

Civil Contingencies, Emergency Powers and No-Deal Brexit

Summary

In recent months, questions have been asked in Parliament about the Government's civil contingencies planning in the event of the UK leaving the EU without having ratified a negotiated withdrawal agreement (ie a 'no-deal' Brexit).¹ The default legal position remains that, in the absence of unilaterally revoking its article 50 notification, the UK will leave the EU with no deal, either on 29 March 2019 or a later date, unless it ratifies a negotiated withdrawal agreement with the EU.

Responsibility for civil contingencies planning in central government lies with the [Civil Contingencies Secretariat](#), which sits within the wider National Security Secretariat in the Cabinet Office.² The Secretariat's budget in 2018/19 was £16.9 million and in January 2019 it had a staff headcount of 94. In September 2018, it was reported that the Civil Contingencies Secretariat's planning project for a no-deal Brexit was codenamed Operation Yellowhammer.³ A document photographed by the press as a government official left HM Treasury stated that its purpose was to plan "for mitigating the immediate impacts of a no-deal Brexit". The Government has since said it is the "randomly selected programme name for some elements of the contingency planning being undertaken by departments to mitigate the potential impacts of leaving the EU without a deal".⁴

In January 2019, it was reported that the Government was considering the use of martial law to deal with potential civil disobedience in the case of a no-deal Brexit.⁵ The use of emergency powers (ie the creation of temporary legislation) is set out in part 2 of the Civil Contingencies Act 2004 (CCA 2004). The Act provides the Government with powers to create emergency regulations to deal with emergencies that threaten "serious damage to human welfare", or that threaten damage to the environment or the security of the UK.⁶ Damage to human welfare is defined in the Act to include disruption to transport networks or to the supply of food, money, energy, or health services. However, Sir Mark Sedwill, National Security Adviser, Cabinet Secretary and Head of the Civil Service, has said the Government has no expectation it will need to use these powers in the event of a no-deal Brexit.⁷

The CCA 2004 provides powers for the monarch or a senior Minister of the Crown to make emergency regulations, under certain circumstances, to deal with the most serious emergencies. In practice, such regulations are drafted and their substance determined by the Government. The powers are wide-ranging, providing the Government with the power to make any provision that could be made by an Act of Parliament or through the use of the royal prerogative.⁸ The regulations must be laid before Parliament as soon as is practicable, and they would lapse after seven days if not approved by both Houses of Parliament.⁹

House of Commons Votes on No Deal and Extension of Article 50

On 12 March 2019, the Government was defeated for a second time in the House of Commons during the 'meaningful vote' on the withdrawal agreement negotiated with the EU.¹⁰ Speaking immediately after the defeat the Prime Minister, Theresa May, stated that she stood by the commitments she had made in her statement of 26 February 2019 to hold further votes to test the House of Commons' opinion on

leaving the EU with no deal and on requesting an extension of article 50.¹¹

On 13 March 2019, the Government tabled a motion to ask whether the House of Commons supported leaving the EU with no deal on 29 March 2019. An amendment to the Government's motion, to rule out leaving the EU with no deal on any date (not just 29 March 2019), was approved by a vote of 312 to 308.¹² The Government's motion, as amended, was subsequently agreed to by a vote of 321 to 278.¹³ Directly after the vote, Theresa May stated in the House of Commons:

The legal default in UK and EU law remains that the UK will leave the EU without a deal unless something else is agreed [...] The options before us are the same as they always have been: we could leave with the deal that this Government have negotiated over the past two years [or] we could seek to negotiate a different deal, but the EU has been clear that the deal on the table is indeed the only deal available.¹⁴

On 14 March 2019, the House of Commons voted by 412 to 202 to approve the Government's motion to seek an extension to article 50.¹⁵ However, the default legal position remains that, in the absence of unilaterally revoking its article 50 notification, the UK will leave the EU with no deal, either on 29 March 2019 or a later date, unless it ratifies a negotiated withdrawal agreement with the EU.

Recent Developments

Operation Yellowhammer

In September 2018, it was reported that the Cabinet Office Civil Contingencies Secretariat's planning project for a no-deal Brexit was codenamed Operation Yellowhammer.¹⁶ A document photographed by the press as a government official left HM Treasury stated that Operation Yellowhammer's purpose was to plan "for mitigating the immediate impacts of a no-deal Brexit". The document also stated "the importance of building a XWH [cross-Whitehall] communications architecture that can help maintain confidence in the event of contingency plans being triggered".

On 2 February 2019, Sam Coates, deputy political editor of the *Times*, reported the details of a leaked document from the Department for Transport about Operation Yellowhammer.¹⁷ The document stated that the scale of the operation was "potentially enormous" and that local responders could become "overwhelmed":

The scale of the operation is potentially enormous. If there is a no-deal Brexit the impact could be felt across every transport mode (and possibly within every sector of wider government) and could grow exponentially as issues impact on each other and the capabilities of local responders at all levels decrease or become overwhelmed.¹⁸

Limited information on Operation Yellowhammer has been officially released into the public domain. In January 2019, responding to a parliamentary question on which units from the armed forces may be made available for Operation Yellowhammer, Mark Lancaster, Minister of State for the Armed Forces, stated:

The Ministry of Defence is in the process of identifying the most appropriate forces to use for Operation Yellowhammer. At this stage it is not possible to give a breakdown by service. We continue to work closely with other government departments to refine the support package.¹⁹

In reply to a written question from Hilary Benn (Labour MP for Leeds Central) in February 2019, asking for the terms of reference of Operation Yellowhammer, the Minister for the Cabinet Office and Chancellor of the Duchy of Lancaster, David Lidington, said:

Operation Yellowhammer is the randomly selected programme name for some elements of the contingency planning being undertaken by departments to mitigate the potential impacts of leaving the EU without a deal. The Civil Contingencies Secretariat is coordinating Operation Yellowhammer contingency planning across government. Officials are working with the devolved administrations, overseas territories, crown dependencies and local resilience forums. Departments are also leading engagement with key industry partners.²⁰

Civil Contingencies Act 2004

It was reported in December 2018 that the Civil Contingencies Secretariat had invited all MPs who were members of the Privy Council to a briefing on the implications of a 'no-deal' Brexit.²¹ On 27 January 2019, the *Times* claimed that the Government was considering the use of martial law to deal with potential civil disobedience in the case of a no-deal Brexit:

Mandarins are considering how to use the sweeping powers available under the Civil Contingencies Act 2004 to stop any civil disobedience resulting from the nation leaving the EU on March 29.²²

Responding to this during evidence to the Joint Committee on the National Security Strategy, Sir Mark Sedwill, National Security Adviser, Cabinet Secretary and Head of the Civil Service, said that the claims in the *Times* were "complete nonsense".²³ In answer to further questions regarding the potential use of emergency powers under the CCA 2004, Sir Mark stated:

There is no expectation that we will need to employ part 2 of the Civil Contingencies Act and were we to do so it would be done only because, for example, we discovered that some secondary legislation had not gone through or there were areas where the powers were unclear and we needed a bridging solution until Parliament was able to act in the normal way. At the moment there is no plan to use that, and it certainly does not involve anything as lurid as the use of the armed forces in the way described in those articles.²⁴

On 5 March 2019, in a debate in the House of Commons on food supplies in the event of a no-deal Brexit, the Parliamentary Under Secretary of State for Food and Animal Welfare, David Rutley, stated:

Another hon. Member asked about the Civil Contingencies Act. It does cover food supply, but it is designed for a national emergency. In a worst-case Brexit scenario, we do not believe that overall food shortages would be such that it is necessary to invoke the Act. In the scenarios that we are working to, that would not be required. None the less, as I have said several times, we are working with and speaking to colleagues across Government to minimise disruption and to consider the possible impacts on vulnerable groups.²⁵

Background on the Emergency Powers

In the 20th century, during the first and second world wars, wide-ranging powers were conferred on the executive by legislation such as the Defence of the Realm Act 1914 and the Emergency Powers (Defence) Act 1939.²⁶ The legislation provided ad hoc emergency powers, repealed after the wars ended. The legislation provided powers to make regulations by order in council which were deemed

necessary for public safety, defence of the realm or the maintenance of public order. Orders in council are regulations approved in person by the monarch on the advice of the Privy Council.²⁷ In practice, such regulations are drafted and their substance determined by the Government.

The use of emergency powers in peacetime has been regulated by different legislation, and in the 20th century was predominantly concerned with mitigating disruption to essential services caused by large-scale industrial action.²⁸ This was the impetus for the passing of the Emergency Powers Act 1920, which provided powers to declare states of emergency and to make emergency regulations. In principle, the provisions of the Emergency Powers Act 1920 could have been invoked during incidents such as natural disasters or other emergencies. However, in practice, the Act was only used twelve times, on all occasions during periods of industrial action.²⁹ The last time a state of emergency was declared in the UK under the 1920 Act was by the Conservative Government of Edward Heath during the coalmining and energy strikes of 1973–74. The Emergency Powers Act 1920 was repealed by the Civil Contingencies Act 2004.

Powers in the Act

The Civil Contingencies Act 2004 was introduced by Tony Blair’s Labour Government in response to a perceived need to update the UK’s civil resilience profile to address issues not covered by the Emergency Powers Act 1920, such as terrorist threats and disruption to modern technology and communication infrastructure.³⁰ The Act was introduced to Parliament on 7 January 2004 and received royal assent on 18 November 2004.

Part II: Emergency Powers

In 2013, guidance on the CCA 2004 published by the Cabinet Office set out background to using part 2 of the Act. It stated that the use of emergency powers was a “last resort” only to be used in “exceptional circumstances”:

[The Act] allows for the making of temporary special legislation (emergency regulations) to help deal with the most serious of emergencies. The use of emergency powers is a last resort option and planning arrangements at the local level should not assume that emergency powers will be made available. Their use is subject to a robust set of safeguards—they can only be deployed in exceptional circumstances.³¹

Definition of Emergency

Section 19 of the CCA 2004 defines “emergency” for the purposes of part 2 of the Act:

- 1) In this Part “emergency” means—
 - a) an event or situation which threatens serious damage to human welfare in the United Kingdom or in a Part or region,
 - b) an event or situation which threatens serious damage to the environment of the United Kingdom or of a Part or region, or
 - c) war, or terrorism, which threatens serious damage to the security of the United Kingdom.
- (2) For the purposes of subsection (1)(a) an event or situation threatens damage to human welfare only if it involves, causes or may cause—
 - a) loss of human life,

- b) human illness or injury,
- c) homelessness,
- d) damage to property,
- e) disruption of a supply of money, food, water, energy or fuel,
- f) disruption of a system of communication,
- g) disruption of facilities for transport, or
- h) disruption of services relating to health.³²

Separate guidance, also published in 2013 by the Cabinet Office, described the role of central government in responding to emergencies.³³ The guidance stated that, under the subsidiarity principle, the expectation was that emergency services and local authorities would be the first responders to emergencies.³⁴ However, for more serious emergencies the guidance stated that “three broad types (or levels) of emergency have been identified which are likely to require direct central government engagement”. Level 1 (described as “significant” emergencies) included examples such as particularly severe weather-related incidents. Level 2 (“serious” emergencies) included examples such as the H1N1 influenza outbreak of 2009 and the response to terrorist incidents, such as the 7 July 2005 attacks on the London transport network. Only the third, most serious, level of emergency (“catastrophic” emergencies) were described as potentially requiring the use of the CCA 2004’s emergency powers provisions:

Catastrophic emergency (level 3) is one which has an exceptionally high and potentially widespread impact and requires immediate central government direction and support, such as a major natural disaster, or a Chernobyl-scale industrial accident. Characteristics might include a top-down response in circumstances where the local response had been overwhelmed, or the use of emergency powers were required to direct the response or requisition assets and resources. The Prime Minister would lead the national response.³⁵

Emergency Regulations

Section 20(1) of the CCA 2004 makes provision for emergency regulations to be made by the monarch by order in council if the conditions set out in section 21 of the Act have been met.³⁶ Section 20(2) makes provision that a “senior Minister of the Crown” may make emergency regulations if they, likewise, are satisfied that the conditions in section 21 are met and that it would not be possible, without serious delay, to arrange for an order in council under section 20(1).³⁷

Section 21 provides that emergency regulations can only be made if: an emergency “has occurred, is occurring or is about to occur”; the regulations are “necessary” to prevent or mitigate an emergency (ie “existing legislation cannot be relied upon” or is “insufficiently effective”); and the need is “urgent”.³⁸

Section 22 sets out the potential scope of the emergency regulations, which “may make provision of any kind that could be made by Act of Parliament or by the exercise of the royal prerogative”.³⁹ The regulations may, among other potential powers:⁴⁰

- amend primary legislation (with some exceptions, set out in section 23);
- confer powers on Ministers of the Crown;
- confiscate property (with or without compensation);
- prohibit or require the movement of people to or from specified places;
- prohibit assemblies of certain kinds; and

- create offences of failing to comply with the regulations.

Section 23 sets out some limitations to the scope of emergency powers. The emergency regulations:⁴¹

- must be “appropriate” and in “due proportion” to the emergency;
- cannot require a person to provide military service;
- cannot prohibit any activity in relation to a strike or industrial action;
- cannot create offences punishable by more than three months imprisonment or impose fines exceeding level 5 on the standard scale; and
- cannot amend section 23 of the CCA 2004 or the Human Rights Act 1998.

Section 26 provides that emergency regulations lapse a maximum of 30 days beginning the day the regulation is made, even if approved by Parliament within the timeframe set out in section 27 (see the ‘parliamentary scrutiny’ section below).⁴² However, there is no prohibition on the creation of new emergency regulations after the 30-day period has elapsed, provided the conditions in section 21 continue to be met.

Section 30 provides that emergency regulations must be made in the form of a statutory instrument (whether or not they are made by order in council).⁴³ In addition, section 30 provides that emergency regulations, whether or not they amend primary legislation, shall be considered as subordinate legislation for the purposes of the Human Rights Act 1998. Under the provisions of the Human Rights Act 1998, secondary legislation, unlike primary legislation, is capable of being quashed by a court following judicial review.

Parliamentary Scrutiny

Section 27 of the CCA 2004 provides for parliamentary scrutiny of the regulations. It states that the regulations must be laid before Parliament as soon as is “reasonably practicable” after they have been made.⁴⁴ The regulations lapse after seven days unless “each House of Parliament passes a resolution approving them”.⁴⁵ Section 27(3) provides Parliament with the power to amend the regulations with the agreement of both Houses.⁴⁶

Section 28(1) states that if Parliament was prorogued at the time the emergency regulations were made it must be recalled within five days in order to consider the regulations.⁴⁷ Sections 28(2) and 28(3) state that if the House of Commons and the House of Lords, respectively, are adjourned at the time the emergency regulations are made, the relevant Speaker of each House must arrange for the House to sit within five days in order to consider the regulations.⁴⁸

Procedure for Invoking Emergency Powers

Regarding the practicalities of how emergency powers may be invoked, the Cabinet Office 2013 guidance, *Responding to Emergencies: The UK Central Government Response*, stated:

In the event of a level 2 or 3 emergency, the central response framework would be initiated and would involve the activation of central government’s crisis management facilities—the Cabinet Office Briefing Rooms (COBR). COBR would be activated in order to facilitate rapid co-ordination of the central government response and effective decision-making.⁴⁹

The guidance stated that one department—the “Lead Government Department” (LGD)—usually takes responsibility for coordinating the central government emergency response.⁵⁰ Where it is unclear which department should take the lead, it is the responsibility of the Cabinet Office to advise the Prime Minister’s Office of the most appropriate LGD. The guidance stated the following regarding the procedure for invoking the emergency powers in the CCA 2004:

Where the lead Government department believes use of the Act is appropriate, the lead minister will advise the Prime Minister accordingly. They, in consultation with other senior ministers, and if appropriate ministers of the devolved administrations in accordance with the concordats between the Cabinet Office and the devolved administrations, as circumstances permit, will decide whether it is necessary to take emergency powers under part two of the Civil Contingencies Act 2004, if they are satisfied that the tests laid down in the Act have been met.⁵¹

Providing further information on the sequence of events required to invoke emergency powers, the guidance stated that it is the responsibility of the lead government department to:

- determine that policy intent cannot be achieved through existing powers following discussion with departmental legal advisers [...]
- obtain agreement from the lead minister to proceed with possible use of emergency powers;
- alert the Parliamentary Counsel; HMSO [Her Majesty’s Stationery Office]; and Privy Council Office [...]
- ensure that COBR agrees the policy content/wording of emergency regulations;
- ensure that the proposed legislation is reviewed by Parliamentary Counsel [...];
- consult ministers from devolved administrations [...] if the order applies to Scotland, Wales and/or Northern Ireland unless a senior Minister decides urgency prevents this;
- lead on parliamentary handling/publication of the regulations. Order to be made by the Queen in Council (or by senior Minister if allowed by the Act);
- keep the regulations under review and ensure that COBR are appraised of the current position. If the regulations are no longer needed they will be revoked [...]⁵²

¹ For example: House of Lords, ‘[Written Question: Emergencies: Planning](#)’, 13 November 2018, HLI 1263; [HL Hansard, 14 January 2019, col 32](#); [HC Hansard, 15 January 2019, cols 994–6](#); and [HC Hansard, 29 January 2019, cols 638–9](#).

² House of Commons, ‘[Written Question: Civil Contingencies Secretariat: Staff](#)’, 17 January 2019, 207215.

³ Greg Heffer, ‘[Operation Yellowhammer: ‘No-deal’ Brexit Plans Leaked](#)’, Sky News, 6 September 2018.

⁴ House of Commons, ‘[Written Question: Brexit](#)’, 18 February 2019, 173517.

⁵ Caroline Wheeler, ‘[UK Ready to Declare Martial Law to Avert No-Deal Brexit Chaos](#)’, *Times* (£), 27 January 2019.

⁶ Civil Contingencies Act 2004, s 19.

⁷ Joint Committee on the National Security Strategy, [Oral Evidence: Work of the National Security Adviser, HC 625](#), 28 January 2019, p 13.

⁸ Civil Contingencies Act 2004, s 22(3).

⁹ *ibid*, s 27.

¹⁰ [HC Hansard, 12 March 2019, cols 208–300](#).

¹¹ *ibid*, cols 295–6.

¹² [HC Hansard, 13 March 2019, cols 451–5](#).

¹³ *ibid*, cols 460–3.

¹⁴ *ibid*, col 464.

- ¹⁵ [HC Hansard, 14 March 2019, cols 647–51.](#)
- ¹⁶ Greg Heffer, '[Operation Yellowhammer: 'No-deal' Brexit Plans Leaked](#)', Sky News, 6 September 2018.
- ¹⁷ Sam Coates, '[Personal Twitter Account](#)', 2 February 2019.
- ¹⁸ *ibid.*
- ¹⁹ House of Commons, '[Written Question: Military Aid](#)', 7 January 2019, 203808.
- ²⁰ House of Commons, '[Written Question: Brexit](#)', 18 February 2019, 173517.
- ²¹ See: Faisal Islam, '[Personal Twitter Account](#)', 5 December 2018; and Jim Pickard, '[Personal Twitter Account](#)', 5 December 2018.
- ²² Caroline Wheeler, '[UK Ready to Declare Martial Law to Avert No-Deal Brexit Chaos](#)', *Times* (£), 27 January 2019.
- ²³ Joint Committee on the National Security Strategy, '[Oral Evidence: Work of the National Security Adviser, HC 625](#)', 28 January 2019, p 13.
- ²⁴ *ibid.*
- ²⁵ [HC Hansard, 5 March 2019, cols 377–8.](#)
- ²⁶ A W Bradley, et al, *Constitutional and Administrative Law*, 2015, p 558.
- ²⁷ Privy Council, '[Orders in Council](#)', accessed 18 March 2019.
- ²⁸ A W Bradley, et al, *Constitutional and Administrative Law*, 2015, p 560.
- ²⁹ House of Commons, '[Written Question: Emergency Powers Act 1920](#)', 12 June 1979, HCW16.
- ³⁰ [HC Hansard, 19 January 2004, cols 1096–103.](#)
- ³¹ Cabinet Office, '[Preparation and Planning For Emergencies: Responsibilities Of Responder Agencies And Others](#)', 20 February 2013.
- ³² Civil Contingencies Act 2004, s 19.
- ³³ Cabinet Office, '[Responding to Emergencies: The UK Central Government Response: Concept of Operations](#)', 19 April 2013.
- ³⁴ *ibid.*, p 8.
- ³⁵ *ibid.*, p 9.
- ³⁶ Civil Contingencies Act 2004, s 20(1).
- ³⁷ *ibid.*, s 20(2).
- ³⁸ *ibid.*, s 21(2–5).
- ³⁹ *ibid.*, s 22(3).
- ⁴⁰ *ibid.*, s 22.
- ⁴¹ *ibid.*, s 23.
- ⁴² *ibid.*, s 26(1).
- ⁴³ *ibid.*, s 30.
- ⁴⁴ *ibid.*, s 27.
- ⁴⁵ *ibid.*, s 27(1)(b).
- ⁴⁶ *ibid.*, s 27(3)
- ⁴⁷ *ibid.*, s 28(1).
- ⁴⁸ *ibid.*, s 28(2–3).
- ⁴⁹ Cabinet Office, '[Responding to Emergencies: The UK Central Government Response: Concept of Operations](#)', 19 April 2013, p 11.
- ⁵⁰ *ibid.*, p 13.
- ⁵¹ *ibid.*, pp 9–10.
- ⁵² *ibid.*, pp 66–7.

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