

April 11, 2019

BREXIT – WHAT HAPPENED?

To Our Clients and Friends:

Clients and friends will understand that we have felt unable to circulate a running commentary on Brexit as events have been so fast moving and volatile. However, broadly speaking, our note of October 10th 2018 [here](#) (with more background in our note of July 12th 2018 [here](#)) predicting that the UK was heading for a soft Brexit remains correct – for the moment.

In particular, both the UK Government and Prime Minister Theresa May survived votes of no confidence in December 2018 and, although the House of Commons has failed to approve the deal agreed between the Government and the EU, the UK Parliament has now passed legislation preventing the UK from choosing to leave the EU without a deal.

A political crisis but not a constitutional crisis

It is worth remembering the way the UK Constitution works. The party with the largest number of MPs forms the Government, either alone if it has a majority in the House of Commons or with others if not; currently the UK Government comprises the Conservative Party with support from the Democratic Unionist Party in Northern Ireland. Accordingly, the Government can only survive with the support of a majority of the House of Commons and the Prime Minister is chosen by the governing party rather than elected directly.

The current political crisis has arisen because a significant minority of the ruling Conservative Party want a hard Brexit but a large majority of the House of Commons wants a soft Brexit. Ultimately the House of Commons will win that battle and it is for this reason that the Prime Minister has now “reached across the aisle” to try and forge a consensus with the Labour party. In doing so she is seeking to outvote those in her own party who are refusing to support the deal she has agreed with the EU.

The basic principles of the Constitution therefore continue to operate, albeit clouded by considerable political noise. The Government currently has neither the support of the Conservative Party nor the House of Commons for its deal.

In normal circumstances that would lead to a General Election but that can only be called by a two-thirds majority of the House of Commons. This would require the support of most Conservative Party MPs, who rightly fear losing power if an election were called. Their partners, the DUP, are also unlikely to vote down the Government in a future vote of confidence as they have no desire for a Labour Government led by Jeremy Corbyn.

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In addition, under its rules, the Conservative Party cannot launch another vote of no confidence in Prime Minister May until December 2019 – although the political pressure could force her to resign before then. In those circumstances the Conservative activists would select the new leader and Prime Minister from a shortlist of two chosen by Conservative MPs.

In the meantime the stalemate continues.

What just happened?

On April 10th 2019 the EU agreed to extend the deadline for the UK's departure from the EU under what is known as the Article 50 process until October 31st 2019.

There are two other key dates. First, on May 2nd 2019 there are local authority elections across the country which will be the first opportunity for many electors to express their views in a domestic party election. Second, on May 23rd there are elections for the European Parliament. Both major parties will have significant internal challenges in reaching agreement on a manifesto or platform for these elections and they are likely to be highly politically charged.

What might happen now?

There are a number of different possibilities:

1. The hard Brexiteers concede for fear of losing Brexit altogether and approve the negotiated deal. At the moment there is little sign of this happening but logically it must remain a possibility not least because it would avoid the need for the UK to take part in the European elections. There have been three votes on the Withdrawal Agreement so far and the losing majority has shrunk from 230 to 58. If this happened then Brexit would happen quite quickly on the agreed terms.
2. The Government agrees a different deal with the Labour party which commands a majority of the House of Commons. History suggests this is unlikely as opposition parties very rarely help support the Government. However, anything is possible in the current circumstances, particularly if that support by Labour could lead to a split in the Conservative Party and improve the chances of a General Election and Labour Government.
3. A series of indicative votes by the House of Commons leads to an alternative proposal (such as a customs union or joining the EEA). In the last series of indicative votes the proposal for a permanent customs union lost by only a slender majority so there is a possibility that more MPs might coalesce around this option so that it gains a narrow majority.
4. A confirmatory referendum is called asking the public to choose between the current negotiated deal (or whatever other deal might emerge under options 2 or 3 above) and remaining in the EU. There is certainly logic in a second referendum given Parliament's inability to agree the terms of Brexit and the political impossibility of Parliament overturning the result of the 2016 referendum. There is, however, considerable political risk for the two major parties and no certainty of the outcome: a marginal win for "Remain" might produce an answer but would not

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resolve the political crisis. On the basis that Parliament has rejected a “no deal” Brexit the only logical question on the ballot paper would be either to approve a Brexit deal agreed with the EU or remain in the EU.

5. Theresa May resigns and the Conservative Party chooses a new leader. As noted above the Conservative Party rules prevent another challenge against Prime Minister May before December but political pressure could force her to step down during 2019 – indeed she has promised to do so if the current negotiated deal is approved by the House of Commons. In those circumstances the Conservative Party would choose the new leader who would be the new Prime Minister.
6. A General Election is called. The political chaos could still lead to a General Election to see if a newly elected House of Commons could resolve the Brexit question. However, given the country and the two main parties remain as split on that question as ever, it would appear unlikely that a newly elected Parliament would fare any better in finding a solution.

The outcome remains unclear but we have learned that, for the moment, neither the EU nor the UK are prepared to contemplate a disorderly “no-deal” Brexit and that the mood of the House of Commons continues to be to lean towards a soft Brexit or, possibly, a second referendum. As a result there must be a high chance of a further extension.



This client alert was prepared by London partners Charlie Geffen and Nicholas Aleksander and of counsel Anne MacPherson.

We have a working group in London (led by Nicholas Aleksander, Patrick Doris, Charlie Geffen, Ali Nikpay and Selina Sagayam) addressing Brexit related issues. Please feel free to contact any member of the working group or any of the other lawyers mentioned below.

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