

TIMING OF BREXIT

EUROPEAN PARLIAMENTARY ELECTIONS

OPINION

28 March 2019

EXECUTIVE SUMMARY

1. This Opinion takes issue with the legal view, voiced recently by the Prime Minister as well as by some in Brussels, that any further extension of the Article 50 notification period would necessarily require the UK to hold European Parliament (EP) elections.

The Dilemma

2. Unless the House of Commons approves the Prime Minister's Withdrawal Agreement, the current extension is due to expire on 12 April 2019. Preparations for EP elections will need to be underway by then if they are to be held, as EU law requires, at the end of May.
3. If the UK and/or EU27 insist that a further extension can be granted only on condition that EP elections are held, grave consequences could ensue if EP elections are rendered impossible either by political opposition or by the passage of time. The refusal of a further extension to the Article 50 period on this ground would dramatically narrow the UK's options and could help precipitate a no-deal Brexit.

The Solution

4. The legally simplest method to resolve the dilemma would be for the UK to hold EP elections.
5. A failure to hold elections would however result neither in the expulsion of the UK from the EU, nor in the invalidity of future acts of the EP.
6. The right to participate in EP elections may be derogated from under EU law. We consider that there are strong reasons why it is unnecessary as a matter of democratic principle for a Member State that is in the process of departing from the EU to send representatives to a legislature whose function is to take decisions and to make laws only for the EU.
7. A suspension of the UK's obligation to hold EU elections could be effected by a number of legal mechanisms falling short of Treaty change. These include, in particular: (1) an agreement between the UK and the EU under Article 50(2) TEU; (2) the imposition of conditions on any further extension of the Article 50 period under Article 50(3); (3) the amendment by Council Decision of EU electoral law as contained in the 1976 Act; and/or (4) a decision of the Heads of State and Government.
8. Were such mechanisms to be adopted, the EP could function lawfully without its UK members for the duration of any extension of the Article 50 notification period or, in the event that the UK's Article 50 notification is revoked, until such time as arrangements can be made for them to be elected once again.
9. We accordingly conclude that the Article 50 period could, if necessary, be lawfully extended without the need to hold European Parliament elections in the UK.

INTRODUCTION

1. We are barristers and academics specialising in EU law, writing on our own initiative.¹ The purpose of this Opinion is to consider whether the UK's notification period under Article 50 TEU may be subject to further lawful extension without the UK holding elections to the European Parliament ("EP") in May 2019.

The central dilemma

2. On 21 March 2019, the European Council agreed to extend the UK's two-year Article 50 notification period.² The terms of that agreement were, in summary, that the UK's membership of the EU will terminate on 12 April unless: (a) a Withdrawal Agreement as provided for by Article 50 TEU has been approved by the House of Commons (in which case the period of membership will be extended until 22 May 2019); or (b) the EU27 agree to a further extension, following an indication of the way forward by the UK.
3. Elections to the European Parliament (the "EP") will be held across the European Union by direct universal suffrage between 23 and 26 May 2019, with the new Parliament sitting for the first time on 2 July 2019. Under UK law, returning officers would need to give notice by 12 April 2019 of a poll to take place on 23 May.
4. It has been suggested by some that without EP elections being held, the UK's membership of the EU could not lawfully be extended beyond the dates fixed for EP elections, and/or the first sitting of the EP. Indeed the Prime Minister herself said, in a statement to the House of Commons on 25 March 2019, that an extension beyond 12 April "*would certainly mean participation in the European Parliamentary elections*". Similar views have been expressed from within the EU27.
5. If the UK and/or EU27 maintain the rigid view that extension past 12 April requires European elections to be held, the consequences could be both unpredictable and grave. Should (1) the existing Withdrawal Agreement not be approved by the House of Commons and (2) EP elections in the UK within the timescale required by EU law prove to be precluded either politically or by the passage of time, a further extension to the Article 50 period could be rendered impossible, ruling out valuable options for the UK and helping to precipitate a no-deal Brexit.
6. This dilemma was recognised by Eleanor Sharpston, an Advocate General at the Court of Justice of the EU ("CJEU"), who in a series of tweets on 20 March encouraged lawyers to find a "legal

¹ We are grateful to Jonathan Faull and to Evanna Fruithof for their help. The conclusions of this Opinion should be attributed only to its authors.

² European Council Decision 2019/476 taken in agreement with the United Kingdom of 22 March 2019 extending the period under Article 50(3) TEU.

workaround” so as to avoid, as she put it, the EP elections tail wagging the Article 50 extension dog. This Opinion accepts the Advocate General’s challenge and suggests a range of possible solutions to the dilemma.

Summary of advice

7. The legally most straightforward method by which to reconcile the demands of EU electoral law with a further extension of UK membership would certainly be for the UK to hold EP elections.³ Any other solution would require the cooperation of the UK’s partners in the EU.
8. We do not however accept that EP elections need to be held in the UK as a precondition for any extension of the Article 50 period beyond either 12 April (as maintained by the Prime Minister), 26 May (the last date on which EP elections may be held), or 2 July (the first day on which the new European Parliament will sit). In our view, other legal means can be envisaged whereby, if necessary, a further extension could lawfully be agreed without EP elections being held in the UK during the period of that extension.
9. We note, first of all, that a failure to hold EP elections in the UK would result neither in the expulsion of the UK from the EU, nor in the invalidity of future acts of the EP.
10. A number of EU Treaty provisions and guarantees of fundamental rights govern participation in EP elections. But bearing in mind their terms, and the fact that the guarantees may be subject to legitimate derogations, their applicability to the special situation of a departing Member State is far from obvious. In our view, there are strong reasons to consider it unnecessary as a matter of democratic principle for a Member State that is in the process of departing from the EU to send representatives to a legislature whose function is to take decisions only for the EU.
11. The situation could be addressed by full-scale Treaty amendment: but we do not consider that this is necessary. Treaty change in any event requires ratification by national Parliaments, which even given the political will, may not be feasible in a short time scale.
12. There are in our opinion simpler mechanisms for regularising the position, in the shape of:
 - (1) a short formal agreement between the UK and the EU under Article 50(2) TEU;
 - (2) conditions on any further extension of the Article 50 notification period, under Article 50(3);
 - (3) amendment by Council Decision of EU electoral law as contained in the 1976 Act; and/or

³ The domestic legislation enabling the holding of elections to the EP remains in force, as provisions of and under the European Union (Withdrawal) Act 2018 repealing that legislation have not yet themselves been brought into force.

- (4) a decision of Heads of State and Government, expressing their views as to how the Treaties should be interpreted and committing if necessary to future clarificatory Treaty amendment.
13. Were such mechanisms to be adopted, the EP would function without its UK members for the duration of any extension of the Article 50 notification period; or, in the event that the UK's Article 50 notification is revoked, until such time as arrangements can be made for them to be elected once again.

RELEVANT LEGAL REQUIREMENTS

Voting rights of EU citizens

14. A number of provisions of primary EU law govern the election of members of the EP (“MEPs”). They can be classified into three categories.
15. **First**, there are provisions of EU law which guarantee to Union citizens the right to vote in elections to the EP and so, implicitly at least, require the holding of such elections. Articles 10(2) and 14(3) of the Treaty on the European Union (the “TEU”), Article 39(2) of the Charter of Fundamental Rights and Freedoms (the “Charter”) and Article 1(3) of the EU’s 1976 Act concerning the election of Members of the European Parliament by direct universal suffrage (the “1976 Act”) all fall into this category, as they variously require that citizens be “directly represented at Union level in the European Parliament” and that MEPs are elected by “direct universal suffrage in a free and secret ballot”. A similar right might be inferred, less directly, from the text of Article 14(2) TEU.
16. However, the rights conferred by these provisions are not absolute. In Case C-650/13 *Delvigne v Commune de Lesparre-Medoc* ECLI:EU:C:2015:648 the CJEU accepted that the right to vote in EP elections could be subject to lawful limitations if the requirements of Article 52(1) of the Charter are met: namely, that any limitation is provided for by law, respects the essence of the right, is proportionate and is necessary to meet objectives of general interest recognised by the EU or the need to protect the rights and freedoms of others (§46). It appears from the CJEU’s analysis that Article 14(3) TEU goes no further than Article 39(2) of the Charter in this regard.
17. **Secondly**, there are provisions of EU law which, whilst also connected to the right to vote (or stand) in EP elections, are concerned with equal treatment as between nationals of different Member States in the conduct of EP elections as and when such elections are held. Article 14 TEU, Articles 20 and 22 of the Treaty on the Functioning of the European Union (the “TFEU”) and Article 39(1) of the Charter are all within this second category. They variously provide that where EU citizens reside in a Member State of which they are not nationals, that State must ensure that they are granted the right to vote and stand in EP elections under the same conditions as its own

nationals. These provisions would not be infringed by a failure on the part of a Member State to hold EP elections. They would be infringed only if a Member State were to set different conditions for the participation in such elections of its own nationals and the nationals of other Member States (*Delvigne*, §§42-43).

18. **Thirdly**, there are provisions of EU law which govern the basis on which EP elections should be organised and held. For example, Article 1(1) of the 1976 Act stipulates that MEPs “*shall be elected on the basis of proportional representation, using the list system or the single transferable vote*”, whilst Article 10(1) provides that elections “*shall be held on the date and at the times fixed by each Member State*” but within an electoral period fixed by the Council (Article 11).
19. The provisions in this third category all proceed on the basis that elections to the EP are to be held in a given Member State. They do not, in our view, address the logically prior question of whether such elections need to be held at all. On our analysis, that is the sole province of the first category of provisions set out in §15 above.
20. The voting rights of EU citizens are further guaranteed by the European Convention on Human Rights (the “**ECHR**”). Article 3 of Protocol 1 (“**A3P1**”) to the ECHR, requires all contracting parties (of which the UK is one) to “*hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature*”. The European Court of Human Rights (the “**ECtHR**”) has previously held that EP elections fall within the scope of A3P1 (*Matthews v United Kingdom* (1999) 28 EHRR 361, §44).
21. As under EU law, however, the right conferred by A3P1 is not unqualified. On the contrary, the ECtHR has previously emphasised that Contracting States enjoy “*a wide margin of appreciation in imposing conditions on the right to vote*” albeit that the Court must always be satisfied that those conditions “*do not curtail the right to vote to such an extent as to impair its very essence and deprive it of effectiveness; that they are imposed in pursuit of a legitimate aim; and that the means employed are not disproportionate*”. In particular, such conditions must not thwart “*the free expression of the people in the choice of the legislature*” (*Matthews*, §63).

Requirements for EP elections

22. MEPs are elected for a term of five years (Article 14(3) TEU). Members must be elected by “*direct universal suffrage*” and by way of a “*free and secret ballot*” (Article 14(3) TEU; Article 39(2) of the Charter; and Article 1(3) of the 1976 Act). Under the 1976 Act, elections for the EP are required to take place in each Member State every five years in a four-day electoral period set by the Council (Articles 11-12 of the 1976 Act). There is limited scope under the 1976 Act for the electoral period to be delayed by up to a month where it proves “*impossible to hold the elections in the Community*” during the original period (Article 11(2)). Whilst EU law specifies some basic

requirements for the conduct and organisation of EP elections (e.g. that elections must be conducted using either “*the list system or the single transferable vote*”: see Article 1 of the 1976 Act), much of the detail is left to individual Member States.

23. The composition of the EP – i.e. how many seats are allocated to each Member State – is decided in advance of the commencement of a new EP term. The composition of the EP for the upcoming 2019-2024 term has already been decided by the European Council, on the alternative bases that the UK is, and is not, a member of the EU at the beginning of the next EP term.⁴ In the event of a further extension of the Article 50 notification period, and always subject to further consideration by the Council, the default composition of the EP for the term 2019-2024 will be on the basis that the UK is a member of the EU, even if the UK’s obligation to hold EP elections is suspended for the duration of that extension.

LEGAL CONSEQUENCES OF FAILURE TO HOLD EP ELECTIONS

24. Before turning to the particular position of a departing Member State, we set out in summary the legal consequences that would ensue in normal circumstances if a Member State were to fail to participate in EP elections. That Member State would likely be in breach of provisions of EU law and A3P1 ECHR as we have outlined above. But the State in question would remain a Member State of the EU and the continued validity of acts of the EP would be unaffected.

Continued membership of EU

25. There is no mechanism under the EU treaties for the expulsion of a Member State from the Union. Consequently, a breach of Treaty obligations, including the obligation to hold EP elections, cannot affect a Member State’s continued membership of the EU.
26. The most serious sanction which the EU can impose on a Member State which has breached its Treaty obligations is provided for by Article 7 TEU. Article 7 will be engaged where the European Council, acting by unanimity and with the consent of the EP, determines that a Member State has committed a “*serious and persistent breach*” of the EU’s core values, including “*respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities*” (Article 7(2) TEU, read with Article 2). In such a case, the Council may decide to suspend certain of the Member State’s rights, including its voting rights in the Council (Article 7(3)). However, Article 7(3) makes clear that the infringing Member State will continue to be bound by all of its other Treaty obligations. Accordingly, even the application of Article 7 cannot result in a Member State losing its membership of the EU or somehow avoid it being bound by its other Treaty obligations.

⁴ European Council Decision 2018/937 establishing the composition of the European Parliament.

27. Whether the EU would seek to impose Article 7 sanctions on a Member State which had failed to hold EP elections or had not taken up its allocated seats in the EP would depend on all the circumstances.

Continued validity of EP acts

28. It has been suggested that a failure of one Member State to hold EP elections and/or take up all of its allocated seats in the EP would imperil the validity of acts of the EP adopted whilst it was irregularly constituted.⁵ We do not share that view.

29. The 1976 Act provides for a newly elected EP to meet one month after the end of the electoral period and stipulates that *“the powers of the outgoing European Parliament shall cease upon the opening of the first sitting of the new European Parliament”* (Articles 11(3) and (4)). Nothing in the 1976 Act prevents or inhibits the EP from being validly constituted, even without all seats having been allocated – or taken up – at the time of its first sitting. Nor does any other provision of the Treaties point to this conclusion.

30. Moreover, the EP acts by a simple majority of the votes cast (Article 231 TFEU) and under the EP’s own Rules of Procedure a quorum for the EP shall exist when just one third of the component MEPs are present in the Chamber (Rule 168(2)). The failure of one Member State to hold EP elections or take up its allocated seats could not therefore prevent the EP from satisfying its own quorum requirements.

31. More broadly, it would be a remarkable outcome if one disaffected Member State were able to place a block on all EU legislative activity by failing to hold EP elections in a timely manner. We cannot believe that this result would be held to follow were the matter to be tested before the CJEU.

32. Our view is therefore that any acts adopted by the EP would continue to be valid, even if one Member State were to fail to hold elections, and take up, its allocated seats. Our view is shared by the EP’s own Legal Service, which in Opinions of September 2017 and February 2019 concluded that *“the possibility for the European Parliament to be validly constituted following the 2019 elections would not be affected by a potential failure of the UK to organise elections”*.

THE SPECIAL CIRCUMSTANCES OF BREXIT

33. For the reasons just given, it seems to us plain that not to hold EP elections in the UK in May 2019 would neither disqualify the UK from continued EU membership, nor affect the validity of acts of

⁵ See, in particular, a leaked “Room Document” of 15 March 2019, seemingly prepared by the EU Council, §7.

the new EP. It remains to ask whether such an omission would necessarily place the UK in breach of the Treaty, Convention and Charter provisions identified at §§14-21 above.

34. There are, as it seems to us, powerful arguments that it would not. In that context, particular regard is to be had to the Treaty provisions on democratic principles (TEU, Title II), notably the principle of representative democracy in Article 10 TEU, and to the particular circumstances of a departing Member State.

The application of democratic principles

35. The point may be illustrated by the following example. If the UK had lodged its Article 50 notification not on 29 March but on 3 July 2017, the two-year notification period would have expired on 3 July 2019. Assuming no earlier departure, and no extension, the UK would thus be leaving the EU on 3 July 2019, after a single day of the first plenary session of the new Parliament. It would be obviously pointless to require EP elections to be organised for a single day of parliamentary activity. If the Treaties could possibly be read as avoiding such an outcome, they surely would be.

36. Similar factors would apply in the situation with which we are faced today, were the Article 50 period to be extended beyond the time set for EP elections. The shorter the period of any extension, the weaker the democratic case for requiring a departing Member State to send MEPs to the new EP. Thus:

- (1) MEPs are elected for five years to take decisions relating to the future of the EU. These will include, in the near future, electing by a majority of its members the President who will serve the Commission from 2019 to 2024, and giving its consent to the appointment of the High Representative for Foreign Affairs and Security Policy and the other members of the Commission; deliberating on the Multi-Annual Financial Framework that will set the budget of the EU from 2021-2027; and passing into law regulations and directives that will form the body of EU law for years to come. The eventual approval of any future relationship between the EU and the UK may also fall to the new cohort of MEPs, if that is agreed during their tenure.
- (2) In sharp contrast to the position of those Member States who remain, the position of a departing Member State is defined by the fact that by its own choice, it will *not* be participating in the future of the EU.
- (3) It is thus, to put it at its lowest, unnecessary as a matter of democratic principle for a departing Member State to send representatives to a legislature whose function is to take decisions only for states that will remain members of the EU.

(4) For a departing Member State to send representatives to a new EP might indeed be considered antithetical to democratic principle. Such representatives, not accountable to the remaining citizens of the EU, would lack legitimacy as regards the resolution of issues whose consequences would not be felt by their constituents.

37. Similar logic underpins the Withdrawal Agreement that has been negotiated and agreed between the EU and the UK. During a transitional period that may last (if extended) until as late as 31 December 2022, it provides that “*Union law, including international agreements, should be applicable to and in the United Kingdom, and, as a general rule, with the same effect as regards the Member States*” (preamble). Yet Article 7 of the Withdrawal Agreement provides that no MEPs are to be elected from the UK. Whilst it is true that the UK will not in strict law be an EU Member State during the transitional period, the acceptance of these arrangements by all EU governments strongly endorses the position that the principle of representative democracy does not require the UK as a departing Member State to be represented in the EP.

Overcoming the Treaty and ECHR obstacles to a suspension of EP elections in the UK

38. For the reasons given above, had Article 50 made express provision for a departing Member State not to participate in EP elections during the notification period, it would in our view have been uncontroversial as an acceptable derogation from the Treaty provisions on EP elections and direct representation.

39. In the absence of such express provision, it is necessary to ask whether insuperable legal problems would be presented by the Treaty and other rules of law, which we have discussed at §§14-21 above, that in normal circumstances would require the holding of EP elections by the UK. We do not think so, for the following reasons.

40. Of the three categories of provision outlined in §§15-19 above, neither the second (non-discrimination provisions) nor third (provisions governing the organisation of EP elections) categories go to the circumstances in which EP elections must be held. In our view, therefore, these provisions would not be contravened by a Member State which fails to hold EP elections. A Member State which failed to hold EP elections would *prima facie* act in breach of provisions in first category, which guarantee the right to vote in EP elections. Nevertheless, as we have pointed out, the right to vote which is guaranteed by those provisions is not absolute, and may be subject to proportionate limitations. The same goes for the right to vote in A3P1.

41. In our view, there is a powerful argument that suspending the UK’s obligations to hold EP elections would be proportionate in the current circumstances, given the impending withdrawal of the UK and the consequences which that has for democratic principles, as discussed in §§35-37 above. We note in this context that the UK would be effecting a limited suspension of its participation in

the EP elections pending further consideration of its withdrawal from the EU rather than taking the altogether more serious step of refusing to hold EP elections whilst intending to remain a Member State of the EU.

42. If we are right about this, it follows that the UK's obligation to participate in EP elections could be suspended by employing existing mechanisms within the Treaties, and – crucially – without the need for Treaty amendment. We explore this in the following section of the Opinion. It would be necessary for at least one such mechanism to be employed, in order to ensure that the limitation of the right to vote entailed in the suspension of the UK's participation in EP elections is "*prescribed by law*".

POSSIBLE LEGAL BASES FOR SUSPENDING THE UK'S OBLIGATION TO PARTICIPATE IN EP ELECTIONS, WITHOUT TREATY AMENDMENT

Article 50 TEU

43. The starting point is the recent CJEU decision in the *Wightman* case (Case C-621/18 *Wightman v Secretary of State for Exiting the European Union*, ECLI:EU:C:2018:999), which concerned the ability of the UK to revoke Article 50 should it choose to do so. Of importance in this context, are the CJEU's findings that:

- (1) Article 50 pursues two objectives: first, it enshrines "*the sovereign right of a Member State to withdraw from the European Union*"; and second, it establishes "*a procedure to enable such a withdrawal to take place in an orderly fashion*" (§56).
- (2) Article 50 has to be interpreted having regard to the "*values of liberty and democracy ... which ... form part of the very foundations of the European Union legal order*" (§62).
- (3) Notwithstanding that Article 50 does not "*explicitly address the subject of revocation*" (§49), it is nonetheless the case that a withdrawing Member State "*has a right to revoke the notification of its intention to withdraw from the EU*" which can be exercised unilaterally for as long as the two-year period laid down in Article 50(3), or any agreed extension period, has not expired (§§57-58).

44. It is therefore clear from the *Wightman* decision that it is possible to imply powers, that are not expressly mentioned on its face, into Article 50 where that is necessary to give effect to its objectives. These include the objective of ensuring the orderly withdrawal from the EU of a state which has notified its withdrawal under Article 50.

Article 50(2)

45. Article 50(2) provides for the conclusion of an agreement between the EU and the departing state “*setting out the arrangements for its withdrawal*”. The hypothesis underlying this Opinion is that the existing Withdrawal Agreement is not approved by the House of Commons and therefore cannot be ratified by the UK. In those circumstances, the UK could of course leave the EU without any Article 50(2) agreement in place, but it must at least be open to the UK and the EU under Article 50(2) to seek to conclude a different agreement. Further, such an agreement could in our view be concluded in different parts or stages, at different times prior to the UK’s departure. Although Article 50(2) refers to “*an agreement*” and “*that agreement*” and states that “[*i*]t shall be concluded”, it would be unduly formalistic to regard those words as necessitating a single agreement concluded all at one time.
46. It would, on that basis, be open to the UK and the EU (acting by the Council, by qualified majority, after obtaining the consent of the EP) to agree in the first instance that the UK shall suspend its participation in elections to the EP, as part of the arrangements for the UK’s withdrawal from the EU. Should it be possible for further arrangements to be agreed, and ratified by both parties, prior to the UK’s withdrawal then these may be consolidated with the agreement in respect of the EP.
47. This route to suspending the UK’s participation in the EP elections may be reconciled with current Treaty provisions governing such elections on two alternative bases. First, for the reasons explained above, we are of the view that such a suspension could be regarded as a legitimate and lawful limitation on citizens’ rights to vote in EP elections, entirely consistent with the Treaty and Charter provisions governing such elections.
48. Second, and alternatively, the Article 50(2) agreement may be regarded as having the effect of modifying the existing provisions of the Treaties, insofar as they apply to the UK as a departing State. Indeed, that is how the current Withdrawal Agreement operates. That agreement extends the effect of many provisions of the Treaties and secondary EU law to the UK, in whole or in part, during the transition period for which it provides. To take one specific example of modification of the Treaties, Article 4 of Protocol No. 5 to the TFEU provides for the UK to be a capital subscriber to the European Investment Bank in the stated amount, but Article 149 of the Withdrawal Agreement provides for the UK’s capital subscription to be repaid. In the same way, we think a revised Withdrawal Agreement could lawfully suspend or postpone the UK’s participation in the EP elections. The only difference would be that the new Article 50(2) agreement would make provision which takes effect before the departure of the notifying state. We do not see that as an insuperable difficulty: what is critical is that the relevant provision is an arrangement for withdrawal; not the precise time at which the arrangement takes effect.

49. However, even if that were considered to be a difficulty, one other potential advantage of reliance upon Article 50(2) may be that the Council would have the ability to authorise the provisional application of the agreement before it formally enters into force (that is, before the EP consents to the agreement, or before the UK has left the EU). That power is integral to the scheme for negotiation of international agreements and agreements with third countries under Article 218 TFEU, a scheme which is at least in part adopted for the negotiation of an Article 50 withdrawal agreement – see the reference to Article 218(3) TFEU in Article 50(2). The power to apply an Article 50(2) agreement suspending the UK’s participation in EP elections before it comes into force would enable the position regarding the forthcoming EP elections to be clarified very quickly indeed.

Article 50(3)

50. Article 50(3) empowers the European Council, acting unanimously and in agreement with the withdrawing Member State, to decide to extend the two-year Article 50 notification and withdrawal period. It is clear from the extension decision taken by the European Council on 21 March 2019 that any extension agreed by it can be subject to conditions (in that an extension until 22 May 2019 is conditional upon the Withdrawal Agreement being approved by the House of Commons). It seems to us that if the European Council considered that a postponement or suspension of EP elections in the UK was necessary in order to achieve: (1) a further extension of the UK’s membership of the EU; and (2) the UK’s orderly exit from the EU, then Article 50(3), read purposively, in the light of *Wightman*, could provide a legal basis for that outcome.

51. This route has the attraction that the suspension of the UK’s participation in EP elections would be treated – in closer alignment with the reality of the situation – as a consequence of the extension of the UK’s membership of the EU beyond the two year Article 50(3) period, rather than as an adjustment which is necessitated by the UK’s departure from the EU. We would repeat the points made in §§38-42 above as to the compatibility of such a suspension with current Treaty, Charter and ECHR law governing elections to the EP.

Article 223 TFEU and an amendment to the 1976 Act

52. Next, it seems to us that it would be possible for the EU institutions to amend the 1976 Act so as to provide for a suspension of the UK’s participation in the EP elections. Such an amendment could take the form of provision specific to the UK, in the light of its impending withdrawal from the EU, or a more general provision which applied to any Member State which had given notification pursuant to Article 50 that it wishes to leave the EU.

53. The legal basis for amendments to the 1976 Act is Article 223 TFEU. Article 223 requires the enactment of legislation to lay down the provisions necessary for the election of MEPs by direct

universal suffrage “*in accordance with a uniform procedure in all Member States or in accordance with principles common to all Member States*”. Although the 1976 Act when originally adopted was an act of the Heads of State and Government of the then European Economic Community, it has subsequently been amended, pursuant to the procedure now set out in Article 223, by Council Decision 2002/772/EC (“**the 2002 decision**”), as well as by various Acts of Accession.

54. Article 14(3) TEU stipulates that MEPs shall be elected for a term of five years but it is the 1976 Act, as amended by the 2002 decision, which regulates the timing of EP elections. As explained at §22 above, it already provides for a limited delay in the holding of elections to the EP, in circumstances where it proves impossible to hold elections during the electoral period fixed by the Council; and for the elections to be brought forward in similar circumstances (Article 11(2)). The 1976 Act also makes certain provision which is specific to individual Member States – see Article 7(2), for example, which permitted MPs in the UK and Ireland to also sit as MEPs for a limited period, by way of derogation from the general rule which prohibits that kind of dual mandate. All of this is, we must assume, compatible with the election of MEPs in accordance with a “*uniform procedure*” or with “*common principles*”, as required by Article 223.
55. In our view, therefore, it would be possible to amend the 1976 Act so as to permit the UK to suspend its participation in the forthcoming EP elections in a manner which is consistent with the existing reach of the 1976 Act and so also compatible with Article 223. Those elections would not be cancelled in the UK for all time but would simply not take place during the electoral period stipulated by the Council under Article 11(1), or the varied period permitted by Article 11(2). It is at least a possible future scenario that the UK will remain a Member State of the EU for a considerable period, if not indefinitely, in which case it may well be appropriate for the EP elections then to be held in the UK. Meanwhile, the EP elections would proceed in the other Member States, most likely on the basis of the current (i.e. 2014-2019) allocation of EP seats to Member States (although whether it was appropriate for the post-Brexit allocation to be adopted instead would be a matter for consideration by the Council).
56. Whether the suspension of the UK’s participation in the EP elections was permitted by new terms of the 1976 Act which are specific to the UK, or which apply more generally in the case of a departing Member State, the 1976 Act could reasonably be said to continue to make provision for elections to the EP in accordance with a uniform procedure or with common principles. We refer again the principles of democratic government as they seem to us to apply to the participation of a departing Member State.
57. As to how any such amendment to the 1976 Act would have to be made, the procedure specified in Article 223 TFEU is somewhat unusual, but appears to have been put in place, and to have worked, without the formality otherwise required for Treaty change. Whilst the 1976 Act has

been described as having Treaty status,⁶ Article 223 TFEU allows for the Act to be amended by way of a decision of the Council acting unanimously, after obtaining the consent of a majority of MEPs. That decision, once adopted by the Council, must be approved by all of the Member States “in accordance with their respective constitutional requirements”. Article 223 provides that the amendments will not come into force until that is done. Whatever the exact requirements in each of the Member States, since the amendments in question would only affect the conduct of EP elections in the UK, and would not oblige any other Member State to change its domestic law, such constitutional requirements in other Member States ought to be limited, and certainly more limited than those which conventionally apply to Treaty change. In other words, it seems to us that once a Council Decision adopting the amendments had been made, the further step of obtaining Member State approval ought to be straightforward.

58. Finally, it seems to us that an amendment to the 1976 Act to suspend the participation of the UK in the EP elections would be compatible not only with Article 223 TFEU but also with other Treaty provisions governing the holding of EP elections (for the reasons we have already given at §§38-42 above), and also that this could (if necessary) be made express in a later Treaty amendment. In any event, we note that there is powerful authority that “*the 1976 Act cannot be challenged before the [CJEU] for the very reason that it is not a “normal” act of the Community, but is a treaty within the Community legal order*” (*Matthews v UK*, §33). On the basis of that authority, the EU institutions could be reasonably confident that a duly enacted change to the 1976 Act could not be successfully challenged in subsequent legal proceedings.

A decision of the Heads of State or Government

59. As we have made clear, it is our opinion that there are powerful arguments in favour of these routes to suspending the UK’s participation in EP elections being compatible with the relevant Treaty and ECHR provisions.

60. However, should there be any doubt about that, we recall that the European Council has in the past sought to address similar doubt as to Treaty compatibility by concluding a decision of the Heads of State or Government.

61. This is a mechanism by which the Heads of State or Government can express their views as to how the Treaties should be interpreted and commit to future Treaty amendment. In the past, decisions of this type have enabled the European Council to proceed on its desired course without delay, but also to guard against future legal challenge. That was done, for example, in the arrangements adopted in June 2009 to provide reassurance and to respond to concerns of the Irish people

⁶ *Matthews v United Kingdom* (1999) 28 EHRR 361, §33; see also Lenaerts et al ‘EU Procedural Law’ (Oxford, 2014) at §6.06, which recognises a category of “*other Union instruments having Treaty status*” into which the 1976 Act is said to fall.

regarding the Treaty of Lisbon, which were deemed to be compatible with the Treaties when they were adopted but were ultimately given force in Protocol No. 35 to the TFEU in 2013.⁷ Similarly, the arrangements which the European Council agreed with the UK to come into force in the event that the UK decided to remain a member of the EU contained a number of commitments to future legal reform, including by way of Treaty change, notwithstanding the view expressed by the Heads of State and Government that those commitments were compatible with the existing Treaties.⁸

62. To the extent that there is any residual doubt about the Treaty compatibility of suspending the UK's participation in EP elections, this could be addressed via a similar decision.

CONCLUSIONS

63. Our advice is summarised at §§7-13 above. In essence, we have identified a number of legal mechanisms, falling short of Treaty change, by which the UK's notification period under Article 50 TEU could be subject to further lawful extension without the UK holding elections to the European Parliament ("EP") in May 2019.



LORD ANDERSON OF IPSWICH K.B.E. Q.C.



JASON COPPEL Q.C.



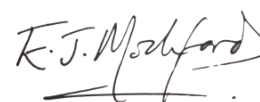
PHILIP MOSER Q.C.



PROFESSOR PIET EECKHOUT



MARIE DEMETRIOU Q.C.



EMMA MOCKFORD

28 March 2019

⁷ Decision of the Heads of State or Government of the 27 Member States of the European Union, meeting within the European Council, on the concerns of the Irish people on the Treaty of Lisbon; and see §§4-5 of the Presidency Conclusions of the Brussels European Council (18/19 June 2009).

⁸ Decision of the Heads of State or Government, meeting within the European Council, concerning a new settlement for the United Kingdom within the European Union; and see §§2-3 of the Conclusions of the European Council meeting of 18 and 19 February 2016.