

Brexit Debate Enters New Legal Terrain With Talk Of Delay

By William Shaw

Law360, London (January 17, 2019, 5:17 PM GMT) -- A Brexit "Plan B" could involve a legally untested extension of the U.K.'s planned departure date after Parliament rejected the government's withdrawal agreement, easing the immediate threat that British banks and businesses will plunge into a regulatory void if there is no deal, according to lawyers and political experts.

Prime Minister Theresa May has come under increasing pressure from business and opposition party leaders to rule out the possibility of a disorderly "no deal" Brexit if she fails to get a compromise deal through Parliament. Lawmakers are deadlocked and, with just 10 weeks remaining, experts see a growing likelihood that the March 29 departure date will be pushed back to allow more time to find a compromise.

"I think that's inevitable," former prime minister Tony Blair told British Broadcasting Corp. radio on Thursday. "If I was in the government now I would already be having discussions with Europe about the terms of extension."

Delaying implementation of Article 50 of the EU Treaty would provide relief for businesses increasingly worried about the legal standing of cross-border financial contracts and customs duties, transportation, customs duties and supply chains — and much else. These concerns will be foremost when May presents her latest proposals on Monday.

The government's position in Britain's divided Parliament is that there will be a no-deal departure on March 29 unless a majority can agree on an alternative, which could take weeks.

"MPs appear to be very clear that they will not support such an outcome, and so we should expect significant activity in Parliament devoted to changing this legislative default," said Ross Denton, a trade partner at Baker McKenzie.



The government's position is that there will be a no-deal departure on March 29 unless a majority of lawmakers can agree on an alternative, as protesters from Remain and Leave continue to demonstrate outside Parliament. (AP)

Legal experts have seen a shift in sentiment away from a hard Brexit, which could create a cross-border regulatory void for individuals and industries. An extension to the departure date would propel Britain into uncharted legal waters and present challenges on both sides of the Channel — but that could buy time for anti-Brexit MPs to force the government to accept a second referendum that might overturn the June 2016 result.

The European Court of Justice ruled in December that Britain can unilaterally cancel the Article 50 mechanism for leaving the EU, bolstering the campaign to stop Brexit with another referendum if Parliament remains deadlocked.

"The exact nature of these processes are still to be determined, and would be the subject of a U.K. challenge if used," Denton said.

Moreover, European Commission officials said this week that a U.K. request to push back the March 29 date must come with an explanation, and then be unanimously approved by all 27 EU governments.

"Some of the EU states might disagree, or possibly require conditions. It requires unanimity," said David Mundy, a partner and parliamentary agent at law firm BDB Pitmans.

Or, Mundy said, Britain could ask for full cancellation of Article 50 — which is permitted by the ECJ — with the possibility of reinstating it later, when the country is clearer about what Brexit deal it wants. But this takes the the ECJ deeper into uncharted legal territory.

"This latter point is difficult for the EU27 to agree, and likely to be subject to conditions," Mundy said.

Robert Bell, partner at Bryan Cave Leighton Paisner LLP, said the EU would have to be convinced that the U.K. has a plan before it agreed to a Brexit extension. Brussels could also put strict limits on the length of a postponement, and it is unlikely to allow Brexit to be delayed beyond European parliamentary elections due to take place in May, he added.

"They have already indicated that they would not consider an extension just to allow the U.K. to continue to bicker about what to do next," Bell said.

If the EU grants an extension, financial services companies will want to know whether the few benefits they were promised in the withdrawal agreement will be swept off the negotiating table.

May's agreement focused on trade in goods rather than key services such as banking and law, but it was cautiously welcomed by the financial services industry. Businesses were pleased with the provision for a transition until the end of 2020 and the potential for equivalence decisions by the European Union that would help banks to keep trading with the bloc.

"In the course of negotiation, the life of U.K.-based financial services companies might be made worse because the government makes concessions," said Howard Morris, senior counsel at Morrison & Foerster (U.K.) LLP.

Banks will hope that negotiators focus on the main barrier on the road to an agreement — a temporary customs arrangement known as the backstop. This would prevent a hard border between Ireland and Northern Ireland and help to maintain the free trade of goods between Britain and the bloc. But it could lock the U.K. into EU customs arrangements indefinitely if no longer-term trade deal is reached.

"The whole concept of equivalence ... is enough to persuade the [financial services] community that they are getting something out of this," Morris said.

But, whatever deal MPs come up with, it is unlikely to deter banks and insurers from shifting their people and operations into the bloc. Many will simply take the time to finesse their exit plans if Britain secures a delay, attorneys predict.

"The only advantage, assuming that we still [leave], is that it gives them more time to get regulatory registrations in Europe," Morris said. "If they haven't already taken steps to be ready for a post-Brexit future they are in a pickle already."

--Editing by Ed Harris.