

SIR WILLIAM CASH, M.P.



HOUSE OF COMMONS

LONDON SW1A 0AA

His Excellency Mr Donald Tusk

President of the European Council

URGENT

9 April 2019

Dear Mr Tusk,

I am the Chairman of the European Scrutiny Committee of the House of Commons, writing in a personal capacity. I would ask that this letter be taken into account during the deliberations of the European Council on 10 April 2019. I can assure you I have had very substantive agreement and support from preminent lawyers for its analysis and content.

It has been widely reported that the Council may propose that the period under Article 50(3) be very significantly extended, perhaps by a year.

I would like to bring to your attention my grave concern as to whether the British Government could lawfully agree to such an extension on the UK's behalf; and my expectation that any such agreement would be likely to be the subject of a legal challenge in the British courts, thus further prolonging the uncertainty surrounding the UK's exit from the EU. My reasons are as follows.

It is a fundamental principle of British constitutional law that the Government may not use their powers—including their powers to make international agreements—so as to frustrate the intention of Parliament.¹ For this purpose, Parliament's intention is to be found, and is only to be found, in the laws it makes, i.e. in Acts of Parliament. Resolutions of the House of Commons may sometimes be politically important but they are of no legal effect at all, unless an Act of Parliament expressly gives them legal effect.²

¹ *R. (on the application of Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [2018] A.C. 61, [2017] 2 C.M.L.R. 15.

² *Laker Airways Ltd. v Department of Trade* [1977] Q.B. 643. The only legally-relevant resolution would be the one required by the European Union (Withdrawal) Act 2018 before the Government may lawfully ratify a withdrawal agreement.

The intention of Parliament is, and remains still, that the UK must leave the EU. This is clear from the European Union (Notification of Withdrawal) Act 2017, in which Parliament referred to and declared '*the United Kingdom's intention to withdraw from the EU*', and from the European Union (Withdrawal) Act 2018, which gives detailed effect to the decision to withdraw, including by repeatedly referring to '*exit day*'. Parliament set that day expressly as 29 March 2019, but has recently agreed to its extension to 12 April 2019 in accordance with the Council Decision of 22 March 2019.

It is very important to note that Parliament's legal intention for the UK to leave the EU is *not* conditional upon a withdrawal agreement. While many members of the House of Commons have said that they do not want the UK to leave without a withdrawal agreement, and indeed the House has passed a resolution stating this, the *law* of the United Kingdom is not qualified in this way. Our law is simply that the UK must leave the EU.

It follows that when the Prime Minister exercises her power to act for the UK at the meeting of the Council scheduled for Wednesday this week, she is *obliged* under our law to refrain from doing anything that would frustrate the intention of Parliament that the UK must leave the EU with or without a withdrawal agreement.

These are manifest limitations on the Prime Minister's competence. They concern rules of UK internal constitutional law of fundamental importance.

In these circumstances, I believe that it would be impossible for the Prime Minister, acting lawfully under UK law, to accept any proposal for a long extension. First, the Prime Minister's own stated position is that

'a long extension ... would at least delay and could destroy Brexit.'

(Hansard (Commons), 29 March 2019, col. 768.)

For the Prime Minister to agree to such an extension in these circumstances would be for her knowingly to use her power in a way that she *herself* believes would risk frustrating Parliament's intention that the UK must leave the EU. This would be legally unacceptable.

Secondly, it is quite obvious from her letter to you of 5 April 2019 that the Prime Minister has absolutely no plan regarding the purpose of any extension, let alone a long extension, other than a hope that some consensus may finally be reached in the House of Commons about proposed revisions to the Political Declaration. This is no reasonable basis for agreeing to a long extension that would frustrate the fulfilment of Parliament's intention by an indefinite period of up to a year.

There is a clear legal route for the legislative will of Parliament to be delivered: the UK can exercise its legal entitlement to leave the EU on 12 April 2019 in accordance with Article 50(3). A long extension, without any rationale for how it is needed in order to deliver the UK's exit from the EU, is simply not something to which the Prime Minister can lawfully agree. It would amount to a deliberate decision to frustrate the clearly-expressed will of Parliament as a matter of the rule of law.

As you know, and as you would expect of any Member State, the UK Government's use of their competences—including the so-called '*prerogative*' powers under which international

relations are conducted—is capable of being challenged in the UK courts to ensure that they are used lawfully.³

I must ask you to note that in these circumstances any decision by the Prime Minister to accept any offer of a long extension is likely to be the subject of legal challenge in the UK courts.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'William Cash', written in a cursive style.

Sir William Cash MP

³ *Council of Civil Service Unions v Minister for the Civil Service* [1985] A.C. 374.