

The Brexit Endgame

A guide to the parliamentary process of
withdrawal from the European Union



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Foreword

As should now be clear to everyone, the process of leaving the European is not straightforward. With six months to go, it is still not obvious that the UK and EU will agree on a withdrawal agreement that will allow Brexit to happen in an orderly fashion. Moreover, as this report illustrates all too clearly, striking a deal will be only the start of what promises to be a complex and unpredictable parliamentary process.

In this exhaustive report, Matt Bevington, Jack Simson Caird and Alan Wager have gone to great lengths to meticulously examine the nooks and crannies of parliamentary procedure to give an insight into how this process might work. Leaving to one side the vicissitudes of party politics, which, frankly, merit a report in their own right, they lay bare the complexities of the parliamentary approval process that lies ahead, and lay out the alternative paths that this might follow.

I am extremely grateful to all three of them for the hours of hard work they put into drafting this report and responding patiently to the various (doubtless seemingly endless) queries that arose from earlier drafts. The report they have produced is a model of the kind of rigorous and informed research that we at the UK in a Changing Europe aspire to produce. They have every right to be proud of the final product, and I hope you enjoy it and learn as much from it as did I.

Anand Menon, Director, The UK in a Changing Europe

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Watch our countdown to Brexit video here: <http://ukandeu.ac.uk/multimedia/countdown-to-brexit>



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Key Findings

The Meaningful Vote

- The ‘meaningful vote’ in the Commons is more than a simple choice between deal or no deal.
- If the Commons decides not to approve the Withdrawal Agreement and the Political Declaration, the government could make a second attempt to get them approved.
- There are a number of ways that the Commons could register its approval or rejection of the agreements, as follows.
- The motion on the Withdrawal Agreement and the Political Declaration will be amendable. This means MPs could, for example, amend it to register their approval of the Withdrawal Agreement but reject the Political Declaration.
- MPs could also amend the motion to insert further procedural hurdles into the process. For example, they could add a requirement for a referendum to be held before exit day.
- If the Commons approves the Political Declaration, this will not settle the debate on the contents of the Treaty on the Future Relationship. The Political Declaration is, as the name suggests, a political agreement and not a treaty, which will be negotiated, approved and implemented after exit day. The UK Parliament’s role in that process is not yet clear.
- Even if the Commons approves the Withdrawal Agreement and the Political Declaration without amendments, MPs could still try to get the government to change its approach to Brexit. They could try to secure concessions from the government as a price for agreeing to vote for the government’s motion, such as the guarantee of a meaningful vote on the Treaty on the Future Relationship.

The Withdrawal Agreement Bill

- If the ‘meaningful vote’ on the Withdrawal Agreement is approved, the Commons will have a second opportunity to reject the deal when the EU (Withdrawal Agreement) Bill, which will convert the agreement into UK law, is being scrutinised.
- MPs will be able to propose amendments to this Bill. Votes on these amendments could enable MPs to influence the Brexit process. Line-by-line scrutiny of the Northern Ireland and Ireland Protocol in the Commons, in the form it is implemented by EU (Withdrawal Agreement) Bill, could create a potential flashpoint. It could also enable parliamentarians to extract legally binding concessions from the government.

- The fact that parliament will have to approve the Withdrawal Agreement (through the resolution) prior to EU (Withdrawal Agreement) Bill being introduced will create a powerful political narrative around the debate: MPs will have already approved the Withdrawal Agreement, and the government will say that EU (Withdrawal Agreement) Bill is simply designed to give effect to that treaty and enables the UK to honour its commitments in that treaty.

The Fixed-term Parliaments Act

- The Fixed-term Parliaments Act (FTPA) makes a general election less likely before exit day. There are now only three ways to trigger a general election: if the Commons votes by a two-thirds majority for one; if a motion is passed with the specific wording set out in the FTPA; or, less likely, if the FTPA is overturned.
- This makes it harder for the government to force through an agreement by threatening Conservative MPs with a general election.
- The Prime Minister's leverage comes from the Article 50 deadline, the threat of her potential resignation and the political alternatives this would likely create, along with the government's ability to control the parliamentary schedule.
- Mrs May can wait until the last minute to push the deal through Parliament, making MPs' choice effectively deal or no deal.
- If the government loses a confidence vote as set out in the FTPA, this would be due either to the collapse of its deal with the DUP or Conservative MPs voting against the government. This would not mean the Prime Minister's inevitable resignation, and Mrs May could remain as Prime Minister until an alternative emerged or a new parliamentary majority was created.

The EU institutions

- It is highly likely that the EU institutions will pass the Withdrawal Agreement, assuming a deal is reached.
- In the best-case scenario, ratification of the deal will spill over into early 2019. The latest point at which a deal will need to be reached and approved by the UK Parliament to allow a comfortable amount of time for ratification on the EU side is mid-January.
- This could be extended by a month or so, to mid-February, with a short extension of Article 50. The final point at which the European Parliament will be able to vote on the deal in any scenario before the next elections is 18 April.
- Nevertheless, it will not be procedural constraints on either side that will hold back the ratification of the deal. There are emergency mechanisms available to rush a deal through *in extremis*. Politics will be the deciding factor in whether or not a deal is completed.
- The Political Declaration will, by necessity, be just that – political. If the Withdrawal Agreement contains a legal commitment to turn the Political Declaration into a treaty, this will not change the status of the Political Declaration. The Treaty on the Future Relationship will have to be approved by the European Parliament, and likely the parliaments of the member states, after exit day.



Introduction

In the final six months before exit day, parliament will have the opportunity to take back control of Brexit. Once the Withdrawal Agreement and the Political Declaration are published, an intense period of parliamentary scrutiny and debate will begin, which could throw up all sorts of challenges for the government. This report aims to provide a guide on the role that parliament, and the EU institutions, will play between now and exit day.

As the UK gears up for the prospect of either a managed and negotiated exit from the European Union or no exit deal at all, it is important that we gain a picture of what can, and is likely to, be done to shape the outcome. We can't predict the future, but we can show what that future will have to contend with. We're describing the car, not saying how it's going to be driven.

This report puts the often arcane – and always confusing – protocol of parliament in the spotlight. There is a key paradox to Brexit: it was a public policy decision ultimately decided away from the corridors of Westminster which MPs must now translate into political and legal reality through the complex operating procedures of the House of Commons. There is a similar paradox in relation to the EU's own approval processes. The European Parliament gets little coverage in political debate in the UK, but its role in the Brexit process will see it take centre stage. The terminology and language of both the UK and EU's parliamentary procedures can often be disorientating. Ultimately, these are questions about the process, rather than the substance, of Brexit. But these questions are absolutely central to where we are likely to end up come 29 March 2019. We have attempted to present our understanding of the processes involved in a way that makes it accessible and comprehensible.

The report covers the following aspects of the process:

- Section 13 of the EU (Withdrawal) Act 2018
- The EU (Withdrawal Agreement) Bill
- The Fixed-term Parliaments Act 2011
- The EU Institutions



Section 13 of the EU (Withdrawal) Act 2018

In the absence of a codified constitution in the UK, parliament's constitutional role is often contested. Where it isn't, the rules are not always easy to find or understand. Yet, even in this context, Brexit is a special case. parliament's role in the Brexit process has been fraught from the outset.

Section 13 of the EU (Withdrawal) Act 2018, which provides the basic rules on the Commons' role in approving the Withdrawal Agreement, is the product of a long domestic political battle over the 'meaningful vote'. That battle focused on the precise role that the Commons should play. Its very existence is a sign of the influence that parliament has been able to exert over the process. However, it is not yet clear whether this provision achieves what its proponents hoped it would.

Parliament v government: the battle to take control of Brexit

In the summer of 2016, the government argued that parliament did not have to legislate to authorise the triggering of Article 50. The government lost that fight in the Supreme Court the following January. The battle then turned to the role that parliament would play in approving the Withdrawal Agreement once the final text is approved by the European Commission and the UK government.

Early in 2017, the UK government committed to giving parliament the opportunity to approve the Withdrawal Agreement. However, not all parliamentary processes for approving treaties are created equally. Under the terms of the Constitutional Reform and Governance Act 2010, the Commons can block the ratification of a treaty; however, the 2010 Act does not provide the Commons with a guaranteed right to a vote to approve a treaty.

The government promise to hold a vote on the Withdrawal Agreement was vague and could have meant a number of different things. At one point it was even suggested that the vote might take place after the UK had left the EU. This was in stark contrast to the legal guarantees enjoyed by the European Parliament under Article 50. Pressure was put on the government to set out in precise terms the role that the UK Parliament would play. A key driver was a desire for the UK Parliament to have the equivalent legal powers to approve or veto the terms of withdrawal as enjoyed by the European Parliament.

In early 2017, the Labour Party sought to draw attention to this by calling for a 'meaningful vote' on the Withdrawal Agreement. The idea of a meaningful vote was that the approval process should not be on a 'take it or leave it' basis, as the government has proposed. There should be, Labour argued, an opportunity for parliament to insist that the government return to the negotiations to secure substantive changes to the Withdrawal Agreement.

The government also faced pressure from its own backbenchers on the details of the parliamentary approval process. Their concerns focused on two connected questions:

- Would the approval vote be held on a 'deal or no deal' basis?
- In the event the Commons voted not to approve the agreement, would this trigger a no deal exit scenario?

Both the Labour Party and the Conservative 'Remainer' rebels sought to argue that parliament should

be able to reject the Withdrawal Agreement without triggering a no deal exit. Instead, they argued that a rejection from the Commons should prompt the government to seek to secure changes to the Withdrawal Agreement (and/or the Political Declaration). Once such changes were secured, the government could then seek Commons approval a second time.

The government's position is that any Commons vote on the agreements will be held on a binary deal or no deal basis. The foundation of this position is that under the terms of Article 50, two years from the date that Article 50 was triggered, the UK will cease to be a member state (11pm, 29 March 2019). The deadline can only be extended by unanimous agreement of the 27 other member states, or if the Withdrawal Agreement specifies another date. The basic point is that parliament cannot control how the government would respond to the Commons' rejection of the agreements. If the Commons rejected the agreements, the government could refuse to seek an Article 50 extension, or even if one was sought it could be refused, and in both cases the default position is that a 'no deal' exit would be the result. In neither scenario could parliament itself prevent this form of Brexit from occurring.

The Commons and the Lords fight back

The battle in parliament during the passage of the EU (Withdrawal) Act 2018 focused on whether the government's commitment to hold a 'meaningful vote' should be set out in statute, and in what form.

The real battle over the legislative procedure began when the EU (Withdrawal) Bill returned to the Commons from the Lords. The Lords amended the Bill to add a clause – known as the 'Hailsham amendment' – which would enable the Commons, in three different scenarios where a deal wouldn't be approved, to give a binding negotiating direction to the government:

- If the government judged that a deal was not possible;
- If no deal had been reached by a certain date; or
- If parliament rejected the government's negotiated agreement.

The aim was to ensure that, if negotiations broke down or the Commons rejected the Withdrawal Agreement, the government could be instructed to take a position that would avoid the UK leaving the EU without a deal. If passed in the Commons, this statutory procedure would have been constitutionally unprecedented and a major restriction on the government's prerogative power to conduct treaty negotiations. The government fiercely resisted this amendment. However, the government was forced to produce a compromise amendment, largely due to pressure from Conservative rebel MPs, and this is what became section 13 of the final Act.

The government's solution stipulated that in each of the three non-approval scenarios a government must put forward a 'motion in neutral terms' which states that the Commons has considered the government's statement on the next steps in the Article 50 process. This was a long way from the Commons issuing binding negotiating directives.

Much of the focus of the debate was on whether the requirement for a motion in neutral terms would mean that the motion would or would not be able to be amended. The logic being that if it was amendable the Commons could use the motion as an opportunity to issue an instruction to the government on the process or substance of the negotiations.

By including the words 'in neutral terms' the government had sought to avoid that scenario, as the Standing Orders say that neutrally worded motions cannot be amended. When this was being debated in parliament, the government conceded the provision could not settle, in advance, whether or not the

motion in question could be amended. That would remain a question for the Speaker. In other words, the government's amendment could not guarantee an unamendable motion, although it did at least reveal the government's intention to make the motion unamendable.

How does section 13 of the EU (Withdrawal) Act work?

This fuss over 'neutral terms' distracted attention from other important elements of section 13. In particular, the initial process of approval of both the Withdrawal Agreement and the Political Declaration has been under-analysed. Here, we break down each of the key elements of the process:

Three documents must be published and laid before both the Commons and the Lords

Section 13 sets out three basic requirements for documents that must be laid before each House:

- A statement that political agreement has been reached;
- A copy of the negotiated Withdrawal Agreement; and
- A copy of the Political Declaration.

The first is likely to be a short written statement which sets out the basic nature of the agreement. It could also set out the likely timetable for the approval process in parliament. The statement could provide an opportunity for the government to set out its position on the status of the two agreements and provide some details on the consequences of approving both agreements.

The second is the legally binding treaty. This has been available in draft form since March 2018, so we have a sense of what it will look like if agreed. It is not clear whether the Withdrawal Agreement will be accompanied by any explanatory material, for example any material equivalent to the explanatory notes that accompany bills, and if so whether it will be written by the UK government alone or jointly with the EU. Perhaps most importantly, it is not known whether the European Union (Withdrawal Agreement) Bill, which will convert the Withdrawal Agreement into UK law, will be published alongside the Agreement itself so that the treaty's domestic implications can be debated before it is approved. On questions such as the backstop for the Irish dimension of negotiations, having sight of the domestic legislative implications could be especially significant if the government is attempting to ease concerns about the commitments in the Withdrawal Agreement.

The third document that must be laid is the Political Declaration on the future relationship. This is likely to be the most controversial of the documents in substance, legal status, form and its procedural implications. In terms of its substance, it is likely to be a short document which sets out basic principles of agreement on the nature of the future relationship. In terms of its legal status, it will not be a treaty, and so the extent to which it binds this government, and other governments, into the future is likely to be controversial.

Its form has already provoked controversy, especially in terms of the level of detail it will include. Some have argued that a detailed agreement is not possible in the time available. Others have argued that vague language will make it harder for MPs to make an informed judgment and would suggest that the substance of the future relationship is far from being finalised. If the Political Declaration is vague, this will potentially make any accompanying explanatory material from the government, particularly on the economic implications, especially significant. The vaguer the contents of the Political Declaration, the more demands there will be that the government explains how its contents will be translated into a treaty that will regulate the UK and EU's post-transition long-term economic relationship. Without this detail, the government will be criticised for pursuing a 'blind Brexit'.

However, the timetable is already relatively short. As things currently stand in the draft Withdrawal Agreement, the Political Declaration will have to be translated into a treaty, approved by the EU and the member states and implemented into UK law before December 2020. In terms of the procedure, the government said in the Chequers white paper that parliament would be able to scrutinise the Treaty (or Treaties) on the Future Relationship when implementing legislation is introduced after exit day. The crucial question on the parliamentary procedure for the future relationship is whether parliament will be granted another chance formally to approve or reject the Treaty on the Future Relationship before it is implemented. If there is to be such an opportunity, when does the government envisage this taking place?

How long between publication and the vote?

All three documents will be laid before parliament and published at the same time. The crucial question is how long this will be before parliament's meaningful vote (and surrounding debate) takes place. The provisions are silent on the timings, other than to say the approval motion should 'so far as practicable' take place before the European Parliament holds its vote under the terms of Article 50.

A matter of days to consider these important and complex documents is likely to make effective debate extremely difficult. The government will want to avoid major political battles. One way to do this would be to reduce the amount of time for scrutiny. Further, the government would like to secure parliamentary approval as soon as possible, to minimise disruption of their overall timetable, particularly in terms of enacting the EU (Withdrawal Agreement) Bill. The government could also justify the short timetable by stating that the Withdrawal Agreement can be considered in detail when the House considers the EU (Withdrawal Agreement) Bill. In terms of the Political Declaration, the government will face more difficult questions. Parliamentarians will want to know the implications for approving the Political Declaration, in particular, the parliamentary timetable for potentially approving, implementing and ratifying the Future Relationship at the end of the transition period.

Will there be enough time to ensure effective parliamentary scrutiny?

A major bone of contention could be whether parliamentary committees get the opportunity to take evidence and report on the documents before the vote is held. The political and legal significance of the agreements will mean that they will be scrutinised by a range of experts. However, in terms of parliamentary scrutiny, there is no substitute for reports from relevant select committees based on evidence and expert independent advice. Even if approving these agreements would not change domestic law directly, it cannot be doubted that the long-term legal and legislative consequences of parliamentary approval of these agreements are of a once-in-a-generation character.

The magnitude of the decision means that effective parliamentary scrutiny requires that parliamentarians can be informed by analysis from relevant parliamentary committees. David Davis' commitment as Brexit secretary to give evidence to the Exiting the European Union Committee prior to the meaningful vote was an important step, and the committee has expressed the hope that it will have time to report to the Commons on the Withdrawal Agreement. The Constitutional Affairs committee of the European Parliament (AFCO) will provide MEPs with a recommendation and a report on whether to approve the Withdrawal Agreement. The absence of a comparable input in the UK Parliament would be regrettable.

The main event: the vote on the Article 50 agreements

Subsection (1)(b) of section 13 is the most significant statutory requirement in the provision. It states that the Withdrawal Agreement can only be ratified if:

The negotiated withdrawal agreement and the framework for the Future Relationship has been approved by a resolution of the House of Commons on a motion moved by a Minister of the Crown.

There are two connected elements of this provision that are worth analysing. The first is the choice to require the approval of both the Political Declaration as well as the Withdrawal Agreement, through a single resolution. The second is to consider what constitutes approval under the terms of this provision.

Why bundle together the Withdrawal Agreement with the Political Declaration on the Future Relationship?

Since December 2017, the government has consistently referred to the ‘meaningful vote’ as Commons approval of the Article 50 agreements. The government’s approach treats the Withdrawal Agreement, a legally binding treaty, and the Political Declaration on the Future Relationship, a political agreement, as a package. The white paper on the future relationship reiterates this point when it says that the Withdrawal Agreement and the Political Declaration are “inextricably linked”. This is a product of the famous mantra of the negotiations that ‘nothing is agreed until everything is agreed’. Subsection (1) (b) of section 13 reflects this approach in that it refers to ‘a resolution’ which indicates that it requires both agreements to be approved by a single resolution. Put another way, two separate resolutions, one of which approved the Withdrawal Agreement and the other which approved the Political Declaration, would not be sufficient. There are several reasons why the government believes they should be treated as a single package:

- 1) Both are agreements negotiated through the Article 50 process, so it makes sense that the Commons approves the resulting agreements as a package.
- 2) Even if each has a different legal status, the Withdrawal Agreement’s legally binding provisions will need to be read alongside commitments in the Political Declaration. For example, the transition period and the protocol on Ireland and Northern Ireland cannot be understood in isolation from Political Declaration’s statements about the nature of the relationship that the UK and the EU will enter into once transition ends.
- 3) Another reason for seeking formal approval of the Political Declaration is to supply the government with a mandate for its approach to the future relationship. The meaningful vote, and the opportunity it presents to tie the Political Declaration to the Withdrawal Agreement, could represent the best chance of getting such a mandate for the government’s approach to the future relationship through parliament.

Yet the inclusion of an express requirement for Commons approval of the Political Declaration is problematic for at least two reasons:

First, Article 50 requires the European Parliament to approve the Withdrawal Agreement. It makes no reference to approving the Political Declaration, but merely to ‘taking into account’ the framework on the Future Relationship. The European Parliament will consider the Political Declaration because it is attached to the Withdrawal Agreement and will offer a non-binding opinion on it. If the Political Declaration is a non-legally binding element of the Withdrawal Agreement, then why does it need to be expressly approved by the Commons? The logic could be that, by doing so, if the resolution required by subsection (1)(b) of section 13 is agreed, the UK government would have a democratic mandate to negotiate the Treaty on the Future Relationship after exit day. But if the Political Declaration requires parliamentary approval at this stage, it should arguably be subject to its own separate approval process. A separate approval process could enable the UK government’s approach to post-exit negotiations on

the future relationship to be debated and scrutinised on their own terms.

Secondly, subsection (1)(b) of section 13 states that the motion approving the Withdrawal Agreement must be passed for the treaty to be ratified. The approval procedure has no direct legal effect in relation to the future relationship. Therefore, any mandate the motion confers would be of limited constitutional value, although its political weight could be significant. In this sense, the express reference to the Political Declaration on the Future Relationship is confusing in its overall constitutional effect.

The Chequers white paper indicates that the UK government would like the final version of the Withdrawal Agreement to include ‘an explicit commitment’ to turn the Political Declaration into a legally binding treaty as soon as possible. If such a commitment were included, it might enable the government to argue that the substance of the Political Declaration is legally protected at the level of international law. However, even if it were included, it would not change the basic fact that the substance of the future relationship will not be finalised, and turned into legal form, until well after exit day. If the Withdrawal Agreement does include such a commitment, it is likely to give rise to significant legal disputes in the parliamentary debate ahead of the vote. Again, in this sense such a commitment might be more hassle than its worth, as it is clear that the Political Declaration will not legally decide the content of the future relationship, at least this means that its opponents can approve the Political Declaration even if they disagree with it, safe in the knowledge that it won’t be settled until after exit day.

Parliament will have to approve domestic implementing legislation before the Treaty on the Future Relationship can come into force at the end of transition on 31 December 2020. However, the UK constitution does not require that the Commons expressly approves the Treaty on the Future Relationship itself. As a result, the reference to the Political Declaration here is likely to raise questions over whether the UK Parliament will again be granted an equivalent right, at a later date, to that of the European Parliament (which, under Article 218 of the Treaty on the Functioning of the EU, has to give its consent to international agreements). This could start another ‘meaningful vote’ debate, this time over the Treaty on the Future Relationship. parliamentarians may well want to know their rights before the vote on the Article 50 agreements takes place.

What must the Commons do to satisfy the meaningful vote conditions?

At one level this is a straightforward requirement that simply means that the Commons must pass a motion which states:

This House approves the exit agreements negotiated by Her Majesty’s government with the European Union under Article 50.

The drafting of subsection (1)(b) of section 13 suggests that the motion passed by the Commons must state that the House approves both the Withdrawal Agreement and the Political Declaration on the Future Relationship. However, the provision does not stipulate the precise words that the motion agreed by the Commons must contain. This is in striking contrast, for example, with the approach of the Fixed-term parliaments Act, which stipulates the precise words that must be agreed for a statutory vote of no confidence to be passed or for an early election otherwise to be triggered.

It will be possible to amend the motion. If it is amended, or if the government agrees to insert additional elements into the motion, this will give rise to the question of whether the motion “approves the agreements”. This could give rise to questions of interpretation.

It is certainly possible to imagine amendments which preserve the motion’s substantive approval of the agreements but seek to add certain conditions. For example, if the House of Commons wanted to approve the agreements but indicate that the approval of the Future Relationship would only be

confirmed when the final text of the Treaty was presented to parliament, and that the Commons would then have a right to approve or reject it, the final motion would look something along the following lines:

This House approves the exit agreements negotiated by Her Majesty's Government with the European Union under Article 50, *noting that the House will be able to approve or reject, after Exit Day but before the vote of the European Parliament, the Treaty on the Future Relationship.*

Such an amendment could not be reasonably interpreted as non-approval and therefore would meet the criteria in subsection (1)(b) of section 13. More difficult questions would arise if the amendment inserted any conditions which meant that further steps would be needed before exit day, and for example inserted a referendum requirement, such as:

This House approves the exit agreements negotiated by Her Majesty's government with the European Union under Article 50, *subject to the agreements being approved through a referendum being held before exit day.*

Such a resolution could reasonably be interpreted as either approval or a refusal to approve. The resolution of this point is likely to turn on whether the additional words amount to a substantive change to the original intent of the approval motion. A key hinge will be whether any conditions on approval have the potential to alter the legal effect of the Withdrawal Agreement (including by delaying its commencement). This means that additional elements which clarify or set out subsequent elements of the Brexit procedure after exit day would not necessarily amount to a substantive change. By contrast, words that in practice place a certain or possible barrier to the Withdrawal Agreement taking effect on exit day would constitute non-approval.

In practice it is right to recognise that politics is unlikely to allow for such subtleties and whether an amendment constitutes approval or non-approval is likely to depend on the way that the government whips the vote: if it claims an amendment constitutes non-approval, then the Commons is highly likely to treat it as such.

Subsection (1)(b) of section 13 provides that the motion to approve must be moved by 'a Minister of the Crown'. This means that a motion to approve the agreements moved by anyone else, a backbench MP or an opposition frontbencher, would not enable the Withdrawal Agreement to be ratified.

Amendment or concessions?

An alternative scenario would be the government itself including words in the motion as a concession to a particular concern raised by a group of MPs. This would depend on whether the concern could be reflected in the text of the motion itself.

The government could attempt to offer concessions which do not involve any change to the motion. For example, they might promise to include specific commitments in the European Union (Withdrawal Agreement) Bill. This scenario highlights the significance of the relationship between the vote based on subsection (1)(b) of section 13 and the debate on the European Union (Withdrawal Agreement) Bill. How the two interact will depend on a number of factors, including whether a draft of the European Union (Withdrawal Agreement) Bill is available when the Commons is debating the meaningful vote motion.

The government could also attempt to offer written or oral statements as concessions on particular points raised by MPs. The general point is that the government needs to secure the resolution set out in subsection (1)(b) of section 13. This will give certain MPs leverage that they can use to attempt to secure concessions. This is likely to be a more realistic way of securing a change of approach from the government rather than seeking to pass the resolution in an amended form.

A decision not to pass?

The most straightforward rule created by section 13 is that, if a majority of the Commons disagrees with the subsection (1)(b) motion, then this is a decision ‘not to pass’ as defined by subsection (3):

Subsection (4) applies if the House of Commons *decides not to pass* the resolution mentioned in subsection (1)(b). (emphasis added)

The words ‘decides not to pass’ leave open the possibility that approval could take the form of a resolution which has been amended in the Commons. Equally, a resolution passed in an amended form could be interpreted as a decision not to pass. However, if the Commons straightforwardly rejects the motion put before them, this creates a different set of implications.

What happens after a decision not to approve the Article 50 Agreements?

If the Commons makes a decision not to approve the agreements – either through a rejection, or an amended resolution that implies a refusal to approve – then subsections (4) to (14) set out the next steps. These provisions were agreed in the context of the government’s position that no parliamentary agreement on their negotiated Withdrawal Agreement and Political Declaration would mean a no deal Brexit. This position led to calls for the Commons to be able to refuse to pass the agreements *and* have to the opportunity to express a view about how the government intends to respond.

However, before examining these provisions it is worth addressing a key prior question that has implications for how they might work in practice:

Could the government have a second attempt to pass the Withdrawal Agreement and Future Relationship Framework?

The way that Section 13 is structured indicates that if the motion to approve both agreements is not approved, then there will not be a second attempt to meet the requirement of Commons’ approval. However, there is nothing in the provision that means a second attempt could not, in theory, be made. Considering what is at stake, if the motion were rejected by a narrow margin, might the government attempt to pass it a second time?

One difficulty is the parliamentary rule, set out in Erskine May – the authoritative guide to how parliament works – that “a motion, which is the same in substance, as a question which has been decided during a session may not be brought forward again during that same session”. This would rule out the government attempting to pass exactly the same motion.

However, could the government attempt to pass a motion that was substantively different from the first in some way, but still met the requirements of the meaningful vote motion? Erskine May says that “whether the second motion is the same or similar to the first is finally a matter for the judgment of the Chair”. In other words, it requires ingenuity but it is not impossible. Political reality might dictate that it is not possible or desirable to make a second attempt. However, as subsection (1)(b) of section 13 does not prescribe the form of words that must be agreed, it is at least possible for a second attempt to be made. With exit day approaching, and the potential for a no deal Brexit, there would be significant political pressure to allow a second attempt to be made.

A government statement and a motion in neutral terms following a decision not to pass

Subsection (4) of section 13 provides that, if the Commons rejects the subsection (1)(b) motion, a Minister must, within 21 days, make a written statement on how the government intends to proceed in the Article 50 negotiations. Subsection (6) sets out that within seven Commons sitting days thereafter,

a Minister has a duty to “make arrangements” for a motion “on neutral terms” that indicates that the Commons has considered the post-rejection statement on how to proceed in the negotiations.

The first point to make about this motion is that subsection (6) does not create a legal requirement that the Commons has to approve the government’s statement on the negotiations. This is in contrast with subsection (1)(b) which must be approved for the Withdrawal Agreement to be ratified. There would be no direct legal consequences if the Commons did or did not agree the motion on the statement. However, in political terms if the government could not get a Commons majority to approve its statement on how to proceed in the negotiations, then doubts would be raised as to whether the government could command the confidence of the Commons and deliver a legislative programme.

Breakdown in negotiations

Subsections (7)-(9) are designed to provide for the eventuality of a breakdown in the Article 50 negotiations before 21 January. If the Prime Minister makes a statement that no agreement can be reached on either the Withdrawal Agreement or the Political Declaration before that date, two further stages will be triggered, set out in subsection (7). As with the rejection scenario, within 14 days of the Prime Minister making this statement, a minister must make a written statement on the next steps in the negotiations. Within seven days of that statement, the minister must make arrangements for the Commons to consider a motion in neutral terms that it has considered the statement.

Subsections (10)-(11) provide an alternative mechanism for triggering a statement and a motion in the event of a breakdown in the Article 50 negotiations with the EU. Subsection (10) provides that if there is no agreement on both the Withdrawal Agreement and the Political Declaration by 21 January 2019 then a minister must, within five days, make a statement and then make arrangements for the Commons to consider a motion on that statement.

Parliamentary approval of a ‘no deal Brexit’

Each of these scenarios appears to be constructed to give the impression that if the Commons rejects the agreements, or if no agreements can be reached, the government will make a statement to explain how the rejection would lead to a no deal Brexit. That said, it is not necessarily the case that the government would decide to trigger a no deal plan in any of these three scenarios. Indeed, it is possible that if the Commons rejects the agreements that the government has agreed to, it could try a second time to get the Commons’ approval.

Another important and overlooked point is that, in any of these three scenarios, if the government did decide to proceed with a no deal scenario, it would need parliament’s help. A whole series of laws would have to be passed to implement a no deal outcome.

While some of this work has been done, notably through the EU Withdrawal Act 2018, it is likely that more legislation would be needed, not least, if any bare bones deals, still falling short of a full-blown agreement on future relations, were agreed before exit day. Any further bills would provide the Commons with more opportunities to express its position through amendments and debates. This means that, despite the fact that the debate on the statement in “neutral terms” will not grant the Commons the opportunity to direct the government, there would still be opportunities for that to happen between the statement and exit day, assuming further legislation would be needed.



The EU (Withdrawal Agreement) Bill

The UK constitution requires that international treaties are implemented through legislation if they are to create legal rights that can be enforced in domestic courts. This secures parliament's right to scrutinise the domestic legal consequences of an international treaty. The Withdrawal Agreement was always going to require a dedicated Act of parliament to be passed before it could take effect in the UK, and the government announced in July 2018 that the EU (Withdrawal Agreement) Bill would be introduced shortly after the subsection (1)(b) motion was passed.

Section 13 of the EU (Withdrawal Agreement) Bill requires this Act to be passed before the Withdrawal Agreement can be ratified. So the EU (Withdrawal Agreement) Bill will need to be passed before exit day on 29 March 2019. This Bill will provide parliament with a second opportunity to reject the Withdrawal Agreement and crucially will give parliamentarians a chance to scrutinise the detail of the Withdrawal Agreement, and potentially secure changes to both the substance and process of Brexit.

Nevertheless, even if in theory the EU (Withdrawal Agreement) Bill represents an opportunity for parliament to influence the Brexit process, the reality could be that there is little chance for anything other than approving the legislation in the form in which it is introduced. The process of scrutinising treaties through implementing legislation is far from ideal in most circumstances. In this context, it is likely to be especially problematic for three reasons: the complexity of the Withdrawal Agreement and the condensed timetable for scrutiny; the relationship between the EU (Withdrawal Agreement) Bill and the EU (Withdrawal) Act 2018; and the relationship between the Withdrawal Agreement and the Treaty on the Future Relationship.

The fact that parliament will have to approve the Withdrawal Agreement (through the resolution) prior to this legislation being introduced is important. This will create a powerful political narrative around the debate: MPs will have already approved the Withdrawal Agreement, and the EU (Withdrawal Agreement) Bill is simply designed to give effect to that treaty and enables the UK to honour its commitments in that treaty. As such, the argument will go, potential amendments risk undermining the process of preparing for exit day. The government will likely present the EU (Withdrawal Agreement) Bill as a technical legal requirement, and many parliamentarians will not want to be seen to disrupt the process.

In parliament this argument will be challenged. Unlike under the 'meaningful vote' process, the House of Lords will play an important role in the scrutiny in the EU (Withdrawal Agreement) Bill. The Lords, and in particular its committees, will take a particular interest in the constitutional implications of the EU (Withdrawal Agreement) Bill.

Parliament demonstrated its capacity for scrutiny when it committed huge efforts to engage with the complexity of the European Union (Withdrawal) Act 2018. This legislation benefited from over 270 hours of parliamentary debate, and reports from five parliamentary committees (three in the Commons and two in the Lords) while it was going through parliament. It appears incongruous that much of the legal effect of this legislation will not take effect on exit day, while the most important legal arrangements set

out in the EU (Withdrawal Agreement) Bill will be subject to a truncated and potentially less rigorous parliamentary process.

What will the EU (Withdrawal Agreement) Bill look like?

The government's chosen approach to the drafting of the EU (Withdrawal Agreement) Bill will play a major role in determining how it is debated and scrutinised in parliament. The government's white paper, 'Legislating for the Withdrawal Agreement between the United Kingdom and the European Union', suggests that the Bill will contain provisions on the following:

- citizens' rights;
- the implementation period; and
- the financial settlement.

Other than these three areas, the EU (Withdrawal Agreement) Bill is likely to contain provisions on other yet to be agreed elements of the Withdrawal Agreement, notably the Protocol on Ireland and Northern Ireland. It will also have to contain provisions on devolution. In each of these areas, the approach taken to the drafting of the EU (Withdrawal Agreement) Bill will be significant.

The drafting of the Bill will influence the nature of the amendments that can be tabled when it is being debated in the Commons. The government is likely to argue that the Bill is restricted to implementing the Withdrawal Agreement and it may resist any attempts to use the Bill to shape other elements of Brexit and the future relationship in particular. Any amendments that would impinge on commitments in the Withdrawal Agreement are likely to be labelled 'wrecking amendments'. The government will pressurise parliamentarians to pass the Bill unamended in order to avoid any disruption in the Brexit process before exit day.

That said, there will in reality be some legislative wiggle room regarding how commitments in the Withdrawal Agreement are implemented. In areas of particular controversy, such as the backstop for Northern Ireland and the powers of the courts to protect citizens' rights, the government is likely to resist any amendments on the basis that, if passed, they could represent a rejection of the Withdrawal Agreement. The basic point is that the EU (Withdrawal Agreement) Bill cannot be amended in a way that risks being interpreted as a failure to honour the commitments in the Withdrawal Agreement.

The complexity of the EU (Withdrawal Agreement) Bill will have an impact on how it is debated. There is a risk that the way in which the Bill interacts with the European Union (Withdrawal) Act 2018 will make it very difficult to understand. The white paper on the EU (Withdrawal Agreement) Bill indicates that it will alter some of the most important elements of the EU (Withdrawal) Act 2018 in order to ensure that the implementation period preserves the current role of EU law once the UK is formally no longer a member state.

In relation to the enforceable rights in the Withdrawal Agreement, the government will have to decide whether these need to be set out in full on the face of the Bill, or whether to include a mechanism which provides a link to the Withdrawal Agreement and gives them legal effect. The government's white paper indicated that it could be the former rather than the latter. This has the advantage of making sure that the substance of the rights can be debated during the Bill's passage through parliament. This approach will also make the legal effect of the rights clearer, which is desirable from a rule of law perspective.

The white paper also indicates that the EU (Withdrawal Agreement) Bill will amend the powers to make secondary legislation contained in the EU (Withdrawal) Act 2018, in order to enable technical changes to be made to correct deficiencies arising from the end of the implementation period. This reliance

on delegated powers, whilst pragmatically justifiable, will make the legal effect of the Bill harder to evaluate.

Timing

One of the principal ways that the government could alleviate some of the difficulties facing parliament in terms of the scrutinising the EU (Withdrawal Agreement) Bill would be to publish it in draft form alongside the final version of the Withdrawal Agreement and Political Declaration. This would maximise the time available for parliamentarians, and in particular committees, to scrutinise the EU (Withdrawal Agreement) Bill. It would also have the advantage of enabling the Withdrawal Agreement itself to be examined alongside the legislation that will implement the UK's exit agreement with the EU.

But it may not be possible for the EU (Withdrawal Agreement) Bill to be published until after the subsection (1)(b) 'meaningful vote' resolution is agreed by the Commons. Whenever it is published, it is highly likely that the parliamentary timetable for the Bill will be a source of political controversy. The EU (Withdrawal Agreement) Bill will have to complete its parliamentary journey between the subsection (1)(b) vote, which could be anytime between November 2018 and January 2019, and exit day on 29 March 2019. That will mean it will have a maximum of five months, and likely much less than that.

The government will argue that a significant proportion of the Withdrawal Agreement has been known since March 2018, and that this should mitigate concerns over the relatively short parliamentary process for the EU (Withdrawal Agreement) Bill. On the parliamentary side, the House of Lords Select Committee on the Constitution, which shaped much of the debate on the EU (Withdrawal) Act 2018, has consistently criticised successive governments when major constitutional bills have been given insufficient parliamentary time to enable effective scrutiny. In terms of analysing the constitutional implications of the EU (Withdrawal Agreement) Bill, it will be vital that the Constitution Committee follows the approach it took for the scrutiny of the EU (Withdrawal) Act 2018 and publishes an interim report on the Bill ahead of the Commons' second reading debate. If it does, the Committee could shape the debate on the constitutional implications of the EU (Withdrawal Agreement) Bill in the Commons and the Lords. The Delegated Powers and Regulatory Reform Committee and the Joint Committee on Human Rights could both also play an important role in the debate on the Bill, on delegated powers and citizens' rights respectively.

The Commons second reading debate: another chance to veto the Withdrawal Agreement?

The second reading debate on the EU (Withdrawal Agreement) Bill will provide, in constitutional terms, another opportunity for the Commons to reject the Withdrawal Agreement. If the government cannot secure a majority, even if the 'meaningful vote' resolution had been agreed, it is difficult to see how the Withdrawal Agreement could be implemented. This would effectively block or delay ratification of the Withdrawal Agreement (subsection (1)(d) of section 13 requires that Royal Assent precedes ratification of the Withdrawal Agreement). Logically, if there is a majority in the Commons on the meaningful vote then one would expect there to be majority for this Bill to implement the agreement. That said, the parliamentary process that preceded the UK joining the then European Economic Community in 1973 shows that this is not necessarily the case.

On 21 October 1971, the House of Commons began a six-day debate on the following government motion:

That this House approves Her Majesty's government's decision of principle to join the European Communities on the basis of the arrangements which have been negotiated.

The motion was passed by 365 to 244 on 28 October 1971 – a majority of 121, and on 25 January 1972 the government introduced the European Communities Bill to the Commons. The three-day second reading debate in the Commons concluded on 17 February 1972. The vote was won by only eight votes, 309 voting for and 301 against. While only 254 MPs voted against the principle of joining the European Communities, 301 MPs voted not to give the Bill, which was designed to implement that decision, a second reading.

An important lesson from that experience is that the form of implementation can change MPs' position on the question of whether to accept an international treaty: their positions changed once the full constitutional implications of the agreements were revealed. In this case, the more time between the meaningful vote and the second reading vote on the EU (Withdrawal Agreement) Bill, the more time there would be for the legal implications of the Withdrawal Agreement to be identified, which could in theory lead to members changing their minds between the two votes.

Committee of the whole House

If the EU (Withdrawal Agreement) Bill gets past second reading in the Commons, it will then have its committee stage on the floor of the House of Commons. This is the stage when the Bill will be subject to detailed scrutiny, and amendments proposed by MPs can be considered and debated.

As discussed above, the issue of the scope of the Bill will likely be prominent in the committee stage. Again, the experience of the passage of the European Communities Act 1972 is relevant here. In 1972 Sir Robert Grant-Ferris, the Chairman of the Ways and Means Committee, made a ruling on the first day of the European Communities Bill's committee stage in the Commons stating that a number of amendments, which purported to change the text of the treaties, were out of order:

Since this is not a Bill to approve the basic treaties, Amendments designed to vary the terms of those treaties are not in order, and I have no option to rule otherwise.

Any amendments which would seek to alter the legal effect of the Withdrawal Agreement or which related to the future relationship with the EU are likely to be controversial. This could create problems for those responsible for determining which amendments will be selected for debate.

As was seen with the EU (Withdrawal) Act 2018, it is rare for the government to accept amendments in the form which they are proposed. Most amendments are tabled by government in response to issues raised earlier in the debate. It is possible that the government will seek to respond to concerns raised during the debate on the meaningful vote resolution by changing the EU (Withdrawal Agreement) Bill before it is introduced, or by introducing amendments during the committee or report stages in the Commons or the Lords. Furthermore, it is possible that issues raised at second reading in either House are followed up with amendments at later stages. However, it is also possible that a restricted timetable and the implementation nature of the legislation will make these sorts of parliamentary negotiations, which were so prevalent in the debate on the EU (Withdrawal) Act 2018, less likely.

Nature of the debate

The parliamentary debate on the government's proposals has not always demonstrated a good grasp of the different elements of the process. There are three distinctions which have caused particular difficulties. The first is between international treaties and the domestic legislation which implements those agreements. The second is between the Withdrawal Agreement and the treaty on the Future Relationship. The third is between Brexit legislation designed to prepare for a no deal outcome to the negotiations and Brexit legislation designed to implement the Withdrawal Agreement and the Treaty on the Future Relationship.

Of particular concern will be the extent to which the EU (Withdrawal Agreement) Bill relates to the UK's future relationship with the EU. In the parliamentary debates on Brexit legislation up to this point, MPs have consistently focused on the substance of the UK's future relationship with the EU. This is understandable given the substance of Brexit will be determined by the contents of that treaty. However, as noted above, the scope of this Bill is likely to focus principally or exclusively on implementing the Withdrawal Agreement. Nevertheless, there are elements of the EU (Withdrawal Agreement) Bill that will enable members to debate the future relationship. These will include, in particular, the Northern Ireland and Ireland Protocol, the provisions on the role of the Court of Justice of the EU, and any provisions in the Bill which relate to preparing for the end of transition.

It is also worth noting that, on the EU (Withdrawal) Bill, the amendments debated in the Commons indicated that officials and the Speaker took the view that the scope of the Bill was broad enough to enable amendments on almost any Brexit-related subject. The long title of the EU (Withdrawal) Bill was particularly broad 'An Act to repeal the European Communities Act 1972 and *make other provision in connection with the withdrawal of the United Kingdom from the EU*' (emphasis added). The scope of EU (Withdrawal Agreement) Bill might be narrower than the EU (Withdrawal) Bill. However, it is still likely to be broad enough to enable amendments on a range of Brexit-related matters.

As the Treaty on the Future Relationship will only be finalised after exit day, there will be a tendency for MPs to want to discuss the issues which remain in play. The Withdrawal Agreement is almost certainly incapable of being changed after it has been finalised and so MPs may want to use the EU (Withdrawal Agreement) Bill to influence the government's approach to the negotiations on the future relationship. One of the difficulties is that it is not yet clear how the parliamentary process will work in relation to the Treaty on the Future Relationship. It would not be surprising if the debates on the meaningful vote motion and the EU (Withdrawal Agreement) Bill feature questions around parliament's role in relation to the Treaty on the Future Relationship. The absence of a clear sense of the role that parliament will play in approving and implementing the future relationship could hinder this debate.

Parliament had to wait until November 2017 to be told that the Withdrawal Agreement would be implemented through its own dedicated Bill. It is likely that the Treaty on the Future Relationship will also be implemented in this manner. The debate on the EU (Withdrawal Agreement) Bill would benefit from the government clarifying how it intends to implement the Treaty on the Future Relationship before the Bill receives its second reading in the Commons (and ideally before the meaningful vote). The Chequers white paper promises domestic legislation to implement the future relationship 'agreements', but does not explain whether this will be one or a number of Bills, or what stage in this process this will occur. The parliamentary process would have a much better chance of producing effective debate if the government set out in some detail the precise role that it expects parliament will play between now and the end of the implementation period.



Brexit and the Fixed-term Parliaments Act

Few groups are as prone to the law of unintended consequences as politicians, amidst political chaos, grasping for quick solutions. The 2011 Fixed-term Parliaments Act (FTPA) provides a textbook example. Forged in the political heat of May 2010 as the first coalition since 1945 strove for stability, the Liberal Democrat negotiator [David Laws](#) claimed the five-year parliamentary cycles it created were landed on by George Osborne in coalition negotiations “in case the economy takes a bit longer than expected to fix”. And when Theresa May called a snap general election in June 2017, supported by 522 MPs from across the Commons, many thought the FTPA had already become obsolete. The rules appeared to return to business as usual, with the Prime Minister holding the power to fire the starting gun on an election campaign: the Prime Minister called for a general election, and (against the government’s expectation) the Labour opposition immediately acquiesced in the request.

Many expect the forces of political gravity to act in the same way again if there is a Brexit gridlock in Parliament. The thought process follows the old protocol: that a general election is called if the Prime Minister wants one or if the House of Commons ensures the government can no longer get its core business through Parliament. So, if May’s Brexit comes unstuck, then so does her premiership. This is also why Section 13 of the EU (Withdrawal) Act, which we have described above – the attempt to legislate for a scenario in which the government’s Brexit deal was rejected – was regarded as both implausible and unnecessary by many experts and MPs. It was [said](#) that, if the Commons rejects the agreements or the negotiations break down, then the government will be forced to resign in any case. And, in that scenario, all bets are off. This reasoning was thought to have swayed some Remain-inclined Conservative MPs not to vote against the government on the Section 13 amendments to the EU (Withdrawal) Bill.

However, rumours of the death of the FTPA continue to be greatly exaggerated. This is, in part, because the name of the Act is misleading. It does not set in stone how long a Parliament can last between each election, and it was never meant to. One of the core aims of the FTPA – to stop Prime Ministers unilaterally calling an election without support from across the House of Commons – was validated by a general election in 2017, called with cross-party support. Both the stated and underlying intentions behind the FTPA process were not to take the politics out of calling general elections. It was to put the political process involved in calling one on a statutory and transparent footing.

FTPA: two routes to a general election

In some ways, government formation and dissolution are now a simpler process: the rules are established and clear for all to see. In other ways, the new rules institutionalise a more complicated process — it means the hurdles are higher and the procedures less flexible. And, simply put, the FTPA makes calling a general election more difficult.

There are now two routes to a general election:

- 1) If a two-thirds majority of all MPs, i.e. not just those present for the vote—more than 434—support a general election (subsections 2(1)& 2(2) FTPA; or
- 2) A government is defeated on a vote on the motion reading, ‘this House has no confidence in Her Majesty’s Government’, and no government is formed during a 14-day period with which the motion can be passed: ‘this House has confidence in her majesty’s Government’ (subsections 2(3)-(5))

If the ‘meaningful vote’ is lost, Theresa May could attempt to call a general election through the first route. However, with exit day looming, the government is unlikely to do so unless it has exhausted all other options. If the government attempted to carry on after the Commons rejected the Withdrawal Agreement and the Political Declaration, Theresa May could face a vote of no confidence through the second route. However, there may be a majority to reject a motion of no confidence even if there is no majority for the exit agreements.

A third, indirect route: the repeal of the FTPA

One of the cornerstones of the UK’s unwritten constitution is that no Parliament can bind its successor. The rules of the FTPA are clear and fixed. However, due to the nature of the UK’s constitution, they are not eternal. Indeed, the 2017 Conservative manifesto made a clear commitment to repeal the FTPA. This was also the mechanism by which Theresa May’s government contemplated calling a general election, had the Labour Party (against some expectations within May’s inner circle) not been whipped in support of an election in April 2017.

However, it is highly unlikely – given the current parliamentary arithmetic in the House of Commons – that this route to a general election would be any easier, should the government desire a vote. Given the government is a minority administration, any attempted legislation to override the FTPA and force an election would require the support of other parties in the House of Commons – as it is unclear why the DUP would support the ending of its existing pact with the government that is scheduled to last till 2022. Any change to override the existing FTPA legislation would also have to pass through the House of Lords, delaying the process. Thus, while this was clearly an option previously contemplated, the overturning of the FTPA is unlikely to be a useful option before March 2019.

Why Theresa May has fewer options than her predecessors

The FTPA is a rare example of the executive branch of government (unintentionally) reducing its political power. One of the key planks of a Prime Minister’s authority in Parliament used to be the ability to up the temperature on a piece of legislation by putting the survival of the government on the line. This was a variation on the age-old adage: ‘back me, or sack me’. Except, in the context of Parliament, the question had an extra edge: ‘back me, or put yourselves up for the sack.’

Prior to the FTPA, if a Prime Minister deemed a vote on any policy an issue of ‘confidence’ and it lost, the government would be required either to resign or to request a premature dissolution of Parliament from the Crown. It was then at the discretion of the Monarch whether or not to grant a dissolution of Parliament and call an election or reappoint a new government from within Parliament.

Under the FTPA, the rules are more prescriptive. A confidence vote can only trigger an election if the specific wording of subsection 2(4) – ‘this House has no confidence in Her Majesty’s Government’ – is

used. If other wording was used by the Commons to express no confidence, this would not directly trigger an election, but it could still prompt the Prime Minister to resign. The [Cabinet Manual](#) explains it remains the case that ‘The Prime Minister is expected to resign where it is clear that he or she does not have the confidence of the House of Commons and that an alternative government does have the confidence’.

The FTPA does not provide a complete or comprehensive rulebook. The constitutional rule that the government must command the confidence of the Commons still exists independently of the FTPA. As a matter of convention, it remains the case that if a particular decision by the Commons was understood to express ‘no confidence’ in the government, the Prime Minister would be expected to resign. In the event that the Prime Minister resigned following such a vote, the successor could then use the provisions of the FTPA to bring about a general election.

Indeed, it may appear common sense that if the government loses a vote on something like Brexit then it should go and an election should be called. At Labour Party Conference on 25 September 2018 Keir Starmer [put it](#) that ‘in the event the deal is voted down, or there is no deal, there ought to be a general election. In an ordinary world that would happen.’ It may even feel disingenuous to argue that the government could carry on under such circumstances. But the two categories of vote – one on the meaningful vote or amendments to it, the other an explicit vote of confidence – are separate. In short, the FTPA means that Conservative MPs on both sides of the Brexit debate – at least in theory – can have their cake and eat it.

How it worked when we joined the EEC

The process of entering the EEC is an important yardstick when looking at the process of withdrawal. Britain entered in 1973 much as it is likely to leave in 2019, following a legislative process defined by a series of tight, staggered votes in the House of Commons. Then Prime Minister Edward Heath enjoyed a healthy working parliamentary majority of 40, compared to May’s 13. The various coalitions secured by Heath for each crunch vote on Europe looked much like some of those May will doubtless consider as she tries to map a route towards a parliamentary majority.

The original vote in Parliament on the Treaty of Accession in 1971 was enabled by the backing of 69 rebel pro-EU Labour MPs, led by Roy Jenkins. This was just the start of the process. The legislation to implement the decision, the European Communities Act, was passed by just eight votes at the crucial second reading stage. Heath’s government relied on the backing of six Liberal MPs, with 15 Conservative MPs rebelling and five abstaining. This is a potentially identical figure to the number of rebels on Conservative benches that would be needed to overturn the May’s working majority.

However, on this key vote, Heath was able to skew the political question in his favour. If he lost, Heath said he would request an early dissolution as he felt “this Parliament cannot sensibly continue” without majority support for his agenda on EEC membership. That 15 eurosceptic Conservative MPs, led by Enoch Powell, voted against Heath in any case is perhaps an unnerving precedent for Theresa May. But even more unnerving for May is that, as Lord Norton’s analysis at the time showed, it was only Heath’s threat that swung the difference.

Options now for the government

Now consider July 2018 and the government’s narrow win, by 307 votes to 301, on an amendment to the Trade Bill that would have compelled, in the absence of any other trade agreement, an attempt to

negotiate a customs union with the EU. An announcement following the vote, made not in Parliament but via a [leaked](#) WhatsApp message from government whips, suggested that:

If Labour rebels hadn't stepped in tonight, we'd have pulled third reading, confidence vote tomorrow, GE in 2 weeks time. That's what our 12 Remain MPs did tonight and I don't think they even understood the consequence of their actions.

This illustrates that the government can still use the provisions of the FTPA to threaten a general election. The point the message did not convey is that there is no reason to suppose that the MPs who could have inflicted a defeat on the Trade Bill would then necessarily vote the same way in a vote of confidence.

If Theresa May comes back with a negotiated withdrawal agreement with the EU, she will not be able stand up in the House of Commons and issue a straightforward 'back me or potentially sack us all' threat to Conservative backbenchers. The FTPA means that a defeat on the 'meaningful vote' cannot itself directly trigger a general election. The Prime Minister could of course resign if the vote was lost. The critical point is that such a resignation would not remove the statutory obligations in Section 13, nor would it preclude a new Prime Minister making a second attempt at securing Commons approval for the agreements without a general election.

There are three ways the Prime Minister could be removed. Firstly, the Prime Minister could lose a motion of no confidence. Secondly, she could be forced into a Conservative leadership contest by her parliamentary party or force a contest herself. Or, finally, as she did in 2017, the Prime Minister could call for a division on a general election and whip her MPs in support. Each would have important political consequences, and would carry political risks as well as opportunities.

1) Motion of no confidence

One of the messy complexities and unforeseen ambiguities of the FTPA is that it potentially creates the conditions for the UK having no working government at all, something which could arise at a crucial point in the Brexit process. The phrase 'in government, but not in power' has become a regularly-used maxim of British politics. It would take on added meaning if a vote of no confidence was called and lost by the government.

If the Prime Minister were to lose a statutory vote of confidence but remain in office, this would trigger a two-week period where a new government would need to find a majority. The [Cabinet Manual](#) states that:

'... it remains a matter for the Prime Minister, as the Sovereign's principal adviser, to judge the appropriate time at which to resign ... recent examples suggest that previous Prime Ministers have not offered their resignations until there was a situation in which clear advice could be given to the Sovereign on who should be asked to form a Government'

This reiterates the presumption that, if there is no immediate alternative, the incumbent remains in place when they have lost the confidence of the Commons. The FTPA is only a partial rule book; it changed the law but it did not displace the existing constitutional conventions on matters of confidence. Whether there is an obligation or a political choice for a Prime Minister [remains constitutionally contested](#). But without any clear alternative Prime Minister, there is the clear constitutional right to stay in office. If this were to happen to Theresa May, she would in practical terms be weakened. This could lead to the charge of the Prime Minister as a 'squatter in Downing Street'. The five days of negotiation before the 2010 coalition were a political pressure cooker for negotiators; a similar two-week process, with a

Prime Minister having lost a confidence vote remaining in post and exit day fast approaching, could be extremely difficult. However, it is constitutionally possible.

The FTPA appears to presume that the new government must be in place before the motion of confidence can be passed that could prevent a general election being triggered. Any such Prime Minister would eventually, in the lexicon of government formation, be the unofficial ‘formateur’. May would retain office until a clear alternative emerged, and it would be May that would have to inform the Queen that such a clear governing alternative had been created. It would also be May that would authorise the Cabinet Secretary to facilitate negotiations between the political parties in the event of a ‘hung’ election result. Therefore, rather than being a misconception that May would inevitably lose her job if she lost a vote of confidence, it is a clash between the unofficial rules and culture of British politics, and the rules in the FTPA.

Incumbency may be an advantage for the Prime Minister. There are practical and credible reasons for this. May would be able to offer direct policy concessions to create a working majority for her Brexit proposals, which would give her an advantage in seeking to cobble together political coalitions across Parliament. The political crisis would also lead to calls for an immediate political fix, which could potentially be best achieved without a change in leadership. There would also be a preference for the Sovereign not to be involved in the political process. Given any government would need to be installed by the Queen prior to the confidence of the Commons being tested, the cleanest way could well be for the incumbent Prime Minister to remain in office. Indeed, the fact that the FTPA triggers a two-week interregnum if a confidence vote is lost could be used as a lever by the Prime Minister. It is plausible the government could need, and would be able to attempt, a second go at passing a motion that satisfied the terms of the meaningful vote clause. Between these two votes the Prime Minister could offer concessions to backbenchers as a means of avoiding a scenario of a vote of no confidence and to shore up support for the second vote. In effect, she could use and talk up the prospect of ‘no government’ during a time of upheaval as leverage for MPs to accept concessions and ultimately keep herself in place.

On the other hand, the rules of the FTPA mean MPs would also have significant power in any scenario following a vote of no confidence. The FTPA would give recalcitrant Conservative MPs – who would just have voted no confidence in her government – an opportunity for high stakes bargaining with the incumbent government. In the past, the threat of a general election was in the hands of the Prime Minister. In the two-week period following a lost confidence vote, MPs from either wing of the Conservative Party (though more likely, given their strength, eurosceptic MPs) could offer May a choice: reform her proposals so they matched their demands; resign her leadership and create an internal party contest; or resign and potentially bring in a Labour minority government, or a general election. Under the new system created by the FTPA it would be the votes of these MPs, where previously it was the Prime Minister’s discretion, that would decide whether a general election would take place.

These rules, in effect, would create a high-stakes political game with no clear winner. Just as the inbuilt assumption in the Article 50 process creates a two-year deadline leading to a member state leaving without a deal, so the two-week timetable inbuilt in the FTPA could mean that a general election contest could also be forced by accident rather than design in the absence of an alternative.

2) A Conservative leadership vote

The threat of a ‘no confidence’ vote for any Conservative leader comes from two sources, which have been conflated in some analysis: losing a confidence vote among MPs at large and losing a confidence vote amongst Conservative colleagues. 48 is the number of Conservative MPs—or 15% of

the Parliamentary party—required for the Chair of the 1922 Committee, Sir Graham Brady, to trigger a vote of no confidence in the leader within the Parliamentary Conservative Party. However, 158 is the number of Conservative MPs, if a confidence vote was called, that would need to vote in a private ballot for a leadership election to be triggered.

Given the weighting of the factions within the Parliamentary Conservative Party and the views on Brexit among Conservative [members](#), it is nearly impossible to foresee circumstances where it would be beneficial for pro-EU MPs to trigger a leadership election. Europhile factions would barely have the numbers within the parliamentary party to trigger a confidence vote, let alone win any contest among the Tory selectorate. On the other hand, pro-Brexit factions within the Conservative Party could mobilise at any time to force a vote of no confidence in the Prime Minister – there are around 70 Conservative MPs who are publicly opposed to the Chequers Deal, and a further 40 or so Leave-voting MPs on the backbenches who are publicly supportive but could feasibly be inclined to support a Brexit candidate.

Conversely, the Prime Minister could announce that the Brexit vote was a matter of confidence, and that she would resign if a vote on her negotiated agreement was lost and force a leadership contest. This could feasibly weigh on the calculation of MPs fearful a new Conservative Prime Minister would be willing to carry through a no deal Brexit. Equally, eurosceptic MPs may not be confident they would have the numbers among the Conservative parliamentary in an internal party confidence vote to force out the Prime Minister. The undesirability of the political instability an internal contest would cause, against the backdrop of the Article 50 timetable, would likely be a key factor.

3) A snap general election

The FTPA does not preclude a snap election called to create a majority for Theresa May's version of Brexit. After all, that is exactly what happened in April 2017. However, the fractured and divided nature of the parties in the House of Commons, the centrality of Brexit as a policy issue and the experience of the 2017 general election could make a rerun far less appealing.

It is also a significantly less attractive option for Theresa May. Unlike a vote of no confidence, this number is calculated from the total number of seats in the House of Commons, 650, rather than the number who turn up for the vote itself. The super-majority of MPs in the House of Commons that would need to vote for an immediate general election is 434, for one to be called without the two-week period mandated by the House of Commons following a simple vote of no confidence. To reach this number is impossible without the support of some of the 236 MPs who are either ministers or shadow ministers.

The Hobson's choices for Conservative MPs

The FTPA removes one political lever – the threat of a general election. However, the government will have two different ways of rebalancing calculations, as MPs weigh up the different options on withdrawal: the internal mechanisms of the Brexit process, and the external timetable it creates; and the threat of a Labour government led by Jeremy Corbyn.

1) May's deal or political chaos

The first tool open to May is to use the time constraints imposed by Article 50 or the threat of her own resignation. This could create a Hobson's choice for MPs: the negotiated withdrawal agreement or no agreement at all.

Moreover, the phrasing of the motion on the meaningful vote – tying together withdrawal and the future relationship – is an attempt to embed a mandate for acceptance of the future strategy for negotiations during transition alongside the Withdrawal Agreement. This would create one ‘all or nothing’ parliamentary vote on both aspects. If it were won, it would potentially give May a greater chance of survival beyond 29 March 2019. Given the clear political risk of a confidence vote being forced after the Withdrawal Agreement has been agreed, this would be an attempt to bind Parliament (and the Conservative Party) to what are likely to be controversial elements of the future relationship. Parliament’s role in the future relationship talks is uncertain, so MPs could see it as their last opportunity to determine the outcome. The need to use Article 50 and the threat of no deal, rather than the threat of an election, is evidence of the Theresa May’s novel (and complex) constitutional dilemma, caused by the provisions of the FTPA.

2) May’s deal or Prime Minister Corbyn

The second Hobson’s choice that May will attempt to use as leverage is the political context. There would be an attempt to create a clear question for Conservative MPs: either accept my Brexit or get Jeremy Corbyn on the steps of Number 10. However, the terms of the no confidence provision of the FTPA dilute this threat somewhat. Rebel Conservative MPs could control the political blowback from the loss of any Brexit vote, as the Prime Minister cannot threaten the dissolution of parliament and a general election. The FTPA leaves the calling of a general election squarely in the hands of the House of Commons, not the government. Eurosceptic MPs unconcerned by no deal would be happy for the clock to tick down, without a deal supported by Parliament but May remaining in office as a lame duck Prime Minister.

For Remainer MPs, the calculation would be more difficult should there be a vote against May’s agreement. Any cross-party vote for withdrawal on ‘soft’ Brexit terms successfully shepherded by May through Parliament would likely lead to an immediate and significant backlash from eurosceptic MPs. To stop any general election would require the subsequent formation of a government that was not reliant on the support of eurosceptic Conservatives – one that had cross-party support. Equally, there is a real possibility of the Withdrawal Agreement being vetoed by a cross-party coalition of pro- and anti-EU MPs. This would mean heading towards a no deal scenario without a clear majority for a move towards either a closer, or a more distant, relationship with the EU. This would then incentivise the further building and testing majorities of particular forms of action in the House of Commons.

This form of cross-party government is certainly made more likely by the political context of Brexit and by the political dynamics of the FTPA. Ken Clarke’s *post hoc* criticisms of the FTPA rested on the two-week interregnum it potentially created in the event of a vote of no confidence. This, Clarke argues, could lead to an ‘anarchic situation’. But two factors would be likely to dominate in such a scenario: a search for a solution to the Brexit timetable and the ticking clock of negotiations, and the fact that a majority of MPs would favour a negotiated withdrawal of some description.

If a vote of no confidence under the terms of the FTPA were to be lost by the government, this would be because the Conservative Party had broken apart or their deal with the DUP had come fatally unstuck. Within this scenario, the two-week timetable for a new administration to be formed without a general election, and the Brexit timetable that would (unless pushed back) keep the ticking clock of 29 March 2019 a live issue, means that the easiest path to 320 votes for a House of Commons majority could be a cross-party formulation of MPs.



The European Institutions

The political and procedural complexity of Brexit in the UK has meant little attention has been paid to how the process will play out in the EU. Relative to the complex and uncertain picture of the UK that we have painted, ratification by the EU ought to be a more straightforward process, not least because it is settled and relatively uncontested.

Once the negotiating teams from the UK and the EU reach agreement on all outstanding aspects of the Withdrawal Agreement, Michel Barnier – the European Commission’s chief negotiator – will recommend that the European Council adopt a position approving the deal. The process is set out in Figure 1 below.

Figure 1: Process ratifying Withdrawal Agreement in EU institutions



The Withdrawal Agreement will be signed by the respective parties prior to ratification, then becoming binding on the UK government and the EU in line with Article 18 of the Vienna Convention obliging states to act in good faith pending ratification. However, it will not enter into force until it has completed this process. This requires approval by the UK Parliament, the European Parliament and the European Council, including the passage of the Bill implementing the agreement in the UK - the European Union (Withdrawal Agreement) Bill. The final vote by the European Council will be by super-qualified majority – meaning at least 20 member states representing at least two-thirds of the EU population will have to support the deal.

The European Parliament

Procedurally, the most complicated hurdle in the EU process is that through the European Parliament. Its role in ratifying the Withdrawal Agreement will take place under what is called a ‘special legislative procedure’, in this case the ‘consent procedure’, under which the parliament has the right to accept or reject the deal. Its decision cannot be over-ruled by any other EU institution, including the European Council. Any substantive changes or amendments to the agreement after it has been passed by the European Parliament – for instance, if the UK side requested further changes to aid domestic ratification – would require it to vote on the deal again. Hence why the European Parliament is keen to wait for MPs to approve the deal first. If the agreement was rejected by the parliament, the European Council could refer it back following changes, if there was time to do so within the Article 50 timetable.

In legal terms, all that is required under the consent procedure is that the parliament is given a ‘Yes/No’ vote on the final deal, with a majority of MEPs present on the day of the vote needing support it to

pass. In reality, however, the parliament typically plays a much more extensive role in all international negotiations. And the Brexit talks have been no exception. The threat of a veto by the European Parliament has led the Commission to keep key players in the parliament informed and up-to-date throughout the Brexit process in order to avoid an upsetting surprise at the last minute.

David Lidington recently suggested the imminent European Parliament elections could cause a problem in getting a quorum of MEPs to hold a vote on the Withdrawal Agreement. A quorum is defined as a third of members – 250 – and it only becomes a problem if a request is made by MEPs to establish a quorum is present, otherwise fewer than this number could even produce a valid vote. Regardless, even in the case that a quorum wasn't present, the vote would simply be deferred to the next session, and it wouldn't mean a rejection of the deal. However, it is extremely unlikely that there wouldn't be a quorum present. By comparison, at the last Plenary session of the previous European Parliament, on 17 April 2014, over 500 MEPs were present to vote.

The most important of the interactions between the European Parliament and EU negotiators have taken place between Commission officials (and Mr Barnier in particular) and the parliament's Brexit Steering Group, made up of leading figures from five political groupings – the European People's Party (EPP), the Socialists and Democrats (S&D), the Liberals and Democrats (ALDE), the Greens (ALE) and the European United Left (GUE) – plus the chair of the Constitutional Affairs Committee (AFCO), Danuta Hübner.

The Steering Group is personally briefed and debriefed by Michel Barnier before and after every negotiating session, and it contributes to all of the European Union's negotiating positions. Mr Barnier's role in this co-ordination has been crucial, and his extensive engagement with MEPs has in some cases led to parliamentarians being in the loop before member states, despite the former having no formal right to be informed.

The parliamentary process

Once the Withdrawal Agreement is referred to the European Parliament, it will go through a two-stage process. First, a committee will debate and take a (non-binding) vote, before a parliamentary debate and (binding) vote in a plenary session.

The Withdrawal Agreement will be considered firstly by the AFCO. The views of other committees, such as the Foreign Affairs Committee (AFET), will also be taken into account and they could be asked to provide a more formal opinion by holding separate (non-binding) votes on the deal. The AFCO will debate the agreement and produce a report including a draft of the resolution to be put before members of the European Parliament (MEPs), as well as the committee's opinions on different aspects of the deal. That report, and its parts, will then be voted on by members of the committee. If passed, this will form the recommendation to the parliament.

If the committee rejects the deal – an unlikely scenario – it will produce a report with a resolution recommending that MEPs do the same. Given that the AFCO includes leading figures from the EPP, S&D and ALDE, it would likely mean the deal subsequently being rejected by the parliament itself. However, assuming the five groupings that make up the Brexit Steering Group support the deal in committee, it is likely to muster a safe majority in parliament too.

The support of the main conservative and social democratic groupings alone would be sufficient to reach this figure. These groupings in the Brexit Steering Group have jointly tabled all but the first of the resolutions passed by the European Parliament on Brexit to date, producing strong majorities (see Table 1 below), given they account for almost four-fifths of the seats in the parliament. This indicates the security and reliability of the majority that is likely to support the Withdrawal Agreement in the parliament.

Table 1: European Parliament Brexit Resolutions

Resolution	For	Against	Abstention
Resolution on the decision to leave the EU resulting from the UK referendum (28 June 2016)	395 (52.6%)	200 (26.6%)	71 (9.5%)
Negotiations with the United Kingdom following its notification that it intends to withdraw from the European Union (5 April 2017)	516 (68.7%)	133 (17.7%)	50 (6.7%)
State of play of negotiations with the United Kingdom (3 October 2017)	557 (74.2%)	92 (12.3%)	29 (3.9%)
State of play of negotiations with the United Kingdom (13 December 2017)	556 (74%)	62 (8.3%)	68 (9.1%)
Guidelines on the framework of future EU-UK relations (14 March 2018)	544 (72.4%)	110 (14.7%)	51 (6.8%)

The approved AFCO report will be tabled in the parliament, debated and put to a vote in a session of the Plenary chamber – the scheduled dates are set out in Table 2 below. A simple majority of members present on the day of the vote is required to pass the deal. The AFCO is also anticipating holding a number of extraordinary meetings in late 2018 and early 2019 to deal with the Withdrawal Agreement

Table 2: Calendar for EU institutions

Constitutional Affairs Committee meetings											
24 Sep	10 Oct	21 Nov	27 Nov	6 Dec	22 Jan	29 Jan	20 Feb	26 Feb	7 Mar	18 Mar	2 Apr
Plenary sessions of the European Parliament											
22-25 Oct	12-15 Nov	28-29 Nov	10-13 Dec	14-17 Jan	30-31 Jan	11-14 Feb	11-14 Mar	25-28 Mar			
European Council meetings											
20 Sep (Informal meeting)		18 Oct			13-14 Dec			21-22 Mar			

How long will parliamentary deliberations take?

During the accession process for Croatia, ratification in the European Parliament took place at the same time of year that the Withdrawal Agreement is likely to be considered. This offers a useful indication of the time constraints involved. Although that agreement was clearly a less time-sensitive process than the UK's exit, it still only took just under two months from the Commission offering a favourable opinion on the treaty (12 October 2011) to the European Parliament adopting a resolution in support (1 December 2011).

The procedures moved relatively swiftly. The AFET, the committee tasked with taking the lead on this issue, effectively completed its considerations in two sittings in the two months following the Commission's approval. The parliament's part in the ratification procedure was completed within just

36 working days. The European Council then adopted a decision supporting Croatia's accession three working days after that, with the treaty signed three days later. In total, just 42 working days were required to ratify the Croatian treaty internally.

Because Brexit is an unprecedented event, the nearest relevant comparison is this accession procedure. By using the 36 working days as a guide, we can establish a rough date by which the deal will have to begin the ratification process in the European Parliament.

The process will stall temporarily on the EU side once the deal is agreed. The European Parliament will not consider it until the 'meaningful vote' on the Brexit deal has passed through the UK Parliament. Given the complexity of the process on the UK side, set out above, there is little point in the European Parliament considering the deal until it is clear that the UK has approved it.

UK ratification will not be complete until the Bill turning the Withdrawal Agreement into UK law has been passed. MPs could still try to influence the content of the agreement even after they have passed a motion supporting it, for reasons we set out above. Article 168 in the draft Withdrawal Agreement points out that the agreement will not come into force until the "necessary internal procedures by each Party" have been completed.

Ratification will almost certainly not be finished by the end of 2018 and so completion of the deal will spill over into 2019. Indeed, the European Parliament may not even begin their deliberations until the new year, depending on when the UK Parliament votes on the deal. This is not only because the EU institutions would have less than a month to pass the agreement before year-end were it reached in mid-November, but because the European Parliament does not want to complete ratification until the UK Parliament has passed the meaningful vote motion.

As it stands, it seems highly unlikely that the deal will be done in time for the European Council on 18 October. Instead, the earliest point at which a deal could now be done is in time for an as-yet-unconfirmed European Council meeting in November. Assuming this would be held some time in the middle of the month – around the 15th – that would leave just 20 working days until the final European Parliament plenary session on 13 December. Even if the UK Parliament passes the motion approving the deal before this point, there will not be sufficient time for the European Parliament to complete its considerations.

The last scheduled European Parliament voting session before the end of the Article 50 period is on 11-14 March. Counting back 36 working days from this point takes us to 24 January. If the European Parliament began its consideration around this date, the committee stage could then take place from early February to early March. parliament's consent at this point would allow for the European Council to sign off the deal at their 21-22 March summit, with a week to spare for the formal signing of the deal.

Pushing ratification to the last possible deadline obviously produces significant risks, not least that the deal would only have one shot of passing without extending the Article 50 period. However, perhaps more significant will be the economic and financial costs of running the clock down so low. In this scenario, we would not have absolute certainty that a deal had been completed until just a week before the end of the Article 50 period, assuming the Withdrawal Agreement Bill had been passed in the UK in the meantime. Needless to say, in this circumstance companies would have little choice in many cases but to trigger contingencies.

To reiterate, there are no precedents for the UK's exit, so this timeline is far from definitive. Nevertheless, it is clear that the House of Commons will need to approve the deal by mid-January for it to be ratified in a comfortable amount on the EU side.

Even if a deal is not signed by mid-January, committees can call extraordinary meetings if necessary and the parliament has the scope to call special plenary sessions at short notice, as it did on 28 June 2016 – the day after the referendum result was known. *In extremis*, there are even plenary sessions scheduled for April. Should extra time be required for ratification, with unanimous agreement of the European Council to extend Article 50 by a few weeks, the very last chance for this European Parliament to vote on the deal – before May’s European elections – would be 18 April.

Under this scenario, the last comfortable chance for the European Parliament to begin its deliberations would be late February 2019. parliamentary committees are not scheduled to sit in May or June 2019, given the elections. As a result, extending Article 50 beyond April - if possible - would have little value, as there would be no opportunity for ratification then until July.

Will the European Parliament support the deal?

The European Parliament has chosen its causes carefully during the Brexit negotiations. It has focused on citizens’ rights and has been less overtly concerned with other parts of the Withdrawal Agreement. Therefore, as long as the agreement adheres to the majority of its priorities on citizens’ rights, which are also shared by the Commission and the European Council, the parliament is unlikely to consider rejecting the agreement.

Moreover, the parliament has an interest in avoiding a no deal scenario and the resulting economic cliff-edge. MEPs want to preserve the parliament’s reputation as a responsible governing institution. The political extremes in the European Parliament do not have the votes to influence the outcome. All of these factors, combined with the extensive level of consultation that has characterised the process to date, conspire to foster a large degree of confidence that the parliament would support the deal.

Perhaps a more feasible possibility is that the European Parliament refers the agreement to the European courts for an opinion on its compatibility with the treaties. Particularly if a legal commitment were included in the Withdrawal Agreement on the future relationship, as the UK has indicated it would like, this could be challenged by MEPs on the basis the agreement goes beyond the remit of the EU institutions. If this happened – either by a referral from the Constitutional Affairs Committee or 75 MEPs – the vote on the deal would be delayed until the courts had ruled on the deal.

The European Council

If the European Parliament ratifies the deal, it will then be up to the European Council to give its consent. The European Council is the meeting of the heads of state and government of the EU member states that takes place periodically – at least four times a year – usually in Brussels.

European Council deliberations take place in private. This breeds a more collegiate culture, as members have less of an eye to external perceptions and can have more frank discussions. However, this lack of transparency also makes it much more difficult to analyse the dynamics in the European Council.

Given that the Withdrawal Agreement substantively concerns only the UK’s withdrawal – the guidelines for which received unanimous support – dissent of any kind on the final deal, let alone a rejection, would be highly surprising. All member states have a shared interest in the major elements of the agreement: the UK’s financial contribution to EU the budget, the rights of their citizens in the UK and the Irish border which, after all, will be an external border for the entire bloc. Again, this unified position owes much to the daily informal contacts between the Commission and member states. This is not to say that there aren’t member states that would rather focus greater energy on the future relationship, in which they may have more at stake, but they would still be likely to support the deal.

Even in theory, there are very few blocking minorities that could derail the Withdrawal Agreement if enough countries were minded to do so. The five biggest member states by population, excluding the UK – Germany, France, Italy, Spain and Poland – would alone be sufficient to reach the 65% population threshold required for a super-qualified majority. If these five countries supported the deal, it would take at least nine other members rejecting it to cause a problem. Given at least 13 of the remaining 22 member states (from northern Europe, Scandinavia and the Baltics) have traditionally been closely aligned with the UK, it is highly unlikely they would bring down the deal. The remaining nine states from southern and eastern Europe could theoretically cause a problem. But even then the chance remains remote. Given the continued backing for the European Council's guidelines, it would take a major departure from those guidelines to cause such a large group to rebel against the deal.

The European Council and Article 50 extension

It remains possible that the two sides will fail to reach agreement in time for the end of the Article 50 period as currently defined (11pm GMT, 29 March 2019). If an extension were required, the European Council holds the keys to such an outcome. Unanimous agreement would be needed – a higher political threshold than for ratifying the deal itself.

Much will depend on the progress of the negotiations, the level of goodwill on both sides and the reasons required for an extension. For instance, if more time is needed for ratification, it would seem crazy to scupper the deal for the sake of an ultimately artificial deadline which it is within the gift of European leaders to alter.

The President of the European Council has the ability to call extraordinary meetings, which happen relatively regularly. In the event, for instance, that the talks do not reach a conclusion by late January, it would become clear that an extension of Article 50 could be necessary. Even though the European Council is not due to meet until towards the end of March, an emergency summit before then may be required if a short extension is needed or a deal is reached.

The point of no return is probably the March European Council itself, as no agreement then – even with a short extension of Article 50 – would leave just a month for the parliament to complete its considerations and vote at its final plenary session before elections on 18 April. Thereafter, parliamentary activities will cease in the run-up to elections on 23-26 May, which means extending Article 50 beyond the end of April, if legally and politically possible, would have little value. The new parliament will not begin until the opening of the first session in early July, so any extension beyond April would have to run at least four months to the end of July to open up new opportunities for ratification.

In a scenario where time runs out, there would need to be serious consideration on both sides of hitherto unthinkable options. For the EU, that could mean considering whether a longer extension of Article 50 – for months rather than weeks – was favourable over a 'no deal' scenario. This would push the talks into a new European Parliament, with the risks and complications that might precipitate.

There is understandable reluctance on the EU side to do so. First, although the polls don't currently suggest a profound change is imminent, the make-up of the European Parliament could shift substantially after the elections, possibly jeopardising the reliable majority that has been cultivated through the Brexit Steering Group. Second, sanctioning an extension of this length of time could become a precedent by which the UK attempts to push the talks back even as far as the new European Commission's term on 1 November. Once the principle of an Article 50 extension has been established, talks could continue slip further and further down the line. Ultimately, the EU institutions want the Brexit talks wrapped up as quickly as possible, and as a result are only likely to sanction an extension of Article 50 in very limited circumstances to aid ratification.

The Political Declaration on the framework for the future relationship

Article 50 states that the European Union should negotiate a withdrawal agreement with an exiting member state “taking account of the framework for its future relationship with the Union.” This is, needless to say, somewhat vague. The UK and the EU merely have to produce a Political Declaration on the framework for the future relationship which will accompany the Withdrawal Agreement.

From the UK side, they would like it to contain a sufficient degree of detail as evidence that they have achieved a future relationship agreement as a quid pro quo for the financial settlement and other concessions in the Withdrawal Agreement itself. Some MPs in the UK will also demand as much detail as possible to avoid a so-called ‘blind’ Brexit, while others will see it as an escape clause justifying their support for the Withdrawal Agreement. The EU27 have their own motivation to want a significant degree of detail, [as Andrew Duff has pointed out](#), not least to tie in the member states politically to ease tensions when the establishing the negotiating guidelines before the substantive talks begin. It would certainly aid future negotiations if both sides could reach a mutually agreeable framework at a detailed level.

The trouble for the UK is that the legal guarantees it would like on the future relationship are not feasible in the remaining timeframe. Secretary of State for Exiting the EU Dominic Raab has very clearly linked the Withdrawal Agreement with the future relationship, saying in a [recent statement to the House of Commons](#), “The financial settlement ... was agreed on the basis that it would sit alongside a deep and mutually beneficial future partnership.” But the financial settlement is part of the Withdrawal Agreement, which will be a legally binding treaty, to be converted into UK law by the European Union (Withdrawal Agreement) Bill, while the future partnership will be dealt with the political declaration in some form of non-binding joint declaration.

The political declaration will not be legally binding, although it will have political significance in both the EU and the UK. The UK wants the Withdrawal Agreement to contain a legal commitment that both sides will endeavour to turn the Political Declaration into a treaty. Such a commitment would serve to emphasise that the two are part of an indivisible package. However, even if the Withdrawal Agreement contains such a commitment it will not change the fact that the Political Declaration is not a treaty. The key point is that under the EU treaties, the Treaty on the Future Relationship will have to go through a separate approval process in the European Parliament after it is negotiated and then will most likely also require the sign-off of parliaments across the EU27. Whatever happens in either parliament before exit day, the substance of the future relationship can only be decided after the UK has left the EU.



CONCLUSION

The rights enjoyed by the European Parliament have been a major driver of the UK Parliament's role in the Brexit process. Not only has the European Parliament had a more secure constitutional veto over the Brexit deal, it has also secured for itself much more substantial involvement in the formation of EU positions than could be dreamed of in the UK. This interaction between the parliaments could also continue after exit day, especially when it comes to completing a Treaty on the Future Relationship after the UK has left the EU. Not just the European Parliament, but also the national parliaments in the EU member states will also likely get a blocking veto over the deal; meanwhile, as it stands the UK Parliament will have few if any meaningful mechanisms to influence the outcome of those talks and consent to the agreement.

The final Brexit deal will consist of two separate but connected agreements. The House of Commons will be asked by the government to approve both as a package. At the end of debate in the Commons, MPs will be asked to vote on whether to accept the government's deal. The vote will not simply be a choice between accepting the deal or rejecting it, even though the government might paint it as such to increase pressure on MPs. Members of parliament can amend the motion accepting the deal to add conditions to it.

Even if MPs approve the motion without amending it, they could try to secure concessions from the government in advance of passing it. For instance, they could work to ensure they get another 'meaningful vote' on the eventual agreement the UK and EU come to on the future relationship after the UK has left.

If the Commons rejected the agreements, the government could, in theory, put them up for a second vote instead of following through on the threat of 'no deal'. Article 50 means that 'no deal' is the default if no agreements can be approved. MPs would have a limited ability to prevent no deal if the government decided to pursue this option at any point. One means of stopping such an outcome would be to topple the government by a vote of no confidence.

If the Commons approves the agreements, parliament will still have to pass a piece of legislation—the EU (Withdrawal Agreement) Bill—before exit day. Otherwise, the Withdrawal Agreement will not form part of UK law and the Withdrawal Agreement cannot come into force.

If the deal is rejected by parliament, or no deal can be agreed with the EU, it has been suggested that a vote of confidence or a general election are likely to follow. The Fixed-term parliaments Act (FTPA) provides rules on both.

In relation to votes of confidence, the FTPA says that if the Commons decides to agree a particular set of words, then this triggers a two-week period to find a new government. By the end of this period, the Commons must decide to pass a confidence motion that says 'this House has confidence in Her Majesty's government', otherwise a general election is triggered.

The Brexit Endgame

Some say the FTPA's rules on confidence mean that Theresa May cannot say that the vote on the Brexit deal is a vote of confidence. However, Mrs May will still be able to make clear that, before the Commons votes on the deal, if it is lost she would resign. Whatever the FTPA says, there is still a constitutional convention which indicates that if the government loses the confidence of the House of Commons, the Prime Minister should resign. If Theresa May resigns, the Conservative Party will have to appoint a new leader who will take over as Prime Minister. What happens thereafter depends on who the new leader is and their ability to command a majority in the House of Commons.

The other way that the FTPA says that a general election can be triggered is if the Commons votes for one by a two-thirds majority. One implication of this is that the government cannot try to blackmail Conservative MPs into supporting the deal by saying that a general election will necessarily follow if it is rejected. It is not in the hands of government alone to call an election. MPs will know that they could conceivably reject the Brexit agreements but then support the Prime Minister in any confidence vote that followed or choose to vote against a general election. Thereafter, all options would remain on the table for the government as it stumbles on.

It is not just the UK Parliament that will play a crucial role in the Brexit endgame. The European Parliament and the European Council also have to approve the deal.

The European Parliament will not consider the deal until it has passed through the UK Parliament. Given the complexity of the process on the UK side, there is little point in the European Parliament considering the deal until it is clear that the UK has approved it. However, UK ratification will not be complete until the Bill turning the Withdrawal Agreement into UK law has been passed. MPs in the UK could still try to influence the content of the agreement even after they have passed a motion supporting it. The longer this process takes, the more it will eat into the time available for the EU institutions to pass the deal.

Once the deal has been ratified in the UK, the deal will be assessed and voted on by the Constitutional Affairs Committee of the European Parliament before being voted on by all MEPs. To pass, the deal needs the support of a majority of MEPs present on the day of the vote. Given the fact that the European Parliament has been consulted every step of the way, and that the outcome of the Brexit negotiations will probably conform to the guidelines the parliament helped shape, it is hard to see it rejecting the deal. However, in the unlikely event it did, EU negotiators would have to seek changes to the Withdrawal Agreement to satisfy the parliament, and the deal would then have to pass through the process again. A re-run may also be required on the UK side in this scenario.

Ratification will almost certainly not be finished by the end of 2018 and so completion of the deal will spill over into 2019. It's not only because the EU institutions would have less than a month to pass the agreement were it reached in mid-November, but because the European Parliament does not want to complete ratification until the UK Parliament has done so.

If the UK process isn't completed until after mid-February, then there is a risk of missing the final voting date in the European Parliament, on 18 April. In some ways, this date is more crucial than 29 March—the end of the Article 50 period. In limited circumstances, Article 50 could be extended for a short period to complete ratification; however, the final voting session of the European Parliament is fixed, with MEPs breaking up thereafter for elections. If this date is missed, a much longer extension of Article 50 would have to be considered—spanning at least several months to at least July—or both sides would face the prospect of 'no deal'.

Ultimately, there are always mechanisms that could be used to pass the deal quickly in an emergency on both sides. So if the talks fail, it will not be because of procedural constraints but because of the politics. Procedure can always be adapted to suit the political circumstances.

The Brexit Endgame

Assuming the European Parliament does pass the deal, the European Council will then vote on it. The Withdrawal Agreement doesn't need unanimous support, but what is called a 'qualified majority'. There is little doubt that either of these will be met.



The **UK** in a
Changing Europe

The UK in a Changing Europe promotes rigorous, high-quality and independent research into the complex and ever changing relationship between the UK and the EU. It is funded by the Economic and Social Research Council and based at King's College London.

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