

The Benn-Burt Extension Act: A roadblock to a No-deal Brexit?

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Introduction: Extension and the Rule of Law

On 9 September, the [EU \(Withdrawal\) \(No.2\) Act 2019](#) ('Benn-Burt Extension Act') received Royal Assent. The Benn-Burt Extension Act imposes a statutory duty upon the Prime Minister (if the relevant conditions are met) to request and accept an extension of the withdrawal negotiating period under Article 50(3) TEU. However, the Prime Minister has repeatedly [stated](#) that he will not request such an extension, ostensibly in clear conflict with the statutory obligations in the Act.

This reticence has prompted [criticism](#) over the Government's commitment to the Rule of Law, and has given rise to [speculation](#) as to whether the obligations of the Benn-Burt Extension Act can be circumvented legally. The Foreign Secretary has even [stated](#) that the Government will 'test the law to the limit'. Boris Johnson faces a trilemma: (1) avoiding an extension to Article 50; (2) remaining Prime Minister; and (3) not violating the Rule of Law.

This post argues that no legal interpretation of the Benn-Burt Extension Act can reconcile the Government's position with the obligations under the Act. The Act places control over avoiding a further extension in the hands of the House of Commons. This can be realised through the House of Commons approving a Withdrawal Agreement under [section 1\(1\)](#), or approving withdrawal without an agreement under [section 1\(2\)](#) before 19 October. This post highlights a third, less obvious scenario whereby the UK could find itself back on the road to a 'no deal' exit on 31 October: if the House of Commons decides, under [section 3\(3\)](#) of the Act, to reject an extension proposal from the European Council to a date other than 31 January 2020. It is therefore crucial that both the European Council and the House of Commons understand the implications of section 3 for a no deal Brexit in making their respective decisions on extension.

The third scenario and operation of the Act

This third option depends on the following scenario: the conditions under section 1(1) and 1(2) have not been met; therefore the Prime Minister is obliged under [section 1\(4\)](#) to send the extension request letter in the form mandated by [Schedule 1](#) of the Act. This is predicated on the position that, before 19 October, the Prime Minister may not rely upon any executive power outside the scope of section 1(4) in order to request an extension that does not comply with the form detailed in Schedule 1. The next step of the scenario would be for the European Council to propose an extension to a date other than 31 January 2020 (the date specified in section 1(4)) in response to this request.

This would trigger the conditions in [section 3\(2\)](#) and section 3(3) of the Benn-Burt Extension Act. Section 3(1) holds that if the European Council were to grant an extension to 31 January, the Prime Minister must immediately accept it. By contrast, if another date is proposed, then section 3(2) introduces a dual temporal condition: acceptance must occur either (1) within two days, or (2) before the end of 30 October, depending on whichever is sooner. Section 3(3) then provides an exception to this condition that empowers Parliament to decide upon the new extension date: if the House of Commons were to decide not to pass a motion

within the section 3(2) time-period, then the obligation for the Prime Minister to accept does not apply.

In this scenario, an executive discretion for the Prime Minister, provided for in [section 3\(4\)](#), becomes operative. The provision states that "[n]othing in this section shall prevent the Prime Minister from agreeing to an extension...otherwise than in accordance with this section". The House of Commons Library [explains](#) the effects of these words: 'If the House of Commons "decides not to pass" a specifically worded motion approving the extension, the Prime Minister then has a free choice whether or not to agree to the extension under subsection 3(4)".

On this reading, any pre-existing executive power to request extension for a different period, as exercised by the previous Prime Minister Theresa May on [20 March](#) and [5 April 2019](#), has been limited by the provisions of section 1 and section 2 of the Benn-Burt Extension Act. This raises an important distinction between the Benn-Burt Extension Act and the first [EU \(Withdrawal\) Act 2019](#) ('Cooper-Letwin Extension Act'). Section 1(6) of the Cooper-Letwin Extension Act states that 'nothing in this section prevents a Minister of the Crown from seeking, or agreeing to, an extension' (emphasis added). The Prime Minister had already requested a second extension on 5 April 2019, before the Cooper-Letwin Extension Act received Royal Assent on 9 April. But if Theresa May had only sought the extension after the Act had come into force, she would have been able to request an extension to a date other than that passed in a House of Commons motion under [section 1\(2\)](#) of the Act, provided that this extension would have ended later than 22 May 2019. By contrast, the present Benn-Burt Extension Act does not permit the Prime Minister to seek any extension other than one which conforms to the terms of the Act.

The crucial point is that, within this scenario, any executive discretion for the Prime Minister is limited to the acceptance of any extension offered by the European Council. The Prime Minister would only be free to accept or reject an extension offer from the European Council upon the fulfilment of the very narrowly defined circumstances detailed above. Crucially, the House of Commons remains in control, as section 3(3) of the Benn-Burt Extension Act requires the House of Commons to decide not to approve the extension before the Prime Minister's discretion is activated.

Conclusion: the responsibility of the European Council and the House of Commons

Significantly, the scenario outlined above depends entirely upon the European Council. Subject to the unanimous agreement of the 27 heads of state or government, the institution enjoys discretionary power under [Article 50 TEU](#) over whether to grant a request for an extension, up to what date, and subject to what conditions. The United Kingdom retains the power, under Article 50(3) TEU, to agree to these conditions, a power which in domestic law has now been regulated by the Benn-Burt Extension Act.

It is paramount, therefore, that the European Council is aware that the consequences of a decision to set an extension date other than 31 January 2020 could set in motion events that may lead to the United Kingdom withdrawing without agreement on 31 October. This would arguably even be the case if the European Council grants a 'flexextension', with different dates dependent upon different conditions, as it did for the first extension Decision of [22 March 2019](#), and the second extension decision on [11 April 2019](#). In turn, the House of Commons must be aware that a decision under section 3(3) not to accept a different date or dates would hand power back to the Prime Minister to reject an extension. The Act has severely restricted the road to a no-deal Brexit on 31 October, but it has not entirely blocked it off.

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