

As some of your Lordships will know, I have a particular interest in the legal aspects of Brexit. Depending on the votes today in the House of Commons, important legal issues may arise under the Benn Act, the European Union (Withdrawal) (No. 2) Act 2019. If the House of Commons today approves the amendment tabled by Sir Oliver Letwin withholding approval of the Prime Minister's deal unless and until the implementation Bill is passed in the next two weeks, or if it rejects the Prime Minister's deal, the Prime Minister has a legal obligation to send the prescribed letter to the President of the European Council by the end of today. He must seek an extension under Article 50 until 31 January next year.

The Minister, the noble Lord, Lord Callanan, has repeatedly told this House that the Prime Minister would comply with the law and has repeatedly resisted the request to amplify what he understands that to mean. This legal obligation would require the Prime Minister personally to send the prescribed letter—the Act sets out the letter—by midnight. In my view, the Prime Minister has that duty irrespective of the purpose of the extension to which the Act refers—a point to which the noble and learned Lord, Lord Mackay of Clashfern, referred a few moments ago. If the EU offers an extension, it must be accepted in accordance with Section 3 of the Benn Act. The Prime Minister would have a legal duty not to frustrate the Benn Act by adding some other phrases to the letter or sending another, conflicting letter. If the Prime Minister did not comply with this legal duty, I do not see how any reputable Attorney-General or Lord Chancellor could remain in post.

The Benn Act, however, does not, and could not, oblige the European Council to grant an extension, and nor does it prevent the Prime Minister reminding the EU member states that he does not want an extension, wants to leave on 31 October and is sending the letter only because Parliament has required him to do so. I do not see that the Benn Act can sensibly be interpreted as requiring the Prime Minister to abandon his policy objectives.

There is a very fine line between not frustrating the Benn Act and the Prime Minister making clear to other EU leaders that his policy is unchanged. What if the Prime Minister telephones another EU leader on Monday and encourages him or her to oppose or even veto an extension? That would be an interesting Supreme Court case.

Section 1(4) of the Benn Act says:

“The Prime Minister must seek to obtain from the European Council an extension”,

but it then adds how he must seek an extension—

“by sending to the President of the European Council a letter”.

I doubt that the courts would interpret the Benn Act as also requiring the Prime Minister to refrain from pursuing his policy objectives by other political means.

What if the Supreme Court in the next two weeks were to hold that the Prime Minister has acted unlawfully by breaching the Benn Act and persuading the EU not to offer an extension? As a matter of EU law, would we still be treated as leaving on 31 October because the EU has not offered an extension, or would the requirement in Article 50.1 be determinative? I quote:

“Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements”.

That question would have to be decided by the Court of Justice of the European Union.

*(Source: Hansard)*