

The Spectre of a No-Deal Brexit: Preparations in France

Where are we now in terms of deal or no deal?

The threat of the United Kingdom (“UK”) leaving the European Union (“EU”) without a deal has not gone away. At the time of writing, the position is the following:

On 10 April 2019, the UK government secured an extension from the EU27 leaders to 31 October 2019 as the new deadline for the UK’s exit.

The UK Parliament must ratify the withdrawal agreement before this deadline expires (if it does so earlier, it can leave on the first day of the month following such ratification). The UK is also obliged to organise elections to the European Parliament if the withdrawal agreement has not already been ratified by 23 May 2019. If it fails to do so, it will leave the Union on 1 June 2019 without a deal.

If no agreement is reached by 31 October 2019 and no further extension of time has been agreed, the UK will leave without a deal¹.

The withdrawal agreement should normally be approved in its existing form though it is conceivable that changes may be sought based on cross-party consultations in the UK.

So a “no deal Brexit” remains a possibility even though everyone seems to want to avoid this.

Is there a framework for “no deal”?

The “no deal Brexit” would mean no withdrawal agreement to govern harmoniously relations between the UK and the remaining EU27, and no transition period for an orderly exit. Alongside the process of negotiation of the withdrawal agreement, the European Commission, as well as EU27 capitals and the UK itself, have thus separately consecrated time and resources to defining a framework for

1. Other possibilities include the organization of a further UK referendum on Brexit (presumably, to vote on approval of the withdrawal agreement, leaving without a deal or remaining in the European Union) or the revocation of the UK’s notice of withdrawal by an Act of Parliament, though both options seem improbable given the decision to leave the EU was already the subject of a popular vote and the UK Government committed to delivering Brexit. A general election could also be called in the UK, but any newly elected leader would be faced again with the same array of choices.

a “no deal Brexit”, to address the most pressing and immediate issues that would arise.

What has the French administration done to prepare domestically for a “no deal”?

As a neighbouring country, host to approximately 190,000 UK citizens and with approximately 150,000 of French citizens residing in the UK (mainly in greater London), France needs to be equipped for an eventual “no deal Brexit”.

Preparations have formally begun with the adoption on 19 January 2019² of a law authorizing the French Government to adopt measures to prepare for the UK’s exit by “ordonnance” (a form of delegated legislation) even where such measures should normally be adopted by primary legislation, as permitted by Article 38 of the French Constitution.

The possibility to take such measures is limited to specific fields and to the “no-deal” scenario only. If the UK leaves pursuant to a withdrawal agreement, such agreement will govern the consequences of its exit in all 27 EU Member States. In that case, any ordonnances adopted pursuant to the Law of 19 January 2019 would be lacking in purpose and thus devoid of legal effect.

The principal substantive matters listed exhaustively in the Law of 19 January 2019 are the following:

- The rights of entry and residence of UK nationals in France;
- The employment of UK nationals who are lawfully engaged in salaried employment in France on the date of the UK’s exit;
- The exercise by legal or natural persons of a regulated professional activity in France where such persons rely the recognition of professional skills or experience obtained in the UK;
- The rules applicable to public servants in France who hold UK citizenship;
- The application of legislation governing social

2. The law’s French title is : LOI n° 2019-30 du 19 janvier 2019 habilitant le Gouvernement à prendre par ordonnances les mesures de préparation au retrait du Royaume-Uni de l’Union européenne.

security rights and social contributions to UK nationals who are legally resident in France on the date of the UK's exit;

- The inspection of goods and passengers travelling to or from the UK and veterinary and phytosanitary inspection of imports from the UK;
- The operation of road transport of goods or persons on the French territory by legal or natural persons established in the UK, including where such goods or persons are in transit only;
- Finally, there is a more general provision allowing the French government to take any other measure necessary to the treatment of the situation of UK nationals who reside in France or carry out a professional activity in France as well as of legal persons established in the UK and conducting business in France, in order to preserve the interests of France.

The terms of the Law make it clear that the ordonnances should apply up to the time when bilateral agreements may be concluded in such fields between France and the UK³. In line with French constitutional doctrine, the Law defines the objectives of the delegated legislation.

It favours continuing to allow UK citizens lawfully resident in France at the time of the UK's withdrawal to remain, consistent with the guidance of the European Commission on this point⁴. It also emphasises the need to preserve France's attractiveness as a place for British people and businesses to do business.

The Law states unequivocally that public servants in France holding UK citizenship, recruited before the withdrawal date, should be maintained in their employment and not subject to new restrictions on the basis of their citizenship.

Finally, goods and people should continue to flow between the two countries, without prejudicing health, safety and security in France.

The Law makes a subtle but important point about the reciprocity of any future arrangements, stating that "*The ordonnances may provide that the measures granting UK citizens or legal persons established in the UK more favourable treatment than third country nationals or legal persons*

3. The mention of bilateral arrangements only may indicate that the French administration sees little scope for the EU27 to negotiate arrangements multilaterally with the UK following a "no deal" exit, even in limited fields such as citizens' rights, or it may simply be an omission in the drafting of the Law. In any case, the same reasoning regarding the *rationae temporis* of the ordonnances should apply whether future arrangements are concluded bilaterally or multilaterally.

4. While the objective is generously stated, the ordonnance in fact gives a 12-month grace period to such persons to regularize their situation in France by obtaining a residence permit, subject to reciprocity. The European Commission's guidance also emphasises that reciprocity is expected on the part of the UK in relation to EU citizens resident in Britain prior to the withdrawal date.

established in third countries will cease to have effect if the UK does not accord equivalent treatment"⁵.

The Law also authorizes the adoption of delegated legislation on an exhaustive list of more technical subjects, including: the taking into account of periods of professional activity or training carried out in the UK for the purposes of calculating entitlements to social benefits or recognising qualifications, the conditions of access to and conduct of financial services in France following the loss of the "passport" of UK entities to provide financial services throughout the European Union, and the continued flow of people and goods through the Channel Tunnel.

In addition, authorization is granted to adopt delegated legislation for the purpose of urgently reintroducing the infrastructure required for customs inspections of goods and passengers going to or coming from the UK.

The Law thus provides a useful indicator of the key areas of concern the French Government wishes to address in anticipation of the UK potentially leaving without a deal.

How and when is the French delegated legislation adopted?

With the exception of the delegated legislation relating to the urgent reintroduction of customs infrastructure, which must be adopted within six months of the date of publication of the Law (i.e. on or before 20 July 2019), the ordonnances must be adopted by the French Government within 12 months of the date of publication of the Law (i.e. on or before 20 January 2020). Once these periods have expired, the ordonnances can only be modified by primary legislation.

In terms of process, the delegated legislation is adopted by the French Council of Ministers, after consultation of the French Council of State. Such legislation may take effect immediately on the date it is published (unless it specifies a later date of entry into force) but each of the ordonnances must be submitted to the French Parliament for express ratification, via a draft law of ratification, not later than six months after the date of its publication.

If the draft law of ratification is not submitted in time, the delegated legislation is deemed null and void. This nullity is not retroactive but applies from the missed deadline.

Once ratified, the ordonnance has the status of primary legislation. The law of ratification can also modify the content of the ordonnance, even retroactively though

5. Emphasis added. The reference to third countries in this context should be understood as non-EU Member States, as it is out of the question that UK persons could be granted more favourable treatment than the nationals of States that remain subject to the EU's free movement rules.

within the usual limits (non-retroactivity of criminal offences...)6.

Developments to date

Throughout the first trimester of 2019, the French administration has continued its preparations for a no-deal Brexit, using the authorization granted by the Law of 19 January 2019 to adopt delegated legislation in a number of the fields mentioned above, both substantive and technical, including:

- The rights of UK citizens resident in France as of the withdrawal date, including the preservation of social security entitlements acquired prior to such date;
- The continued presence of UK firms who exercise regulated professional activities in France, such as law firms and accountancy practices;
- The continued presence of French public servants who are UK nationals;
- The reintroduction of the infrastructure required for customs inspections between France and the UK;
- The continued operation of road transport services in France by persons established in the UK;
- The continued provision of certain financial services in France, in particular in the insurance sector, in the event of the loss of the “passport” of UK entities to provide financial services throughout the European Union;
- Arrangements for the continued exchange of defence materials between France and the UK;
- Arrangements for the continued use of the Channel Tunnel.

Further information on the specific content of these measures can be found at <https://brexit.gouv.fr>

Finally, the French measures are complementary to the measures adopted by the European Commission to address a “no deal Brexit” which may be consulted at: https://ec.europa.eu/info/brexit/brexit-preparedness_en

6. It is not clear what are the effects of a refusal of the Parliament to ratify the ordonnance after filing of the draft law of ratification. While one might reasonably posit that the ordonnance is then deemed null and void, the position is not settled in French jurisprudence and some commentators argue that it retains the status of delegated legislation. In any case, the situation does not really arise in practice as the Government does not normally seek ratification unless it is confident of the law being passed. Furthermore, there is little motive to refuse ratification, as the Parliament is free to modify the content of the ordonnance in the law of ratification.

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