2019.²³ Later that day, the Commons voted in favour of an amendment tabled by Sir Oliver Letwin (Conservative MP for West Dorset) intended to give precedence on the order paper on 27 March 2019 for motions enabling the Commons to “begin [...] the process of working its way towards identifying a way forward that can command a majority in this House” (a process that has been colloquially referred to as “indicative votes”, although the exact procedure has yet to be determined).²⁴ As of 26 March 2019, the ‘exit day’ regulations are listed on the Commons order paper as not having been scheduled for a specific date.²⁵

The House of Lords is due to consider the ‘exit day’ SI on 27 March 2019.²⁶ There is no time limit specified for debate on delegated legislation in the Lords. Under House of Lords standing order 72, motions to approve most types of statutory instrument may not be moved until a report on the instrument from the Joint Committee on Statutory Instruments (JCSI) has been laid before the House.²⁷ However, the House has agreed from time to time to dispense with this standing order.²⁸ Baroness Evans of Bowes Park is due to move a motion in the House of Lords on 26 March 2019 to dispense with standing order 72 on 27 March 2019 so that the Lords can consider the ‘exit day’ SI whether or not the JCSI has reported on it. Lord True (Conservative) has tabled an amendment to the government motion under which the Lords would decline to consider the SI until the JCSI has reported, on the grounds that “it is not in accordance with the practice and traditions of the House to consider significant affirmative instruments laid by Her Majesty’s Government without prior consideration by that committee”.²⁹

Dr Brigid Fowler of the Hansard Society has noted that:

SI subject to the affirmative procedure normally take six to eight weeks to complete their parliamentary passage, from the day they are laid before Parliament to the point at which they are approved by both Houses. Laying and securing the approval of both Houses for an SI in less than

one parliamentary sitting week will thus require an expedited process.³⁰

She suggests that in the Commons, this could be facilitated by holding the debate on the floor of the Chamber (rather than debating the SI in a delegated legislation committee, then having a separate approval motion to be considered by the whole House), and in the Lords by making “exceptional arrangements” for the JCSI to report quickly, or by setting aside standing order 72.³¹

- ¹ HM Government, [Legislating for the Extension of Article 50](#), 25 March 2019.
- ² Prime Minister, [Letter to Donald Tusk, President of the European Council](#), 20 March 2019.
- ³ For further background, see: House of Lords Library, [Brexit: Further Recent Developments](#), 21 March 2019.
- ⁴ European Council, [European Council \(Art. 50\) Conclusions, 21 March 2019](#), 21 March 2019.
- ⁵ For further background, see: House of Lords Library, [Brexit: Further Recent Developments](#), 21 March 2019.
- ⁶ Department for Exiting the European Union, [Letter from the UK's Permanent Representative to the EU to the President of the European Council Concerning Article 50 Extension](#), 22 March 2019.
- ⁷ [European Council Decision EU 2019/476 Taken in Agreement with the United Kingdom of 22 March 2019 Extending the Period under Article 50\(3\) TEU](#).
- ⁸ EUR-Lex, [European Union Decisions](#), accessed 20 March 2019.
- ⁹ *ibid.* Further information about EU Decisions is available in the House of Commons Library briefing, [Legislating for Brexit: EU Decisions](#) (19 January 2018).
- ¹⁰ This provision of the EUWA has not yet been brought into force. For more information about how EU law flows into domestic law through the European Communities Act 1972, see the [Explanatory Notes to the European Union \(Withdrawal\) Act 2018](#).
- ¹¹ HM Government, [Legislating for the Extension of Article 50](#), 25 March 2019.
- ¹² [HL Hansard, 25 March 2019, col 165](#).
- ¹³ Mark Elliott, [Redefining 'Exit Day' in Domestic Law](#), Public Law for Everyone Blog, 25 March 2019. Professor Elliott serves as the Legal Advisor to the House of Lords Constitution Committee, although these remarks were written in a personal capacity.
- ¹⁴ House of Lords, [Companion to the Standing orders and Guide to the Proceedings of the House of Lords](#), 2017, para 10.02.
- ¹⁵ *ibid.*, footnote 2. For further details, see: House of Lords Library, [Government Defeats in the House of Lords on Delegated Legislation](#), 21 March 2019.
- ¹⁶ House of Lords Library, [Delegated Legislation in the House of Lords Since 1997](#), 5 January 2016, p 1.
- ¹⁷ House of Commons Library, [Statutory Instruments](#), 15 December 2016, p 24.
- ¹⁸ House of Lords, [Companion to the Standing orders and Guide to the Proceedings of the House of Lords](#), 2017, para 10.14.
- ¹⁹ *ibid.*
- ²⁰ UK Parliament, [MPs Guide to Procedure: Delegated Legislation and Statutory Instruments](#); and [MPs Guide to Procedure: What Happens After a Delegated Legislation Committee](#), accessed 20 March 2019.
- ²¹ UK Parliament, [MPs Guide to Procedure: Delegated Legislation and Statutory Instruments](#), accessed 20 March 2019.
- ²² Brigid Fowler, [Changing EU 'Exit Day' by Statutory Instrument](#), Hansard Society Blog, 18 March 2019.
- ²³ [HC Hansard, 25 March 2019, col 41](#).
- ²⁴ [HC Hansard, 25 March 2019, col 82](#).
- ²⁵ House of Commons, [Order Paper](#), 26 March 2019, p 39.
- ²⁶ House of Lords, [Future Business](#), 26 March 2019, p 4.
- ²⁷ House of Lords, [The Standing Orders of the House of Lords Relating to Public Business](#), 2016.
- ²⁸ House of Lords, [Companion to the Standing orders and Guide to the Proceedings of the House of Lords](#), 2017, para 10.12, footnote 5.
- ²⁹ House of Lords, [Future Business](#), 26 March 2019, p 1.
- ³⁰ Brigid Fowler, [Changing EU 'Exit Day': How Might the Statutory Instrument Be Expedited Through Parliament?](#), Hansard Society Blog, 25 March 2019.
- ³¹ *ibid.*

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