

The Brexit Endgame

A short guide



BINGHAM
CENTRE FOR
**THE
RULE
OF
LAW**



The **UK** in a
Changing Europe



Foreword

With attention focussed on the negotiation taking place between the UK and the EU in Brussels, insufficient attention has been paid to the nature and complexities of the parliamentary processes that will begin once a deal has been done or, alternatively, in the event that no deal can be done. In this short and accessibly written summary of a more detailed report they have drafted, Matthew Bevington, Jack Simson Caird and Alan Wager have provided a short and clear analysis of what those processes might consist of. Drawing on detailed research into parliamentary procedure, yet presented in an easily readable form that is accessible to the non-specialist, they alert us to the twists and turns that lie ahead as we approach the planned date of Britain's exit from the European Union.

As such, they have provided a great example of what we at the UK in a Changing Europe aspire to do, which is to present the findings of social science research and present them in an accessible format so that they can inform the widest possible audience. I hope you agree with me that what follows is not only highly informative but also highly readable, and I extend my heartfelt congratulations to the authors.

Watch our countdown to Brexit video here:

<http://ukandeu.ac.uk/multimedia/countdown-to-brexit>



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.



The Brexit Endgame

Six months to go until the UK is due to leave the EU. The politics of Brexit will doubtless be messy and complex. So, too, will the process. What if Parliament rejects the deal? Will MPs be confronted with a stark 'deal or no deal' choice? Can Parliament send the government back to the negotiating table? Will the government fall if it can't get the deal through? And, if Parliament does pass the deal, what must the EU do to ensure it comes into force?

This report is intended to answer these questions. In it, we have tried to summarise as clearly as possible what needs to happen in both the UK and the EU for the Brexit process to be completed, and what might derail that process along the way. The findings in this report are derived from a more comprehensive version which can be found [here](#).

What must Parliament do?

The final Brexit deal will consist of two separate but connected parts:

- A treaty setting out the terms under which the UK will leave the EU (the Withdrawal Agreement).
- A statement outlining how the UK and EU envisage their future relationship (the Political Declaration).



Although both will be voted on together, the political declaration will not be legally binding. The UK and EU will need to negotiate another treaty, or series of treaties, to sort out how things like trade and security co-operation will work in the future. However, there is a possibility that this may be Parliament's last opportunity to have a say over the future relationship. As things stand, it has limited means to shape, or block, a future treaty.

In June this year, Parliament agreed a series of laws setting out how this approval process will work (in the European Union (Withdrawal) Act 2018). It is these laws that stipulate that both parts of the agreement will be put before both Houses of Parliament at the same time and will be voted on as a package.

Given the tight Article 50 timetable, this package will probably be presented to Parliament soon after a deal is reached (whenever that may be). However, it is not at all clear how long MPs will have to scrutinise the agreements. The government will, of course, want to make sure it has a majority before any vote. And it is probably the case that the later the vote happens, the more leverage the government will have, as it will be able to argue that there is a binary choice between 'deal and no deal' as the Article 50 clock ticks down.

If MPs are asked to approve the deals quickly, there may not be time for Select Committees to play the kind of role usually demanded of them when it comes to important constitutional decisions of this kind. And a short timescale would mean MPs having to grapple with two highly complicated texts without having the time to reflect on them in detail.

If MPs feel they have been pressganged into voting on a deal they have not had sufficient time to absorb, this could create problems down the line. As well as the agreement with the EU, the government will also have to pass an additional piece of legislation turning the Withdrawal Agreement into UK law. By virtue of the fact that a bill needs to go through multiple steps in Parliament before it can become law, MPs will probably have longer to scrutinise this than the Withdrawal Agreement. It is therefore conceivable that they will raise issues at this point that they either did not have time to bring up or had not considered when the exit deals were passed.

Going back to the Withdrawal Agreement itself, MPs will be asked to vote on it and the political declaration. This, however, will not be a simple binary, 'yes/no' affair (however much the government might like to portray it as such). Parliamentarians will also be able to amend the motion. They might add conditions, such as accepting it on the understanding they get a proper vote on the final trade deal with the EU, or even conceivably on condition of another referendum. However, if Parliament amends the

motion in such a way as to alter the agreement itself, this would amount to a rejection, with implications that we will discuss in a moment.

And, of course, there are all sorts of informal tactics by which MPs can exert pressure on the government. As we've seen with previous bits of Brexit-related legislation, the threat of a defeat might lead the government to amend its proposals.

If the Commons rejected the agreements, the government could, in theory, put them up for a second vote. It could decide, after losing the first vote, to make concessions to try to pass it a second time. For instance, had it not done so already, it could offer MPs a meaningful vote on any future trade treaty with the EU.

If the government chose not to resubmit the deal for parliamentary approval, it could choose simply to end the negotiations and opt for a 'no deal' outcome. However, even if it took this approach, it would need a Commons majority to implement mitigating measures. The recent technical notices published by the government indicate that Parliament would have to pass a significant amount of legislation in order to secure an orderly no deal.

The rules agreed by Parliament in June this year determine what will happen if no deal is reached with the EU by 21 January 2019 or if the Commons rejects whatever is agreed. The government must make a statement on what it plans to do next, which the Commons will debate and vote on. Thereafter, things are far murkier. If the government decided to go ahead with no deal, and the Commons rejected the statement setting out this approach, it is unclear what would happen next. However, faced with such a rejection of the government's approach to Brexit, it is unlikely that the government could carry on, and the next step could be a vote of confidence as set out in the Fixed-term Parliaments Act (FTPA), which we will come to shortly.

Turning Brexit into law

If, on the other hand, the government secures an agreement and the Commons approves it, even this would not be the end of the process. Parliament would still, as mentioned above, have to pass a piece of legislation—the EU (Withdrawal Agreement) Bill—before exit day. Otherwise, the Withdrawal Agreement will not come into force.

You could be forgiven for thinking that Parliament would pass this without a murmur, given that it would have already approved the deal itself. But things, particularly Brexit things, are rarely that simple. Some parliamentarians may raise objections or try to extract further concessions at this point. For instance, the full implications of an agreement over the so-called Irish backstop may only become clear in the period after

the meaningful vote but before the bill implementing the Withdrawal Agreement is passed.

History suggests that MPs don't necessarily vote the same way on legislation implementing an international agreement as they did on the agreement itself. When Britain joined the then EEC in 1973, the agreement to join passed with a large majority, but the Bill to turn it into UK law – the European Communities Act – scraped through by just eight votes.

The detailed legal aspects of leaving the EU might provoke just this kind of rethink. Once MPs see what the government is proposing on, for instance, the role of the courts or arrangements for Northern Ireland, positions could change. This type of legislation normally takes at least six months to go through both Houses of Parliament. But in these extraordinary circumstances, it will need to go through much more quickly, possibly in a matter of weeks.

Whatever happens, the Brexit deal cannot be ratified unless this legislation is passed, adding another layer of uncertainty to an already complex process.

Might the government fall?

The Fixed-term Parliaments Act (FTPA) lays down the rules that MPs will follow in the event that there is either no deal with the EU, or Parliament votes down whatever deal is agreed. These rules give MPs the power to reshape the government's Brexit deal without necessarily resorting to a general election.

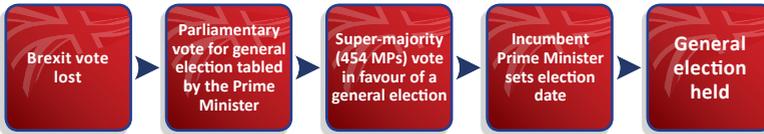
Put simply, the FTPA has two practical effects. First, it increases the barriers to a general election by establishing just three ways in which one could be called. Second, it thereby reduces the government's ability to force MPs to support its version of Brexit by threatening an election.

The four routes to a general election

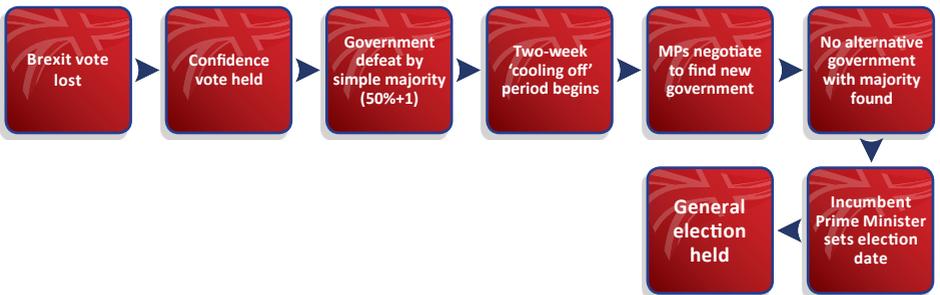
The Pre-FTPA (no longer available)



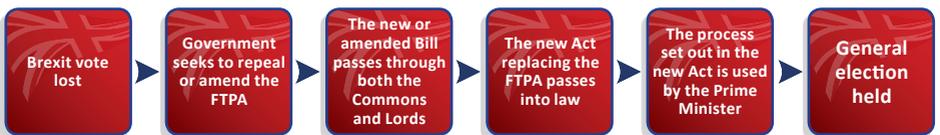
The 2017 General Election Route



The 'No Confidence' Scenario



The 'Overturn the FTPA' Scenario



As things stand, with the FTPA in place, there are two established ways to trigger a general election. The first is that a two-thirds majority of the Commons (not just those that show up to vote), or 464 MPs, needs to vote for an election.

The second is that a simple majority (50% +1, so a minimum of 326) of MPs must pass a specifically worded no confidence motion in the government. This would then be followed by a two-week period when an alternative government could be formed. If such a government can't be formed, there would be a general election.

A final option would be to overturn the FTPA. This is something that the Conservative manifesto of 2017 pledged to do and would involve the government winning a vote in Parliament. However, it would require approval in the House of Lords too, which would eat up valuable time.

Given current parliamentary arithmetic, there are hurdles on all these routes. All would require the government to seek the support of other parties in Parliament.

The FTPA means that Theresa May cannot threaten a general election if the vote on the Brexit deal is lost. In the past, Prime Ministers could make any issue a matter of 'confidence'. If the government lost a key vote that they marked as a matter of confidence, they were required either to resign or seek a dissolution of Parliament. This has historically been an effective way of ensuring that MPs from the governing party toe the party line.

However, because of the FTPA, a general election cannot be the direct result of the rejection of any bill in the House of Commons. Instead, it requires Parliament to vote on the specific phrases contained within the FTPA. These votes would be separate to those on the Brexit deal, meaning MPs could vote differently in each. In short, MPs can veto both the Brexit deal and a general election.

What about the EU?



Once a deal is hammered out between the UK and the EU (assuming that one is) the European Commission will set out a statement recommending to the European Council – the heads of state and government of the EU27 – that it be approved. The

Commission's formal role in the process then comes to an end. The European Council will then pass it on to the European Parliament for its approval.

However, this is where the process will stall temporarily. The European Parliament will not consider the deal until the UK Parliament has at least passed the meaningful vote motion on the deal. There is little point in the European Parliament considering the deal until it is clear that its UK counterpart has approved it.

However, UK ratification will not be complete until the bill turning the Withdrawal Agreement into UK law has been passed. Article 168 of the draft Withdrawal Agreement says that the agreement won't enter into force until this domestic legislation is passed in the UK. It is not clear whether or not the European Parliament will also wait for the implementing bill to be passed first as well before it votes.

Once the deal has been approved by the UK Parliament, it will be voted on by the Constitutional Affairs Committee of the European Parliament before being sent to a plenary session of all MEPs for consideration. To pass, it needs the support of a majority of MEPs present on the day. Given the support of the largest party groupings, which have worked closely with the Commission during the negotiations, there is little doubt that a majority will be secured.

However, in the unlikely event that the European Parliament did reject the deal, 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.

Historical experience suggests that the European Parliament can carry out ratification relatively quickly. It could begin its deliberations in mid-January and still sign off the agreement in time for the UK to leave the EU on 29 March. Obviously, in the event that the UK sought to extend the Article 50 process, this could be pushed back still further. At the absolute latest, the European Parliament has to vote on the deal by its last voting session on 18 April. Thereafter, the Parliament breaks up for elections.

If the deal isn't ratified in the UK until after mid-February, then there is a risk of missing this final vote in this term of the European Parliament in April. This date could, in fact, prove more important than 29 March—the end of the Article 50 period. While it is possible to extend the Article 50 period to complete ratification, the final voting session of the European Parliament is fixed. Thereafter, the five-week period of campaigning leading up to the elections will begin.

If this date is missed, a much longer extension of Article 50 could have to be considered because a new parliament will not be in place to consider the deal again until July. Either that, or we would face the prospect of 'no deal'.

Article 50 extension?

If time begins to run out, an extension of the Article 50 period could be considered. The European Council is the institution that holds the key here, and it would have to agree unanimously.

Much would depend on the circumstances in which an extension were requested. It is more feasible if for a short period (of weeks) simply to allow time to ratify the deal. A more lengthy extension for continued negotiations would be much more problematic, both for legal and political reasons, though perhaps not impossible if the alternative was no deal.

European Council

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', or the support of at least 20 member states representing at least two-thirds of the EU population.

There is little doubt that these conditions will be met. The European Council will have approved the detail before sending it to the European Parliament for ratification. The member states have also been in close contact with the Commission throughout the talks so there is no reason to think the deal would encounter difficulties at this stage.

Once these hurdles have been passed, the EU will be ready to sign the Withdrawal Agreement.

Political declaration

The political declaration will not be legally binding, although it will have political significance in both the EU and the UK. Both sides might try to claim that the declaration gives them a mandate to negotiate the future relationship according to the terms of that statement. However, even if the Withdrawal Agreement contains a legal commitment that both sides will try to turn the Political Declaration into a treaty, it will not change the fact that it is not a treaty.

EU agreements with third countries that cover member state competences—which the future treaty with the UK would—have to go through a separate approval process in the European Parliament and will require the sign-off of parliaments across the EU27. The EU has been clear that this cannot be avoided by using the Article 50 process in the way the UK would like.

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 process of leaving the EU has been, and will continue to be, complex. Much will depend on the political compromises that the UK government is forced to make both in negotiations with the EU and before its own parliament. The key points in the process are as follows:

- Parliament will vote on the two parts of the Brexit deal in one package.
- This will be presented to Parliament shortly after it has been agreed with the EU.
- The government may want to wait to ensure it has a majority before holding a vote.
- MPs will be able to amend the motion to approve the Brexit deal, such as accepting it on the proviso that MPs get another meaningful vote on the final trade deal.
- If MPs reject the deal, the government could choose to end negotiations and go for 'no deal' or it could try a second time to get the deal passed.
- Once the deal is passed, Parliament then has to approve a bill turning the Withdrawal Agreement into UK law – without this Bill the deal cannot be ratified.
- It is not a given that just because MPs vote for the Brexit deal they will vote the same way on the legislation implementing it.
- If a deal can't be reached or it can't get through Parliament, the rules set out in the Fixed-term Parliaments Act (FTPA) would determine what happens next.
- The FTPA sets out two paths to a general election: if a two-thirds majority of MPs support one, or the government loses a confidence motion and can't regain the support of the Commons within two weeks.
- On the EU side, once a deal is reached the Commission will recommend it to the European Council which will then pass it on to the European Parliament.
- The process will then temporarily stall as the European Parliament waits for the UK Parliament to pass the deal.
- If it does so, the deal will go through the Constitutional Affairs Committee before being voted on by a session of all MEPs – a simple majority of those present on the day is all that is needed for it to pass.
- Once that happens, the European Council will then vote. The deal will need the support of at least 20 member states representing at least two-thirds of the EU population.



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.

020 7848 2630 | ukandeu@kcl.ac.uk | www.UKandEU.ac.uk | [@UKandEU](https://twitter.com/UKandEU)