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BREXIT: Can "EXIT DAY" Be Changed in Time?

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On March 21st the European Council agreed to extend the UK's Article 50 notice period, either:

- Until May 22nd if the Withdrawal Agreement and Political Declaration (WA) is approved by the House of Commons before March 29th; or
- Until April 12th if the WA is not approved.

The April 12th deadline would allow (indeed require) the UK to present a viable alternative plan in order to avoid a "no deal" Brexit once that extended notice period expires. EU Council President Donald Tusk emphasized that all options remain open in those circumstances, including revocation of the UK's Article 50 notice, a further referendum or an alternative proposal for a deal. Should a viable alternative be presented, other than revocation, a longer extension might be available, but only if the UK takes part in elections for the European Parliament.

The European Council's decision to offer two end-dates for the Article 50 extension invites the House of Commons to approve the WA, but removes the Prime Minister's frequently repeated insistence that there is a binary choice between the WA and "no deal". Consequently, it is possible that the government might decide not to bring the WA back to the House of Commons for a third "meaningful vote". It is also possible that if a third "meaningful vote" were to be called, then the government would again fail to secure approval. In those circumstances, the House of Commons would have to find a viable alternative in time to meet the 12 April deadline.

"Exit Day"

The first priority, though, would be to ensure that 29 March does not see an accidental "no deal" Brexit.

The EU (Withdrawal) Act 2018 defines "exit day" as 11.00pm on March 29, 2019. That definition is used as the trigger for a range of statutory provisions, including repeal of the European Communities Act 1972 and the beginning of the two year period within which the government may use "Henry VIII" powers to amend UK law in order to prevent, remedy or mitigate "deficiencies" in retained EU law arising from EU withdrawal. The definition must be amended before March 29th in order to avoid a "no deal" Brexit on March 29th.

The mechanism for amendment is a statutory instrument, subject to the "draft affirmative procedure". This means that the government must lay the draft statutory instrument before Parliament. Next, the House of Commons must vote in favor of the draft. If that happens, then the House of Lords must also vote to approve the draft. The statutory instrument can come into force immediately after both votes have been taken.

Normally, the "draft affirmative procedure" involves a debate of no more than 90 minutes, either in a committee room or in the main Chamber, and the whole scrutiny process takes between 6 to 8 weeks. However, it is possible (and in this case necessary) to expedite the process, so in theory, at least approval ought to be possible before March 29th, assuming that the government produces the draft statutory instrument by March 25th.



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What Could Possibly Go Wrong?

The draft statutory instrument cannot be amended. It must be either accepted or rejected. If rejected, by either House of Parliament, then the existing definition of "exit day" would remain.

The UK government clearly remains determined to secure approval for the WA. Consequently, it is possible that the draft statutory instrument might be used to exert pressure on MPs to vote for the deal - for example, by providing only for a change of "exit day" from March 29th to May 22nd and, in effect, making the extension conditional on approval of the WA. From a government perspective, that would restore the Prime Minister's position of "my deal, or no deal". Given the febrile political atmosphere, the House of Commons might well reject a draft presented in that form. That would not rule out a further draft statutory instrument, but it would present a significant timing challenge as the 29 March deadline looms.

To meet the timing challenge, the House of Lords would also have to agree to depart from its normal procedures and time limits. Before a statutory instrument can be put to a vote in the House of Lords it must first be scrutinised by the Joint Committee on Statutory Instruments (JCSI), and the JCSI report must be presented to the House. JCSI meetings are scheduled for Wednesdays, and its weekly agenda normally covers only statutory instruments that have been laid on or before the Monday of that week. Consequently, if the first draft were to be rejected, then the JCSI would have to agree to late presentation of a replacement.

It is also possible that political machinations might delay or even derail Parliamentary business as the March 29th deadline looms. The Prime Minister's televised address to the nation on March 20th, together with negative reports of her performance at the EU Council meeting on March 21st, may have reinforced opposition to the WA, and could yet lead to a further vote of "no confidence" in the government or to resignations, whether of Ministers or even of the Prime Minister.

Brexit Delayed?

With a week to go until the March 29th deadline, businesses and individuals can, perhaps, take some comfort from the European Commission's offer of an extension. If the House of Commons were to approve the WA before March 29th, then "exit day" would move to May 22nd, and that would mark the beginning of a transitional period up to December 31, 2020. If the House of Commons were to reject the WA, but secure an appropriate amendment to the "exit day", then Parliament would have until April 12th to find a workable "Plan B". However, goods are currently in transit with delivery dates falling after March 29th. Contractual obligations fall to be performed after that date, and provision has to be made for potential liability to customs duties, import VAT, export licensing costs and regulatory compliance.

Business "as usual" must continue to co-exist with politics "as unusual".

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