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Brexit delayed again: until 31 October 2019?

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Summary

EU leaders at the European Council meeting on 10 April 2019 agreed to extend the Article 50 period in order to delay Brexit for a second time.

The first Article 50 extension

The first extension of Article 50 was agreed on 21 March and provided for an extension until 22 May if the UK-EU Withdrawal Agreement (WA) had been approved by the House of Commons by the original Brexit date of 29 March. Alternatively, it provided for an extension of Article 50 until 12 April if the WA was not approved, by which point the European Council expected the UK to “indicate a way forward”. The WA was rejected for a third time by the House of Commons on 29 March.

On 2 April, the Prime Minister proposed talks with the Leader of the Opposition to agree a deal enabling the UK to leave the EU by 22 May. This would involve approval of the WA and an agreed approach to the future UK-EU relationship. If an agreed approach is not possible, the Government would seek to agree with the Opposition on a number of options to be put to the House of Commons and the Government would be ready to “abide” by the decision of the House. The plan envisaged that the WA would be approved and legislation to implement it would be passed by Parliament by 22 May in order to avoid UK participation in the European Parliament (EP) elections. Mrs May said the plan would require a further extension of Article 50. The Labour party leader agreed to talks and these are ongoing.

After votes enabling non-government MPs to control the agenda of the House of Commons on specific days, the Cooper bill obliging the Government to seek another Article 50 extension passed its various Commons stages in one day on 3 April. It took longer to get through the House of Lords, but eventually received Royal Assent on 8 April.

On 5 April, the Prime Minister wrote to the President of the European Council Donald Tusk seeking a further extension of Article 50 until 29 June. She said she accepted the EU’s view that if the UK were still a Member State on 23 May, it would be required to take part in the EP elections. She said that while it was beginning preparations for the poll the Government wanted to agree a timetable for ratification of the WA before the election date in order to cancel participation. Mrs May referred to the ongoing talks with the Labour party to agree a unified approach and the alternative plan of putting different options to the House of Commons.

The European Council agrees a second extension

Prior to the European Council meeting on 10 April, President Tusk proposed a flexible extension of up to a year, which could be ended early if both the UK and EU had ratified the WA. This would avoid a series of short extensions and emergency summits. At the meeting itself, the majority of EU leaders supported this idea but it was opposed by French President Macron. He expressed concerns about the UK blocking

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EU decisions and progress on his reform agenda, and proposed a short extension until 22 May instead.

The European Council eventually agreed on an extension until 31 October, with the possibility of the UK leaving earlier if the WA is ratified (on the first day of the month after ratification). The European Council Conclusions also included a provision for UK withdrawal on 1 June if it does not hold EP elections, and referred to a review of progress at the European Council meeting on 20-21 June 2019. The Conclusions and the European Council Decision formalising them included reference to the UK commitment to act in a constructive and responsible manner during the extension period in accordance with the duty of “sincere cooperation” and noted that the UK would remain a Member State “with full rights and obligations”, and that it has the right to revoke its Article 50 notification at any time.

Sincere co-operation

The principle of ‘sincere co-operation’ is set out in Article 4(3) of the Treaty on European Union (TEU) which states that the EU and its Member States shall “in full mutual respect, assist each other in carrying out tasks which flow from the Treaties”, and that they shall ensure fulfilment of obligations arising from the Treaties, facilitate the achievement of the EU’s objectives and refrain from any measure which could jeopardise them. Member States have previously been taken to the Court of Justice of the EU (CJEU) for not ‘sincerely cooperating’.

The European Council Conclusions and Decision also refer to an expectation that the UK fulfil its obligation of ‘sincere co-operation’ “in a manner that reflects its situation as a withdrawing Member State”. They state that the UK should “refrain from any measure which could jeopardise the attainment of the Union’s objectives, in particular when participating in the decision-making processes of the Union”.

There is however no legal obligation on the UK as a “withdrawing Member State” to behave in a certain way beyond its normal Treaty obligations, including ‘sincere co-operation’. This wording should therefore be read as a non-legal request that the UK behave ‘nicely’ in light of its impending departure, as well as a legal reminder that it is obliged to cooperate with EU processes as long as it remains a Member State.

The European Council Conclusions also include a reference to the other 27 EU Member States (the EU27) holding meetings without the UK to discuss matters related to the situation in the EU after Brexit. This would be in addition to meetings held under Article 50 TEU to discuss the Brexit process. These are likely to be ‘informal’ meetings where decisions are not taken.

Transition and the future UK-EU relationship

Unless the relevant dates in the WA are amended, a longer Article 50 extension will reduce the duration of the transition/implementation period provided for by the WA. The WA transition period lasts until the end of December 2020, with a possibility of a further extension of one

or two years. A UK-EU agreement to further extend the transition would need to be reached by 1 July 2020, eight months after the possible Brexit date of 31 October.

This shortened transition period would also mean less time to negotiate a future agreement governing UK-EU relations, given that the EU has reiterated that these negotiations cannot start until the UK actually leaves the EU.

The European Council Conclusions state that should the UK's position "evolve", it might "reconsider" the Political Declaration setting out the framework for the future UK-EU relationship "in accordance with the positions and principles stated in its guidelines and statements, including as regards the territorial scope of the future relationship". The wording on territorial scope is likely to be a reference to a future EU-UK agreement not applying to Gibraltar without Spain's consent.

European Parliament elections

On 8 April, the Government made the Order enabling the holding of the EP elections. The deadline for delivery of nomination papers and lists of candidates is 25 April for most UK constituencies. If the UK reaches agreement to leave the EU before 23 May and "exit day" as defined by the *EU (Withdrawal) Act 2018* is amended to reflect this agreement, then the legislation allowing EP elections to happen will be repealed and UK participation in the elections will be cancelled.

If UK MEPs are elected on 23 May, they will not take up their seats if both the UK and EU ratify the WA and the UK then leaves the EU prior to 2 July when the new EP sits for the first time.

UK participation in the EP elections means that the envisaged reallocation of UK MEPs may be deferred. EU legislation reallocates 27 of the UK's MEPs to 14 other Member States. This reallocation will still take place when the UK leaves the EU, meaning that MEPs for these reallocated seats will be 'elected' but will remain in limbo – unable to take up their seats until the UK and its MEPs leave.

Practical difficulties in ratifying WA prior to EP election

UK ratification would require House of Commons approval of the WA and the passage in Parliament of the *EU (Withdrawal Agreement) Bill* by 22 May. There are 17 sitting days from 23 April (when the House of Commons returns from Easter recess) and 22 May, although there could be additional sitting days if the Commons sits on Fridays and possibly even weekends.

EU ratification also requires EP consent. If the UK ratifies the WA in May or June, there could be logistical difficulties in holding the EP consent vote for the WA given that it is not scheduled to sit again until 2 July, and this could delay the date of withdrawal from the EU. However, EU law provides that the outgoing EP remains in office until the new one sits for the first time, and the EP's rules of procedures allow it to be recalled on an exceptional basis.

Election of Commission President

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If UK MEPs do take up their seats, they could potentially only be MEPs for a short period before leaving. The presence of UK MEPs will have an impact on the formation of (and funding allocations) for political groups in the EP, and the election of the EP President.

If there are UK MEPs over the summer, this could also influence the selection process for the next European Commission President. The European Commission President is elected by the European Parliament, following a proposal by the European Council which agrees a candidate by qualified majority, taking into account the results of the EP elections. The presence of UK MEPs will most likely benefit the (currently) second-largest political group in the European Parliament, the Progressive Alliance of Socialists and Democrats. The Labour party belongs to this group. The largest EP group is the European People's Party. The Conservative party left this group in 2009.

Nomination of UK Commissioner

The term of office of the European Commission expires on 31 October. Once a Commission President is elected, Member States need to put forward their nominations for Commissioners. Nominations face European Parliament hearings in September and then the EP votes to confirm the composition of the Commission in October. It is possible that the UK may still be required to nominate a Commissioner even though it is scheduled to leave the EU by 31 October at the latest. The European Council could agree that the UK does not need to nominate a Commissioner.

Exit Day

The two Article 50 extensions have required that Statutory Instruments be laid by the Government to change "exit day" as defined by *the EU (Withdrawal) Act 2018*. This can be done under the Act to align it with any new exit date agreed with the EU. Following a Government amendment introduced during the passage of the Cooper Bill, the eventual Act (*the European Union (Withdrawal) Act 2019*), amended the *European Union (Withdrawal) Act 2018* so that any regulations that change "exit day" will no longer require approval by both Houses under the draft affirmative procedure. Instead, the Government may make regulations subject only to annulment by either House. This procedure was followed on 11 April for the extension agreed the previous day.

1. Background

1.1 The UK's first Article 50 extension request

In her [letter to the President of the European Council Donald Tusk](#) on 20 March 2019, Theresa May requested an extension to the Article 50 period in order to delay the UK's exit from the EU until 30 June 2019. She said she intended to hold another Commons vote on the Withdrawal Agreement (WA) as soon as possible and that the extension would be required to pass legislation to implement it. On 14 March, the Government indicated in the House of Commons debate on extending Article 50 that if the WA had not been approved by 20 March, there would be the [prospect of seeking a longer extension](#) requiring UK participation in the European Parliament elections on 23-26 May.

Mrs May's letter to President Tusk asserted, however, that she did "not believe that it would be in either of our interests for the UK to hold European Parliament elections", and it did not include a request for a longer extension if the Withdrawal Agreement was not approved.

For further background on the UK decision to seek an Article 50 extension, the issues raised by the request and comments from EU leaders on a possible extension, see House of Commons Library Briefing Paper 8496, [Extending Article 50: could Brexit be delayed?](#), 19 March 2019.

1.2 The European Council Conclusions of 21 March, 2019

On 21 March 2019, the European Council (heads of EU governments or heads of state) meeting agreed on an extension to the Article 50 period to delay the UK's exit from the EU until at least 12 April 2019.

The European Council [Conclusions](#), issued close to midnight on 21 March, explained that the EU27 leaders (meeting without the UK) agreed to extend Article 50 until 22 May 2019, provided that the Withdrawal Agreement (WA) was approved by the House of Commons the following week.

In the event of the WA not being approved, the European Council agreed to an extension until 12 April, by which point it said it expected the UK "to indicate a way forward before this date for consideration by the European Council".

In his remarks following the European Council, President Tusk held out the possibility of a longer extension being agreed beyond 12 April if the WA had not been approved and the UK decided to participate in the EP elections.

He said the UK Government will then have, "[a choice of a deal, no-deal, a long extension or revoking Article 50](#)". EU leaders have previously stated that a longer Article 50 extension would require a [new event, new political process](#) or [deep political change](#) in the UK.

In her [statement](#) following the European Council meeting, the Prime Minister said that if the Withdrawal Agreement was not agreed, the UK “would either leave with no deal, or put forward an alternative plan”.

Why were these dates chosen?

The agreement on 21 March differed from what the Prime Minister asked for in her letter to the President of the European Council the previous day.

The UK request for an extension to 30 June was based on the view, which appeared to be supported in some EU documents, that UK participation in the European Parliament (EP) elections could be avoided [as long as the UK had left the EU by 2 July](#), when the new parliament sits for the first time.

However, advice from the European Commission warned of the [risk of legal uncertainty affecting EU actions](#) and raised the spectre of the UK then requesting a further extension after 23 May or deciding to revoke Article 50, without having representation in the EP and with some of its EP seats having been reallocated. The EU has adopted [legislation](#) reallocating 27 of the UK’s 73 seats in the EP Parliament to 14 other Member States, but this will only come into effect when the UK has left the EU (see section 3.5).

For further discussion of the European Council Conclusions on 21 March, and the context to the Conclusions, see House of Commons Library Briefing Paper 8533, [Brexit delayed: the European Council Conclusions on extending Article 50](#), 22 March 2019.

See also House of Commons Library Insights, [The EU agrees to delay Brexit – but for how long?](#) and [European elections and a longer extension to Article 50](#).

1.3 The Withdrawal Agreement is rejected for a third time

On 28 March, the Government announced it would hold another approval vote for the WA in the House of Commons the following day (the originally scheduled Brexit day of 29 March). However, unlike the two previous unsuccessful ‘meaningful votes’ on WA (held on 15 January and 12 March), the Political Declaration setting out the framework for the future EU-UK relationship (PD) would not be put to the House for approval. The vote was not therefore on a motion satisfying the conditions of Section 13(1)(b) of the *European Union (Withdrawal) Act 2018*, which requires that both the WA and PD are approved¹.

But the motion, if approved, would have satisfied the condition set out by the European Council on 21 March 2019, that the Article 50 period would be extended until 22 May 2019 if the WA was approved by 29 March, to provide time for the necessary implementing legislation to be

¹ See House of Commons Library Debate Pack 2019 - 0079 [United Kingdom’s withdrawal from the European Union \(29 March 2019\)](#), 29 March 2019

adopted by Parliament. The Speaker of the House of Commons confirmed that the motion complied with the requirement he set out on 18 March that the same question previously decided during a session may not be brought forward again. In the vote on 29 March, the Commons' nevertheless rejected the WA again [by 344 votes to 286](#). 12 April therefore became the scheduled Brexit date.

1.4 The Prime Minister proposes talks with the Opposition to agree a unified approach on the future relationship

On 2 April, the Prime Minister made a [statement](#) following a lengthy cabinet meeting, offering to sit down with the Leader of the Opposition to agree a plan "that we would both stick to - to ensure that we leave the European Union and that we do so with a deal". This would involve agreeing to the current WA, acknowledging that the EU has said it cannot be reopened, while agreeing an approach on the future relationship with the EU.

If this did not result in agreement on a single unified approach, then the Government and Opposition would instead agree a number of options for the future relationship to be put to the House of Commons, and the Government would be "ready to abide by the decision of the House" on these options. The plan envisaged Commons approval of the WA and passage of the *EU (Withdrawal Agreement) Bill* to implement it before 22 May in order to avoid UK participation in the EP elections.

The Leader of the Opposition, Jeremy Corbyn, agreed that the Labour Party would participate and talks began the next day.

The Prime Minister said in her statement that this plan would need a further extension of Article 50: "one that is as short as possible and which ends when we pass a deal".

1.5 The Prime Minister makes a second Article 50 extension request

On 5 April 2019, the Prime Minister [wrote to Donald Tusk](#) informing the European Council that the UK was seeking a further extension to the Article 50 period, proposing that that this period should end on 30 June 2019. She said that if the parties are able to ratify the WA before this date then "the Government proposes that the period should be terminated early".

Mrs May said the Government was taking "further action to seek a consensus across the House of Commons on the right way forward". She referred to the Government talks with the Labour party "in order to agree a proposal that can be put before the House of Commons which allows the United Kingdom to leave the European Union with a deal". She then explained:

If the talks do not lead to a single unified approach soon, the Government would instead look to establish a consensus on a small number of clear options on the future relationship that

could be put to the House in a series of votes to determine which course to pursue. The Government stands ready to abide by the decision of the House, if the Opposition will commit to doing so.

Mrs May reiterated the Government's view that it was neither in the UK's nor EU's interests for the UK to participate in the EP elections as a departing Member State, but said that the Government accepted the EU's view that if the UK were still a Member State on 23 May, then it would be under a legal obligation to hold EP elections. She said that the Government was therefore undertaking preparations to hold the elections, including by making the Order that sets the date of the poll. However, Mrs May said that the Government wanted to agree a timetable for ratification of the WA allowing the UK to withdraw from the EU before the 23 May and therefore cancel UK participation in the EP elections.

1.6 The *European Union (Withdrawal) (No.5) Bill*

On 25 March 2019, an amendment to the Government's Brexit motion was adopted, providing for the suspension of House of Commons Standing Order No.14(1) (which provides that government business shall have precedence at every sitting save as provided in that order) on 27 March, allowing motions on indicative votes on the future UK-EU relationship to take precedence. The [Business of the House motion](#) on 27 March enabled a second day, 1 April, to be set aside to [debate these options again](#). The Business of the House motion [adopted on 1 April](#) allowed for the suspension of Standing Order No.14(1) again on 3 April.

On 3 April, rather than stage further indicative votes, MPs used the Business of the House Motion to debate and vote upon the *European Union (Withdrawal) (No.5) Bill*, a Private Member's Bill proposed by Yvette Cooper MP.² The Bill provided that, the day after receiving Royal Assent, the Prime Minister would have to table a motion seeking Commons approval for a proposal that the UK asks the European Council for an extension to Article 50. The motion would set out the Prime Minister's preferred extension date. The Commons would be able to insist on a different extension date. The Prime Minister would be legally required to seek the extension. In the event that the European Council did not agree to the Prime Minister's request but proposed an alternative date, the Prime Minister would have to seek further Commons approval before agreeing to that revised date.³

The Bill passed all of its Commons stages on 3 April, and was then eventually passed by the House of Lords on 8 April, also receiving Royal Assent, on 8 April. Amendments in the House of Lords, agreed by the

² An amendment to the Business of the House motion proposing that another day (8 April) be set aside for a further indicative votes session was defeated after the Commons vote was tied 310-310 and the Speaker cast his vote in favour of the noes, in line with Commons precedent that "[important decisions should not be taken except by majority](#)".

³ See House of Commons Library Briefing Paper 8541, [European Union \(Withdrawal\) \(No. 5\) Bill 2017-19](#), 2 April 2019.

House of Commons, removed the requirement for the Prime Minister to go back to the House of Commons should the European Council propose a different date to that mandated by the House.⁴

By the time the Bill had received Royal Assent, the Prime Minister had already made another request to the European Council to extend the Article 50 period. However, in compliance with the new legislation, the Government tabled a motion in the House of Commons seeking agreement that the Prime Minister request an extension of Article 50 until 30 June 2019. The motion, retrospectively endorsing the extension request to the European Council already made by the Prime Minister, was agreed by 420 votes to 110.

1.7 EU Reaction

Also on 2 April, the EU's chief Brexit negotiator Michel Barnier said that if the UK Parliament did not vote in favour of the WA in the coming days "then only two options would remain: leaving without an agreement or requesting a longer extension of the Article 50 period". He said that a long extension would [not automatically be granted](#) and "would carry significant risks for the EU". A "strong justification" would therefore be needed.

On the same day, French President Macron said that a long extension, implying the UK takes part in EP elections and the EU institutions, had "nothing easy or automatic about it" and warned that the EU "can't be held hostage long-term by the resolution of a political crisis in the UK".

He referred to the three rejections of the WA by the House of the Commons putting the UK on a path to exiting the EU without a deal, and said it would up to the UK "to present [a credible alternative plan](#) backed by a majority before 10 April in order to avoid that".

In a statement to the European Parliament on 3 April, President of the European Commission Jean-Claude Juncker said that 12 April was the ultimate deadline for the approval of the WA and if it was not done by then "[no further short extension will be possible](#)". He said that after 12 April "we risk jeopardising the European Parliament elections, and so threaten the functioning of the European Union". With regard to the future relationship he said:

Much of the debate in the House of Commons has related to the future relationship between the European Union and the United Kingdom. The European Union stands ready to add flexibility to the Political Declaration, to pave the way for a close economic partnership between the European Union and the United Kingdom in the future.

Following a meeting with the Irish Prime Minister Leo Varadkar on 4 April, German Chancellor [Angela Merkel said](#):

We do hope that the intensive discussions that are ongoing in London will lead to a situation by next Wednesday, when we have a special council meeting, where Prime Minister Theresa May will

⁴ See House of Commons Library Insight, [The Cooper Act and Article 50 – a new role for Parliament?](#), 9 April 2019.

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have something to table to us on the basis of which we can continue to talk.

We want to stand together as 27. Until the very last hour – I can say this from the German side – we will do everything in order to prevent a no-deal Brexit; Britain crashing out of the European Union.

But we have to do this together with Britain and with their position that they will present to us.

Mr Varadkar said that the EU needed to be patient with the UK but that any request from the UK for another extension must involve "[a credible and realistic way forward](#)".

On 6 April, Mr Varadkar said that any EU country that vetoed an Article 50 extension and, as a result, caused economic and political harm to other Member States particularly vulnerable to a no-deal Brexit "[wouldn't be forgiven for it](#)".

2. The European Council, 10 April 2019

2.1 EU leaders are invited to the European Council meeting

Following the Commons' third rejection of the WA on 29 March, President Tusk said he was [calling a European Council meeting on 10 April](#), where the EU's response to any new UK Article 50 request would be considered.

An [invitation letter](#) to the EU heads of state or government from Donald Tusk, published on 9 April, stressed the need for the European Council to do its "utmost" to avoid no deal and proposed an Article 50 extension of up to a year to avoid "a rolling series of short extensions and emergency summits". This extension could be terminated early if the UK ratified the WA. President Tusk said:

. . . our experience so far, as well as the deep divisions within the House of Commons, give us little reason to believe that the ratification process can be completed by the end of June. In reality, granting such an extension would increase the risk of a rolling series of short extensions and emergency summits, creating new cliff-edge dates. This, in turn, would almost certainly overshadow the business of the EU27 in the months ahead. The continued uncertainty would also be bad for our businesses and citizens. Finally, if we failed to agree on any next extension, there would be a risk of an accidental no-deal Brexit.

This is why I believe we should also discuss an alternative, longer extension. One possibility would be a flexible extension, which would last only as long as necessary and no longer than one year, as beyond that date we will need to decide unanimously on some key European projects. The flexibility would allow to terminate the extension automatically, as soon as both sides have ratified the Withdrawal Agreement. The UK would be free to leave whenever it is ready. And the EU27 would avoid repeated Brexit summits. Importantly, a long extension would provide more certainty and predictability by removing the threat of constantly shifting cliff-edge dates. Furthermore, in the event of a continued stalemate, such a longer extension would allow the UK to rethink its Brexit strategy.

President Tusk referred to concerns raised by some Member States "that the UK's continued presence as a departing EU country would pose risks for the functioning of the EU27 at a time of key decisions on its future". To address them there would therefore need to be agreement on a number of conditions:

no re-opening of the Withdrawal Agreement; no start of the negotiations on the future, except for the Political Declaration; the UK would have to maintain its sincere cooperation also during this crucial period, in a manner that reflects its situation as a departing member state.

However, President Tusk reminded European Council members that the UK would "remain a member state with full rights and obligations" and

“in any event, the UK can revoke Article 50 at any time, as stated by the European Court of Justice”.

President Tusk concluded by asking European Council members not to be “influenced by negative emotions”. He said:

We should treat the UK with the highest respect, as we want to remain friends and close partners, and as we will still need to agree on our future relations. Neither side should be allowed to feel humiliated at any stage in this difficult process.

As you know, with Brexit there are no easy solutions. Both aforementioned options have their advantages and disadvantages. Therefore, let us discuss them in an open, creative, and constructive way.

2.2 European Council Conclusions

As with the European Council meeting on 21 March, the European Council met in the Article 50 format (the EU27 without the UK) on 10 April after an initial meeting with the Prime Minister to discuss the UK request. It was [reported](#) that 17 EU leaders, including those from Germany, the Netherlands, Hungary, Poland, Portugal, the Netherlands and the Baltic states, supported Donald Tusk’s proposal for a long Article 50 extension to either 31 December or 31 March 2020, but that French President Macron had [argued for a short extension](#) only until 22 May.

Member States including France and Belgium also sought stronger wording and safeguards to ensure continuing “sincere co-operation” on the part of the UK while it remained a Member State.

After a lengthy meeting, the European Council agreed on an extension until 31 October 2019, with the possibility of the UK leaving earlier if the WA is ratified (on the first day of the month after ratification). The Conclusions also included a provision for UK withdrawal on 1 June (11 pm on 31 May in UK) if it does not hold EP elections, and referred to a review of progress at the European Council meeting of June 2019. The Conclusions included reference to the UK commitment to act in a constructive and responsible manner during the extension period in accordance with the duty of “sincere cooperation” and noted that the UK would remain a Member State “with full rights and obligations” and has the right to revoke its Article 50 notification at any time.

The [European Council Conclusions](#) published late on 10 April read as follows:

1. The European Council takes note of the letter of Prime Minister Theresa May of 5 April 2019 asking for a further extension of the period referred to in Article 50(3) TEU.
2. In response, the European Council agrees to an extension to allow for the ratification of the Withdrawal Agreement. Such an extension should last only as long as necessary and, in any event, no longer than 31 October 2019. If the Withdrawal Agreement is ratified by both parties before this date, the withdrawal will take place on the first day of the following month.

3. The European Council underlines that the extension cannot be allowed to undermine the regular functioning of the Union and its institutions. If the UK is still a Member of the EU on 23-26 May 2019 and if it has not ratified the Withdrawal Agreement by 22 May 2019, it must hold the elections to the European Parliament in accordance with Union law. If the United Kingdom fails to live up to this obligation, the withdrawal will take place on 1 June 2019.

4. The European Council reiterates that there can be no opening of the Withdrawal Agreement, and that any unilateral commitment, statement or other act should be compatible with the letter and the spirit of the Withdrawal Agreement and must not hamper its implementation.

5. The European Council stresses that such an extension cannot be used to start negotiations on the future relationship. However, if the position of the United Kingdom were to evolve, the European Council is prepared to reconsider the Political Declaration on the future relationship in accordance with the positions and principles stated in its guidelines and statements, including as regards the territorial scope of the future relationship.

6. The European Council notes that, during the extension, the United Kingdom will remain a Member State with full rights and obligations in accordance with Article 50 TEU, and that the United Kingdom has a right to revoke its notification at any time.

7. The European Council takes note of the commitment by the United Kingdom to act in a constructive and responsible manner throughout the extension in accordance with the duty of sincere cooperation and expects the United Kingdom to fulfil this commitment and Treaty obligation in a manner that reflects its situation as a withdrawing Member State. To this effect, the United Kingdom shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives, in particular when participating in the decision-making processes of the Union.

8. In addition to meetings under Article 50 TEU, the 27 Member States and the Commission, where appropriate together with other institutions, bodies, offices and agencies of the Union, will continue to meet separately at all levels to discuss matters related to the situation after the withdrawal of the United Kingdom.

9. The European Council will remain seized of the matter and will review progress at its meeting in June 2019.

Remarks by President of the European Council

In his [remarks issued following the European Council meeting](#), President Tusk said the “flexible extension” granted to the UK would mean an additional six months during which “the course of action will be entirely in the UK's hands”. He said:

It can still ratify the Withdrawal Agreement, in which case the extension will be terminated. It can also reconsider the whole Brexit strategy. That might lead to changes in the Political Declaration, but not in the Withdrawal Agreement. Until the end of this period, the UK will also have the possibility to revoke Article 50 and cancel Brexit altogether.

He added that the UK would “continue its sincere cooperation as a full member state with all its rights, and as a close friend and trusted ally in the future” and concluded with this “message to our British friends”:

this extension is as flexible as I expected, and a little bit shorter than I expected, but it's still enough to find the best possible solution. Please do not waste this time.

Remarks by President Macron

Following the European Council meeting, French President Macron told reporters that he had blocked proposals for a longer Article 50 extension, which he said would [not have been logical for the EU](#). He said:

We would have decided to weaken our institutions, by having a member who is permanently there but leaving.

It's true that the majority was more in favour of a very long extension. But it was not logical in my view, and above all, it was neither good for us, nor for the UK.

I take responsibility for this position, I think it's for the collective good.

President Macron reportedly expressed concerns during the meeting that a long extension would “[import Britain's political crisis](#)” into the EU. Prior to the meeting on 10 April, President Macron had [tweeted](#):

What is essential: nothing to compromise the European project. We have a European Renaissance to lead, I believe very deeply and I do not want the subject of Brexit to block us on this point.

2.3 Statement by Prime Minister following European Council

In her statement in the early hours of the morning of 11 April, the Prime Minister said she had met with President Tusk and “agreed an extension to the Brexit process to the end of October at the latest”. Mrs May said:

I continue to believe we need to leave the EU, with a deal, as soon as possible.

And vitally, the EU have agreed that the extension can be terminated when the Withdrawal Agreement has been ratified — which was my key request of my fellow leaders.

For example, this means that, if we are able to pass a deal in the first three weeks of May, we will not have to take part in European Elections and will officially leave the EU on Saturday, 1st June.

During the course of the extension, the European Council is clear that the UK will continue to hold full membership rights, as well as its obligations.

As I said in the room tonight, there is only a single tier of EU membership, with no conditionality attached beyond existing treaty obligations.

Mrs May concluded by referring to frustration from many people that she had to request the extension, her regret that the WA had not been approved by Parliament, and the need to “now press on at pace with

our efforts to reach a consensus on a deal that is in the national interest”.

She said that talks would continue between the Government and the Opposition “to seek a way forward” and referred to the duty of politicians “to find a way to fulfil the democratic decision of the Referendum, deliver Brexit and move our country forward”.

2.4 European Council Decision on extending Article 50

A [European Council decision](#) formalising the agreement with the UK on extending the Article 50 period was published on 11 April. It summarised some of the points covered by the Conclusions, stating in Article 10 that this further extension “cannot be allowed to undermine the regular functioning of the Union and its institutions”, that the UK will remain a Member State “with full rights and obligations in accordance with Article 50 TEU” and that the UK has “a right to revoke its notification at any time”.

Regarding UK participation in the EP elections, Article 10 of the Decision also stated:

If the United Kingdom is still a Member State on 23-26 May 2019, and if it has not ratified the Withdrawal Agreement by 22 May 2019, it will be under an obligation to hold the elections to the European Parliament in accordance with Union law. In the event that those elections do not take place in the United Kingdom, the extension should cease on 31 May 2019.

Regarding “sincere co-operation”, Article 10 stated:

The European Council takes note of the commitment by the United Kingdom to act in a constructive and responsible manner throughout the extension period in accordance with the duty of sincere cooperation, and expects the United Kingdom to fulfil this commitment and Treaty obligation in a manner that reflects its situation as a withdrawing Member State. To this effect, the United Kingdom shall facilitate the achievement of the Union’s tasks and shall refrain from any measure which could jeopardise the attainment of the Union’s objectives, in particular when participating in the decision-making processes of the Union.

Regarding UK representation in EU institutions and bodies, Article 11 stated:

The ongoing mandates of members of institutions, bodies, offices and agencies of the Union nominated, appointed or elected in relation to the United Kingdom’s membership of the Union will end as soon as the Treaties cease to apply to the United Kingdom, i.e. on the date of the withdrawal.

Regarding the Withdrawal Agreement and negotiations on the future relationship Article 12 stated:

This extension excludes any re-opening of the Withdrawal Agreement. Any unilateral commitment, statement or other act by the United Kingdom should be compatible with the letter and the spirit of the Withdrawal Agreement, and must not hamper its

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implementation. Such an extension cannot be used to start negotiations on the future relationship.

As with the European Council Conclusions, the Decision (Article 13) stated that the European Council would review progress relating to the Article 50 extension at its meeting in June 2019 (taking place on 20-21 June).

The Decision referred in Article 14 to the UK's agreement to the Decision as set out in a letter from Sir Tim Barrow, the UK's Permanent Representative to the EU, also on 11 April. This [letter](#) confirmed the UK's agreement to the Decision, referring to an earlier draft of the document.

3. Analysis and implications of the Extension

3.1 The rights and obligations of the UK as a Member State

Paragraph 6 of the 10 April 2019 European Council Conclusions states that for however long the extension lasts – until 31 October 2019 at the latest – the UK will continue to operate as a “full Member State”. Up until 31 October 2019, the UK also retains the right to change its mind about leaving the European Union.

The inclusion of paragraph 6 is to highlight the difference between this ‘extension’ and the position the UK would be in if it concluded the Withdrawal Agreement and found itself in a ‘transition’ period. Under ‘transition’, the majority of EU law rights and obligations would apply to the UK, with the **exception** of institutional representation and voting powers. However, under the ‘extension’ until October, the UK **maintains** its institutional representation and voting powers. It is for this reason that the EU27 have also included a reference to the duty of “sincere co-operation” in paragraph 7 of the Conclusions and Article 10 of the Decision:

Sincere co-operation

Paragraph 7 of the Conclusions (and Article 10 of the Decision) represent a detailed elaboration of the overarching principle of EU law known as the duty of ‘sincere cooperation’, set out in Article 4(3) of the *Treaty on European Union*:

Article 4(3) TEU

Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.

The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.

The Member States shall facilitate the achievement of the Union’s tasks and refrain from any measure which could jeopardise the attainment of the Union’s objectives.

The principle is justiciable, and Member States have been taken to the Court of Justice of the EU (CJEU) by the European Commission where they were seen to not be ‘sincerely cooperating’.

An illustrative example of what a breach of the duty to sincerely cooperate looks like is the 1988 *Commission v Greece* case.⁵ Here, the Commission commenced infringement proceedings against Greece in light of difficulties encountered by importers of various cereals. However, Greece did not respond to the Commission correspondence regarding its findings. The ordinary process of the infringement

⁵ Case C-240/86 *Commission v Greece* ECLI:EU:C:1988:173.

proceedings requires the Member State to engage in a dialogue with the Commission about why it believes that it has *not* infringed EU law – but Greece simply did not respond to any of the Commission attempts to commence this dialogue over a six-month period. At this point, the Commission commenced an action against Greece before the CJEU, and the CJEU agreed with the Commission that Greece had failed to ‘sincerely cooperate’:

26. ... even if difficulties encountered by the Greek government did prevent it from providing the information requested it should have informed the [Commission] of that fact within a reasonable period. On the contrary, it remained silent until these proceedings were brought.

27. Consequently, [Greece’s] conduct constitutes a failure to fulfil the duty incumbent on every Member State to ... facilitate the achievement of the Commission’s tasks. The Greek government’s refusal to cooperate with the Commission prevented the latter from becoming aware of unpublished regulations which were in force for a long period and from ascertaining whether barriers to the import of cereals resulted from those regulations.

What *Commission v Greece* shows is that the duty contained in Article 4(3) requires, above all, cooperation in the sense of providing information that will help EU *processes* to be completed. It cannot be interpreted as requiring any Member State to, for instance, vote in a particular way on any legislative proposal – but a refusal to attend meetings so that legislation can be debated, for example, would be problematic under the duty of sincere cooperation. The UK’s ability to exercise powers in the EU institutions is consequently not limited by this ongoing Member State status and the principle of sincere cooperation that comes with it: MEPs and ministers in the Council may act freely, provided they are acting. This is not a ‘new’ obligation.

The UK’s responsibilities as a withdrawing Member State

Paragraph 7 of the Conclusions (and Article 10 of the Decision) add a little more than the continuing obligation to sincerely cooperate. The EU27 have stressed that it expects the UK (and its representatives) to behave in a manner that ‘reflects its situation as a withdrawing Member State’. What this means is, of course, open to interpretation – the concept of a ‘situation as a withdrawing Member State’ is not a pre-existing one in EU law, and so there is no precedent to refer to.

The inclusion of the wording can be assumed to be a consequence of, for example, Jacob Rees-Mogg [promising](#) to be ‘as difficult as possible’ if the UK is to remain a Member State for longer. Mr Rees-Mogg’s comments also allude to the ways in which the UK could prove to be explicitly difficult: votes on approving the EU budget, and votes on future EU projects that the UK has always been particularly opposed to, such as any development of an EU Army. Under the wording of paragraph 7 of the Conclusions, the EU is indicating that it ‘expects’ the UK to not vote against developments that ultimately will not affect it directly – as it will not be a Member State when they come to fruition.

However, it needs to be stressed that this emphasis on its status as a 'withdrawing Member State' accompanies a diplomatic request, rather than a legal obligation. There is no requirement for any UK MEPs, or any UK representatives in Council meetings, to vote *in favour of or abstain* on any EU initiatives if they are legitimately opposed to them. Particularly in light of the fact that the option to revoke Article 50 TEU continues, as the Conclusions stress in paragraph 6, this cannot be taken to mean that the UK is obliged to effectively 'ignore' its own interests in EU decision-making processes. It can, after all, continue to be a Member State with rights – and as such, it has every right to vote against a proposed EU budget or the development of an EU army, or any other EU measure that it deems in conflict with its own interests. [Speaking to the EP on 16 April](#), President Tusk said he had "strongly opposed the idea that during this further extension the UK should be treated as a second category Member State".

On a practical level, the UK's opportunities for 'being difficult' are likely to be limited. Steve Peers, Professor of EU Law at the University of Essex, [notes](#) that the majority of 'key' decisions to be taken by the EU institutions will not be taken between May and October:

the EU institutions do less work than usual between May and October of an election year (ie the term of most of the extension decision), since the European Parliament (EP) focusses on the elections and their aftermath and the outgoing Commission is winding its activities up. But there are some activities. However, the Commission, EP and CJEU do not act by unanimous vote, and the EU institutions' rules of procedure don't provide for filibustering (ie discussing an issue endlessly to stop debate)...

The possibility for obstruction exists more in the Council (made up of ministers) and the European Council (made up of Presidents and Prime Ministers). The Council usually (but not always) decides by qualified majority voting (QMV), while the opposite is true of the European Council. For QMV, the UK vote has to count in some way (except where the UK opts out), and asking the UK to abstain accomplishes nothing, since UK abstentions would in effect count as a vote against. However, it's rare that so many Member States oppose a proposal that the UK has the swing vote...

The UK could, of course, block everything where it has a veto. This particularly applies to taxation, accession to the EU, Treaty amendment, foreign and defence policy, and major decisions on the budget. But budget decisions are due to be agreed next year, after the second extension decision will run its course, and applicant Member States are all a long way from joining the EU.

Paragraph 7, in summary, should be read as a non-legal request that the UK behave nicely in light of its impending departure, as well as a legal reminder that it is obliged to cooperate with EU processes as long as it remains a Member State. A failure to 'behave nicely' is, however, unlikely to cause significant problems to the overall functioning of the EU institutions.

Paragraph 8 of the Conclusions is a new addition to the existing Article 50 TEU possibility for the EU27 to meet *without* the UK, as needed. The Article 50 TEU provision for meetings without the UK are limited to

those meetings that pertain to the Article 50 processes; paragraph 8, however, implies a broader agreement that as the UK is a departing Member State, there will be 'future business' for the EU27 to engage with that the UK does not need to be a part of, and indeed, should not be a part of, as it will effectively be a 'third country' by the time the outcomes of those meetings come into effect.

The Treaties are silent on how 'meetings' are to be structured, in general terms. They set out how voting in the institutions will work, but meetings in which votes do not take place are not subjected to specific rules per the Treaties. Professor Peers thus [concludes](#) that these are likely to be 'informal' meetings, where decisions are not taken. This reading of paragraph 8 is supported by the fact that the meetings are to be used to 'discuss' matters, rather than to 'decide upon' matters. The UK has agreed, in agreeing to the extension, that such informal meetings are permissible, in which case there are no legal reasons for them not to take place.

There is no similar wording to paragraph 8 of the Conclusions in the European Council Decision formalising the Conclusions.

3.2 The future UK-EU relationship

Transition will be shorter

If the WA is eventually ratified by the UK, the end date of the transition period provided for in the WA (whereby EU rules will continue to apply but without UK representation in the EU institutions) will not change and its duration will therefore be shorter than originally envisaged (unless the relevant dates in the WA are amended). The WA provides for a transition ending on 31 December 2020, with a possibility of extending the transition for another one or two years. The WA provides that any decision on extending the transition should be taken by 1 July 2020.⁶ If the UK therefore takes up the full duration of the extension agreed on 10 April and leaves the EU on 31 October 2019, the transition period will last for 14 months, unless an extension to the transition is agreed with the EU. Extension to the transition period will need to be agreed within eight months.

The transition period has been presented by the [Government](#) and the [EU](#) as providing a bridging or implementing period between the UK's exit from the EU and the commencement of a new framework governing the future UK-EU relationship, also providing time to negotiate that new relationship.

The EU insists that negotiations on the future EU-UK relationship cannot begin until the UK is a third country, i.e. it has left the EU. This is in line with Article 218 TFEU (on agreements between the EU and third countries or international organisations), in spite of initial UK hopes that the withdrawal agreement and the future relations agreement could be discussed in parallel. The EU and UK have agreed a Political Declaration

⁶ See section 5 of House of Commons Library Briefing Paper 8453 [The UK's EU Withdrawal Agreement](#), updated 11 April 2019

on the framework for the future EU-UK relationship, which is not legally binding and which the [EU has said](#) could be amended. The detailed negotiations would begin as soon as the UK leaves the EU under the terms of the WA.

The shortened duration of the transition, however, will leave less time to negotiate the new framework in time for the end of the transition period. Unless a new relationship framework is ready for implementation at the end of the transition period (and this includes arrangements that mean that the 'backstop' is no longer needed), then the provisions of the WA's Northern Ireland-Ireland 'backstop' protocol will need to be implemented⁷.

Territorial scope of future relationship

Paragraph 5 of the European Council Conclusions and Article 12 of the European Council Decision reiterate the EU's position that "an extension cannot be used to start negotiations on the future relationship".

But paragraph 5 of the Conclusions adds that if the UK's position should "evolve", the European Council might "reconsider" the Political Declaration "in accordance with the positions and principles stated in its guidelines and statements, including as regards the territorial scope of the future relationship".

This last comment, which is not in the European Council [Decision](#) itself, is likely to be a reference to a future EU-UK agreement not applying to Gibraltar without Spain's consent.

Article 3 of the Withdrawal Agreement makes clear that the Agreement will apply to the UK and its Overseas Territories and Crown Dependencies, to which the EU Treaties currently to a greater or lesser extent apply. A footnote also recalls that "the territorial scope of the Withdrawal Agreement, including as regards the transition period, should fully respect paragraphs 4 and 24 of the [European Council Guidelines](#) of 29 April 2017, notably as regards Gibraltar". The relevant paragraphs in the Guidelines are as follows:

4. On the date of withdrawal, the Treaties will cease to apply to the United Kingdom, to those of its overseas countries and territories currently associated to the Union, and to territories for whose external relations the United Kingdom is responsible. [...]

24. After the United Kingdom leaves the Union, no agreement between the EU and the United Kingdom may apply to the territory of Gibraltar without the agreement between the Kingdom of Spain and the United Kingdom.

The UK Government insisted throughout the negotiations that Gibraltar's constitutional status post-Brexit would remain secure, and the Spanish Government confirmed that sovereignty was not part of the negotiations.

But the Spanish Government objected to Article 184 of the Withdrawal Agreement, which says that the EU and the UK will negotiate a future

⁷ See section 8 of House of Commons Library Briefing Paper 8453. See also House of Commons Library Insight, [The backstop explained](#), 12 December 2018.

relationship as outlined in the Political Declaration, but does not specify that Spain will negotiate with the UK independently about Gibraltar. Spanish Foreign Minister Josep Borrell wanted Article 184 to be clear that it meant that the future negotiations between the UK and the EU would not apply to Gibraltar. Donald Tusk and Jean-Claude Juncker [confirmed in a joint letter](#) their “shared interpretation” with Spain of Article 184 and the territorial scope of the future relationship between the EU and UK.

In an [Annex](#) to the WA and PD two statements entered in the minutes of the November European Council summit sought to clarify Article 184 and allay Spain’s concerns. The first reiterated points made in the letter on interpreting Article 184:

The sole purpose of Article 184 of the Withdrawal Agreement is to create best endeavours' obligations for the Union and the United Kingdom to negotiate agreements governing their future relationship. It imposes no obligations regarding the territorial scope of such agreements. Therefore, there is no obligation or presumption, on the basis of this provision, for such agreements to have the same territorial scope as the one provided for in Article 3 of the Withdrawal Agreement.

The European Council and the European Commission take note of the declaration by the United Kingdom, that the United Kingdom shares this interpretation.

The second declaration also made clear that the territorial scope of the WA – which includes Gibraltar - will not necessarily be the same as that of any future agreements between the EU and the UK:

After the United Kingdom leaves the Union, Gibraltar will not be included in the territorial scope of the agreements to be concluded between the Union and the United Kingdom. However, this does not preclude the possibility to have separate agreements between the Union and the United Kingdom in respect of Gibraltar. Without prejudice to the competences of the Union and in full respect of the territorial integrity of its Member States as guaranteed by Article 4(2) of the Treaty on European Union, those separate agreements will require a prior agreement of the Kingdom of Spain.

DexEU Under Secretary of State Robin Walker [confirmed](#) the Government’s and the EU’s “shared interpretation of Article 184” in a parliamentary statement on 10 December 2018.

This point was again confirmed in paragraph 18 of the [Joint Instrument](#) of 11 March 2019 (part of the so-called ‘Strasbourg package’) clarifying the purpose of Article 184 of the WA (i.e. “There is no obligation or presumption, on the basis of this provision, for such agreements to have the same territorial scope as the one provided for in Article 3 of the Withdrawal Agreement”).

In a letter to the Commission and Council Presidents on 25 November 2018 the UK Permanent Representative to the EU, Sir Tim Barrow, had sought to reassure Gibraltar of the Government’s solidarity with it:

the Government ... further restates that it will negotiate the future agreements implementing the Joint Political Declaration on behalf of all territories for whose external relations the United

Kingdom is responsible, including Gibraltar, to ensure an appropriate and beneficial future relationship with the European Union, taking into account their existing relationships with the European Union.⁸

3.3 The UK will take part in the European Parliament elections

The Prime Minister's [letter to Donald Tusk](#) on 5 April said that the Government accepted the EU's view that if the UK were still a Member State on 23 May, then it would be under a legal obligation to hold the EP elections. She said that the Government was therefore undertaking preparations to hold the elections including by making the Order that sets the date of the poll.

On Monday 8 April the Government made the [European Parliamentary Elections \(Appointed Day of Poll\) Order 2019](#). This Order enables the holding of the EP elections. The Order sets polling day for electing UK MEPs on Thursday 23 May. Setting polling day triggers the legal timetable for the election in the UK.

The [explanatory memorandum](#) to the Order says:

It remains the Government's intention to leave the EU with a deal and pass the necessary legislation before 22 May, so that we do not need to participate in European parliamentary elections.

This Order appoints the date of the European Parliamentary elections, but it does not make these elections inevitable as leaving the EU before the date of election automatically removes our obligation to take part.

Under the [European Parliament Elections Regulations 2004](#), publication of the notice of election by returning officers must be 25 working days before the election date. This meant that [notice needed to be published](#) on 12 April for the South West region of England and 15 April for other constituencies (the date was earlier in South West England as it includes Gibraltar which has an additional public holiday).

The deadline for delivery of nomination papers and lists of candidates of registered political parties is 24 April for South West England and 25 April for other electoral regions.

If the UK reaches agreement to leave the EU before 23 May, 'exit day' as defined by the [EU \(Withdrawal\) Act 2018](#) will need to be changed. This has already been done twice by Statutory Instruments.⁹ The Statutory Instrument laid on 11 April amended exit day to 31 October 2019 (see section 4 below). 'Exit day' is important because lots of legislation will be repealed on that day. This includes all the legislation that allows for the EP elections to happen in the UK, principally the [European Parliamentary Elections Act 2002](#) and the [European](#)

⁸ Tim Barrow, [letter](#) to Jeppe Tranholm-Mikkelsen, Secretary General of Council of EU; [letter](#) to Martin Selmayr, Secretary General of European Commission, 25 November 2018

⁹ For the first change, see House of Commons Library Insight, [EU 'exit day' is changed in UK law](#), 28 March 2019

[Parliamentary Elections Regulations 2004](#). In the event of this happening, polling day will not take place¹⁰.

If the EP elections do take place in the UK on 23 May, there is still the possibility that the newly elected UK MEPs would never take up their seats.

The new Parliament does not sit for the first time until 2 July. So if the WA was ratified between 23 May and 30 June, the UK could leave the EU on 1 July before MEPs took their seats.

If the UK is still a Member State on 2 July then UK MEPs will take up their seats, but they would cease to be MEPs on the day that the UK leaves the EU. The EU's planned reallocation of some of the UK's EP seats would then take place (see section 3.5).

UK MEPs could influence EP political group formation and selection of European Commission President

If UK MEPs do take up their seats, they could potentially only be MEPs for a short period before leaving. The presence of UK MEPs will have an impact on the formation of (and funding allocations) for [political groups](#) in the EP, and the election of the EP President. It could also impact on the formation of EP Committees, including the Budgets Committee (although the UK is expected to have left the EU prior to the decision being taken on the EU's [seven-year budget framework](#) for 2021-2027).

If there are UK MEPs over the summer, this could also influence the selection process for the next European Commission President (see section 3.6).

The European Commission President is elected by the European Parliament, following a proposal by the European Council, which agrees a candidate by qualified majority and taking into account the results of the EP elections (Article 17(7) TEU).

In 2014, the European political groups used the [Spitzenkandidaten process](#) for the first time, whereby they select lead candidates to be European Commission President, with a view to the European Commission Presidency going to the candidate of the leading party group in the EP election. However, although it followed this process in 2014, the European Council is not obliged to do so by the EU Treaties and EU leaders have [voiced opposition](#) to doing so again in 2019.

The presence of UK MEPs [will benefit](#) the (currently) second-largest political group in the EP, the Progressive Alliance of Socialists and Democrats (186 MEPs). The Labour party belongs to this group. The largest EP group is the European People's Party (217 MEPs) but it will not benefit from UK elections. The Conservative party used to belong to this group but left and formed a new group in 2009, the European Conservatives and Reformists, together with other parties including the Polish ruling Law and Justice Party (this group currently has 76 MEPs).

¹⁰ See House of Commons Library Insight, [Are we preparing for European Parliamentary elections?](#), 9 April 2019.

The *Spitzenkandidaten* for the European People's Party (EPP) is Manfred Weber, chair of the EPP group in the EP and an MEP for the German Christian Social Union. The Socialists and Democrats' candidate is the Commission's First Vice-President Frans Timmermans, previously a Government Minister in the Netherlands and Dutch Labour Party representative.

3.4 But EP elections in UK can be avoided if WA is ratified before 22 May

Under [Section 13 \(1\)](#) of the *European Union (Withdrawal) Act 2018*, UK ratification of the WA requires that it (along with the PD) is approved by the House of Commons (the so-called 'meaningful vote') and Parliament passes an Act of Parliament containing provision for the implementation of the WA. The planned EU (Withdrawal Agreement) Bill will provide for the implementation of the WA.

If this process is completed by 22 May, then the UK could leave the EU without taking part in EP elections.

It is difficult to predict exactly how much Parliamentary time would be required to pass the EU (Withdrawal Agreement) Bill. Parliamentary time spent on previous Bills implementing EU Treaties ranged from 11 sitting days (the Bill to implement the Treaty of Nice in 2001) to 41 sitting days (the Bill to implement the Maastricht Treaty in 1992). The original *European Communities Act 1972*, through which the UK accepted the terms of membership of the then European Economic Community, took 39 Parliamentary sitting days to pass.¹¹

When the House of Commons returns from Easter recess on 23 April there will be 17 sitting days until 22 May, although there could potentially be additional sitting days on Fridays (4 in total) and even weekends.

EU ratification of WA could still delay Brexit

One possible complication of the timelines agreed by the European Council on 10 April is that EP consent is required for EU ratification of the WA and the EP is not scheduled to sit between the final plenary session of the outgoing EP on 18 April and the first sitting of the new EP on 2 July. However, the EP is not "dissolved" on 18 April and could be recalled in order to hold its consent vote if the WA is approved in this period. The Act establishing European Parliament direct elections provides that the outgoing EP remains in office until the first sitting of the new EP,¹² and the EP's Rules of Procedure allow the President of the EP to convene Parliament "on an exceptional basis".¹³ A third of

¹¹ See House of Commons Library Briefing Paper 3341, [EU Treaty change: the parliamentary process of bills](#), 15 June 2015.

¹² See Article 11 of [Consolidated version of the Act of 20 September 1976](#), as last amended by Council Decision 2002/772/EC, Euratom of 25 June and 23 September 2002.

¹³ See Rule 146, Convening of Parliament, [Rules of Procedure of the European Parliament](#).

Members will need to be present for the EP to be in quorum and a simple majority of those present will be needed for its consent¹⁴ (see section 4.1 of House of Commons Library Briefing Paper 8496, [Extending Article 50: could Brexit be delayed?](#), 19 March 2019).

There could nevertheless be difficulties in scheduling an EP sitting at short notice if the House of Commons approves the WA in the final weeks of the European election campaign. It should be noted however that the European Council Conclusions and Decision provide that UK ratification of the WA needs to have taken place by 22 May to avoid taking part in the EP elections, otherwise it will be required to leave the EU on 1 June. This leaves open the possibility of the UK completing ratification of the WA by 22 May, not taking part in the EP elections but remaining in the EU until the EU has completed its ratification process. This would require a recall of the EP to vote on consent unless EU ratification is then deferred until 2 July or later. As specified in Article 50 TEU, the Council of the EU will then also need to approve the WA by a super qualified majority¹⁵ (and without the UK's participation).

3.5 The reallocation of the UK's EP seats will be deferred

The European Commission [advised](#) prior to the 21 March European Council that certainty was required by mid-April as to whether the UK would still be a Member State and therefore taking part in the EP elections, or would be leaving before 23 May and therefore not taking part. The EU has adopted [legislation](#) reallocating 27 of the UK's 73 seats in the European Parliament to 14 other Member States¹⁶. The Commission said that these Member States would need to know whether they were preparing for the elections on the basis of the existing EP seat allocation or the new one by mid-April.

Following the European Council agreement of 10 April, these Member States are still uncertain as to how many MEPs they will be electing on 23-26 May. The legislation reallocating the UK's seats states that in the event of the UK still being a Member State at the beginning of the new parliamentary term, the old allocation will continue to apply "until the withdrawal of the United Kingdom from the Union becomes legally effective". Once this withdrawal becomes legally effective, the number of MEPs per Member State will be as provided for under the new allocation.

¹⁴ Rule 168 provides that a quorum shall exist when one third of the component Members of Parliament are present in the Chamber, but that all votes shall be valid whatever the number of Members voting unless the President, on a request made by at least 40 Members before voting began, establishes that a quorum is not present. If fewer than 40 Members are present, the President may rule that there is no quorum.

¹⁵ A 'super-qualified majority' is defined as at least 72% of the members of the Council representing Member States comprising at least 65% of the population of the EU. This means at least 20 Member States will need to approve the WA.

¹⁶ The biggest gainers will be Spain and France with five additional seats each, and Italy and the Netherlands with three additional seats each. Ireland will get an additional two seats. Denmark, Estonia, Croatia, Austria, Poland, Romania, Slovakia, Finland and Sweden will get one additional seat each.

Commenting on this situation, the EP's Brexit Steering Group co-ordinator Guy Verhofstadt [tweeted](#):

The Brexit extension risks making this Parliament a real pigeon house, a dovecote. With British MEPs flying in & out & others on the substitute benches.

In the 14 Member States potentially gaining additional MEPs once the UK leaves the EU, some candidates will be elected but will remain in limbo until the UK actually leaves. For example, the Irish Government has said that the last elected candidate in the constituencies getting an additional MEP [will not take up their seats](#) in the EP until the UK has left.

Organising elections in this way will be easier where Member States have a list system whereby the next candidate on the list will take up their seat once the UK leaves¹⁷. In Ireland, where the [single transferable vote](#) system is used, Prime Minister Varadkar has raised the prospect of there being [two separate election counts](#) in the constituencies gaining an extra seat, with one count under the old MEP allocation and one under the new one¹⁸.

Another question raised is whether these 'waiting in limbo' MEPs will get paid a salary and expense while waiting to take up their seats. In Ireland, a government spokesperson said that this would be "[for the European Commission to clarify and decide on](#)". These would-be MEPs also face the prospect of never taking up their seats at all if the UK revokes Article 50.

3.6 The UK may still need to nominate a Commissioner

A new team of Commissioners is appointed every five years. The current Commission is in office until 31 October 2019, which is also the extension end date. The term of office of the new Commission begins on 1 November. The Government may however have to start the nomination process for a UK Commissioner in the summer, particularly if there is a possibility of a further Article 50 extension beyond 31 October.

Member States usually put forward nominations for European Commissioners in August. The procedure for nominating the UK Commissioner is that the Prime Minister, in consultation with and on the advice of the Foreign Secretary, nominates the UK candidate. There is no parliamentary scrutiny of the nomination procedure.

Following the EP elections in May, a new President of the European Commission and the College of Commissioners as a whole must be appointed. The process begins with the nomination of the President by the European Council, taking into account the results of the EP elections. That candidate is then approved by the EP by an absolute majority. Once the Commission President has been appointed and the

¹⁷ See this [infographic](#) from Simon Usherwood which shows which Member States will be getting additional MEPs and how they organise their elections.

¹⁸ Irish Prime Minister Leo Varadkar has [stated](#) that this may be required.

High Representative for Foreign Affairs and Security Policy has been chosen by the European Council, each Member State puts forward their nomination for Commissioner. Each nominated Commissioner participates in EP hearings in September, after which the EP votes in plenary in early October to confirm the composition of the Commission as a whole.

Steve Peers commented:

Member States do not have a veto on the major appointments to the EU institutions to be made later this year: Mr Juncker became Commission President despite the UK's opposition (joined by Hungary), and Mr Tusk was re-elected as European Council President despite the opposition of Poland. There's no veto on appointing the rest of the Commission this autumn either, although Member States do act unanimously when appointing CJEU judges or renewing their terms. As regards the Commission in particular, the implications aren't fully fleshed out: the UK and UK MEPs will still presumably have a vote for the new Commission, since those votes would normally take place before November 1, but would it follow that also the UK should nominate a Commissioner who might not even take office?¹⁹

One of the original intentions of the Treaty of Lisbon when it was agreed by EU leaders in 2007 was to reduce the size of the European Commission so that the number of European Commissioners no longer corresponded to the number of Member States. However, following the referendum vote against the Treaty in Ireland in June 2008, the December 2018 European Council agreed that a planned reduction in the number of European Commissioners would not take place and that a European Council Decision would be taken to the effect that the Commission [shall continue to include one national of each Member State](#).

Article 17(5) TEU as amended by the Treaty of Lisbon states that

As from 1 November 2014, the Commission shall consist of a number of members, including its President and the High Representative of the Union for Foreign Affairs and Security Policy, corresponding to two thirds of the number of Member States, unless the European Council, acting unanimously, decides to alter this number.

The European Council [Decision](#) providing that the Commission will continue to consist of a number of members equal to the number of Member States was taken on 22 May 2013.

There have been [indications](#) that the UK will be expected to nominate a Commissioner in the usual way over the summer, even though it is scheduled to leave the EU by 31 October 2019.

While the duration of the UK's continued membership of the EU remains uncertain, the European Council could, however, take a decision under Article 17(5) TEU to alter the number of Commissioners so that the UK does not need to nominate one. Given that the UK is legally scheduled to leave the EU before the new Commission takes

¹⁹ EU Law Analysis, [Trick or Treaty? The legal issues of the second extension of the UK's EU membership](#), 10 April 2019

office on 1 November 2019, it could alternatively be agreed that the UK does not need to nominate a Commissioner without a formal European Council decision on the number of Commissioners.

Article 246 TFEU may also be relevant should a UK Commissioner resign when the UK leaves the EU or ahead of UK withdrawal when this becomes certain. It states:

The Council may, acting unanimously on a proposal from the President of the Commission, decide that such a vacancy need not be filled, in particular when the remainder of the member's term of office is short.

4. 'Exit day' in domestic law

4.1 Original position in the *EU (Withdrawal) Act 2018*

The [EU \(Withdrawal\) Act 2018](#) and other legislation related to it make a range of changes to UK law effective on or after "exit day". These changes are intended to minimise disruption in UK law when EU law ceases to be applicable to the UK and it is no longer given direct effect under the [European Communities Act 1972](#).

The original [2018 Act](#) defined "exit day" as 29 March 2019 at 11pm GMT. This aligned with what was (then) the date on which the EU Treaties would have ceased to apply by automatic operation of law under Article 50(3) TEU.

However, in the event that Article 50(3) was extended, the UK legislation would not have automatically updated to reflect that change in circumstances. Instead, a statutory instrument would need to be made by a Minister of the Crown, and with the active approval of both Houses of Parliament (under the [draft affirmative procedure](#)).²⁰ Those regulations would change "exit day" to realign it with the new expiry date of Article 50 in EU law.

4.2 How was exit day changed following the first extension?

Following [the European Council's decision of 22 March](#), 'exit day' in domestic law had to be changed either to 22 May if the House of Commons shortly thereafter approved the Withdrawal Agreement or to 12 April if it had not approved it.

Had the UK failed to pass a statutory instrument, there would have been a risk that its domestic legislation was incompatible with its obligations as an EU Member State during any extended period.

To avoid that scenario, the Government laid in draft [The European Union \(Withdrawal\) Act 2018 \(Exit Day\) \(Amendment\) Regulations 2019](#) on 25 March. Both Houses then debated and approved the regulations on 27 March.²¹ Since the House of Commons then went on to reject a motion to approve the Withdrawal Agreement on 29 March, 'exit day' was accordingly updated to 12 April 2019.²²

4.3 How has exit day been changed following the latest extension?

Section 2 of the [European Union \(Withdrawal\) Act 2019](#) (previously the European Union (Withdrawal) (No.5) Bill or Cooper Bill) amended

²⁰ [Section 20\(3-4\) EU \(Withdrawal\) Act 2018](#)

²¹ [HC Deb 27 March 2019 Vol 657 cc429-457](#); [HL Deb 27 March 2019 Vol 796 cc1843-1866](#)

²² [HC Deb 29 March 2019 Vol 657 cc771-775](#). For information on the first exit day change SI, see Library Insight, [EU 'exit day' is changed in UK law](#), 28 March 2019.

[section 20\(4\)](#) of the [European Union \(Withdrawal\) Act 2018](#). This was an amendment [introduced by the Government](#) during its Commons stage. Any regulations that change 'exit day' will no longer require approval under the draft affirmative procedure. Instead, a Minister of the Crown may make regulations subject only to annulment by either House. Unless time is made to debate and pray against the statutory instrument by the Opposition or backbenchers or by Peers, the change of exit day can come into effect at the behest of the Government.

[The European Union \(Withdrawal\) Act 2018 \(Exit Day\) \(Amendment\) \(No. 2\) Regulations 2019](#) were made on 11 April and came into force immediately thereafter. 'Exit day' in UK law is now 31 October 2019.

This set of "change of exit day" regulations does not accommodate the conditionality of [the European Council's Decision of 11 April](#). That decision provides that the extension ceases to have effect on 31 May if both of the following conditions are satisfied:

- the UK has not ratified a Withdrawal Agreement by 22 May; and
- the UK has subsequently failed to hold European Parliamentary elections in line with its Treaty obligations.

Should that scenario arise, a Minister would need to make a further set of "change of exit day" regulations. In the absence of either a further agreed extension or the revocation of Article 50, the Government would be expected to commence the remaining provisions of the [EU \(Withdrawal\) Act 2018](#) and to prepare the UK statute book for a no-deal exit.

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