

# Resolving the Brexit impasse

The second meaningful vote, indicative votes and an extension to Article 50

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# Resolving the Brexit impasse

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## Executive summary

- There are three main options left for the Commons: approve the deal through the second meaningful vote, hold indicative votes on the future relationship and request an extension to Article 50.
- The second meaningful vote will probably use a similar procedure to the first, but the Government is likely to suggest fewer than five days of debate.
- There is a case to be made for changing the format and having separate motions on the Withdrawal Agreement and the Political Declaration for the second, or even third, meaningful vote.
- Separate motions on each would enable the Commons to engage with the deal in a way that takes into account where there is scope for changes to be made: the future relationship.
- Indicative votes on the future relationship could provide a way for the Commons to express its view on a range of different Brexit options before the second meaningful vote.
- We suggest that indicative votes should focus solely on what is contained in the Political Declaration. They would be more effective if no deal or a further referendum were not options.
- The direct route to achieving indicative votes involves taking a Government motion on Brexit and amending a combination of the Business of the House Motion and the motion itself to enable MPs to hold indicative votes on the options outlined above.
- The indirect route for holding indicative votes would involve the Commons amending a motion to secure a day or days on which to hold indicative votes.
- There are broadly three types of extension request that could be made to lengthen the Article 50 period: a technical extension, a forced extension and a panicked extension.
- A technical extension would be requested by the government, a forced extension would be imposed by MPs and a panicked extension would come about simply if time ran out.
- There are two main factors that shape the EU's response: how an extension is requested and for what purpose, and time. Any extension ought to achieve a clear purpose and must be for a strictly limited period of time to achieve that purpose.

## Context

The House of Commons and the Government are in limbo, between the end of one process and the beginning of another. The Commons debate on 29 January 2019, when the Brady amendment was passed, marked the conclusion of the process regulating the first meaningful vote, as set out in section 13 of the EU (Withdrawal) Act. That process began on 26 November 2018, when the Government made the statement that political agreement with the EU had been reached, and laid both parts of the deal before the House.

Before exit day on 29 March 2019 the House of Commons will play a major role in determining how the Brexit Endgame plays out. At this stage, there are three principal ways the Commons could shape the Brexit process:

- Approve or reject the Brexit deal when the second ‘meaningful vote’ under the terms of section 13 of the EU (Withdrawal) Act takes place;
- Decide on a number of options for the future relationship through ‘indicative votes’; and
- Request an extension to Article 50.

These decisions could be taken via a number of different legal and procedural routes. This briefing outlines and analyses a number of them.

On 14 February the Commons will consider an amendable motion on the Government’s approach to the negotiations. Whether the motion is passed, rejected or amended will have no legal consequences for the Brexit deal. This will not be a motion under section 13 of the EU (Withdrawal) Act 2018.

On 12 February the Prime Minister made a commitment that the Commons would be able to consider another amendable motion on Wednesday 27 February if, by that date, the Commons has not already approved the Brexit deal. Again, this motion will have no legal consequences for the deal itself. However, both of these motions could present opportunities for either indicative votes to be held or for the Commons to ask the Government to request an extension to Article 50.

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The Government has stated that it intends to make a second attempt at getting its Brexit deal through the Commons before 29 March 2019. Without approval in this second meaningful vote, the Brexit deal cannot come into force.

If the Government gets the deal through the second meaningful vote, it will then have to pass the EU (Withdrawal Agreement) Bill before exit day. This is likely to be extremely difficult and controversial. The EU (Withdrawal) Act 2018 took over 11 months to complete its journey through Parliament. It is possible that the Government will attempt to pass the EU (Withdrawal Agreement) in a matter of days.

## The second meaningful vote: how will it work and does it matter?

According to section 13 (1)(b) of the EU (Withdrawal) Act 2018, the Commons has to expressly approve both elements of the deal—the Withdrawal Agreement and the Political Declaration on the Framework on the Future Relationship—before the Withdrawal Agreement can be ratified.

Once the Government has completed its negotiations with the EU, it will make a new statement saying that political agreement has been reached (as required by section 13(1)(a)(i)). This statement, alongside the Withdrawal Agreement and the Political Declaration, will be formally laid in the Commons (as required by section 13(1)(a)). This will signal the beginning of the parliamentary process for the second meaningful vote.

The Government will then table the approval motion on the Brexit deal itself (required by section 13(1)(b)). In terms of the procedure used to consider the motion, it is likely that the Government will propose something similar to the one that was used for the first meaningful vote on 15 January. The Business of the House Motion for the first vote was the product of a [Procedure Committee inquiry and report](#). The two core recommendations of that report were that there should be at

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least five days for debate and that any amendments selected should be decided upon before the Government's approval motion.

However, the Government might propose that, for the second meaningful vote, the debate should last less than five days. The Government will need to ensure there is sufficient time for the EU (Withdrawal Agreement) Bill to be passed.

If MPs are not satisfied with the procedure proposed for the second meaningful vote by the Government, the Commons can amend the Government's Business of the House Motion, which is the first thing that MPs will decide on after the debate begins. Last time around, on 4 December and 9 January, MPs made two significant changes to the Business of House Motion.

## **What happens if the Commons rejects the deal at the second meaningful vote?**

If the Commons rejects the deal again, Section 13(4) of the EU (Withdrawal) Act requires that within 21 days the Government would have to lay a statement, and within seven days of that statement a minister would have to move a Commons motion on that statement. In all likelihood, given the short amount of time before 29 March, the Government is likely to respond much more quickly than the statute requires.

If the Commons wanted to specify precisely when the Government would need to respond, it could seek to shorten this timetable, as it did on 9 January, by amending the Business of the House Motion (in that case to require a motion to be tabled within three days of the Commons rejecting the deal).

## **An alternative approach to the second (or even third) meaningful vote?**

One procedural change that the Government might consider, which could have a significant bearing on what happens, is that it could table two separate approval motions in the Commons: one on the Withdrawal Agreement and one on the Political Declaration.

The relevant legislation (section 13(1)(b) of the EU (Withdrawal) Act) says that both elements of the deal need to be approved by 'a resolution'. However, this would not prevent them be approved separately through two resolutions.

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One of the major challenges for the Commons is that it is being asked to approve the outcome of one set of treaty negotiations (on the Withdrawal Agreement) and a mandate for the beginning of another process (on the future relationship). The main advantage of a two-motion approach is that it would allow the Commons to debate the issues raised by each part separately, and for amendments to be tailored to each.

By considering each element of the deal through separate motions, this would enable the Commons to take into account their distinct legal status. The Withdrawal Agreement is a treaty and the Political Declaration is not. The Withdrawal Agreement will create legal obligations as soon as it comes into force on exit day, whereas the Political Declaration will not.

Consequently, while the Withdrawal Agreement cannot be amended, it is possible that the Political Declaration could be approved subject to proposed changes regarding the future relationship. The Government can offer more concessions in relation to both its negotiating position on the future relationship and in terms of the role of the Commons in those negotiations.

Separating the two parts of the deal could help the Government to build the coalition it requires to get the deal through the Commons. Many MPs have different positions on the two parts of the deal. Opposition to the Withdrawal Agreement is predominantly focused on the potential legal implications of the Protocol on Ireland/Northern Ireland. By contrast, MPs' position on the Political Declaration is connected to their view of the Government's position on what the UK's relationship should be with the single market and customs union.

However, approval of the Political Declaration by the Commons would not necessarily prevent the Government changing, or later being prompted by the Commons to change, its position on the future relationship after exit day. Some MPs couch their opposition to the Withdrawal Agreement on the basis of objections to the contents of the Political Declaration. By separating the two elements of the deal, opposition to aspects of the Political Declaration, which can be renegotiated, would not prevent the legally binding treaty being approved.

The main disadvantage of a two-motion approach would be that it would undermine the fact that the two agreements are part of a collective and connected package

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negotiated under Article 50. The Withdrawal Agreement contains a number of provisions which engage with the future relationship—for instance, Article 184 says that the UK and the EU will endeavour to turn the Political Declaration into a treaty before the end of transition. Further, the Protocol on Ireland/Northern Ireland contains legally binding arrangements on the future relationship and therefore provides a further link between the two elements of the deal.

## **Would the government passing the Withdrawal Agreement separately to the Political Declaration cause problems for the EU?**

The Political Declaration does not need to be formally approved by either the European Council or European Parliament in order for the Withdrawal Agreement to be ratified on the EU side. Article 50 states only that ‘an agreement with [the exiting] State, setting out the arrangements for its withdrawal’ must be formally approved. The framework for the future relationship—the Political Declaration—must be taken into account, but this is a vague requirement that goes no further than to stipulate that one must at least exist and be referred to in the Withdrawal Agreement.

Thus, the division of the ratification process in the UK into separate votes on the Withdrawal Agreement and Political Declaration would have few direct implications for the EU’s own ratification process. The member states and the European Parliament are likely to vote on and approve both as a package in any case.

## **Does the Political Declaration need to be approved by the Commons?**

If the Commons approved a resolution on the Withdrawal Agreement and not the Political Declaration, would this prevent the Withdrawal Agreement being ratified? It is possible to see a way that the Withdrawal Agreement could be ratified without the Political Declaration being expressly approved by the Commons, or at least, not approved in the same way.

From a legal perspective, the domestic requirement to approve the Political Declaration is based on section 13(1)(b) of the EU (Withdrawal) Agreement. Absent that requirement, there are no further legal obligations that would need to be met in relation to the Political Declaration. By contrast, in the absence of section 13, for the Withdrawal Agreement to be approved and take effect in domestic law by exit day the Government would still have to ensure that the terms of the Constitutional

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Reform and Governance Act 2010 were met and that the necessary domestic legislation—the European Union (Withdrawal Agreement) Bill—was passed.

On 12 February, the Government indicated that if there was insufficient time for the terms of the Constitutional Reform and Governance Act 2010 to be met, which requires a treaty to be laid before the Commons 21 sitting days before it can be ratified, the Government would ask Parliament to disapply the statutory requirement for the Withdrawal Agreement through the EU (Withdrawal Agreement) Bill.

In principle, if the Commons approved the Withdrawal Agreement but not the Political Declaration (or if the Political Declaration was approved subject to conditions) the Government could use the EU (Withdrawal Agreement) Bill to remove the requirement that the Political Declaration be approved. This approach could be used in either a two-motion scenario or if the Commons amended a motion on both elements of the deal to state that the Withdrawal Agreement was approved but the Political Declaration was not.

## Options for indicative votes

Finding a majority in the House of Commons remains the principal stumbling block to ratifying the Withdrawal Agreement and Political Declaration. Indicative votes—giving MPs a say on a menu of different Brexit options to find out which has greatest support—would provide a way for the Commons to express its view on a range of different Brexit options. Such a vote, if held before the second (or even the third) meaningful vote, could help the Government to find a way of getting the deal over the line.

We suggest that indicative votes should focus solely on what is contained in the Political Declaration. Also, such votes would be more effective if options included neither no deal nor a further referendum.

The scope for flexibility in the negotiations lies in the Political Declaration on the UK's future relationship with the EU. Theresa May and Jean-Claude Juncker's joint

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statement on 7 February ruled out reopening the Withdrawal Agreement, and Jeremy Corbyn's letter to the prime minister on 6 February also implicitly accepted the contents of the Withdrawal Agreement, demanding changes only to the Political Declaration. If indicative votes are to have government buy-in, their outcome must be deliverable within the negotiations with the EU and (absent a significant extension) within the time specified by Article 50: a renegotiation of the Withdrawal Agreement would not meet this criterion.

There are persuasive reasons not to include both 'no deal' and 'further referendum' options in the range of choices within the indicative votes. Indicative votes are about finding a route through the Brexit impasse. A no deal Brexit—ruling out support for the Withdrawal Agreement—would make it unrealistic to immediately negotiate a future relationship with the EU. In any case, as the status quo ante, MPs in favour of no deal could express their opposition to all of the stated alternatives in order to further that aim.

A further referendum would require government support and further legislative arrangements—the vehicle for which could plausibly be the Withdrawal Agreement Bill. For the purposes of indicative votes, which would be designed to hone the Political Declaration based on existing workable solutions, it makes more sense if the options are limited to the future. As a result, indicative votes should be on statements which add conditions to ratification of the Withdrawal Agreement and the Political Declaration. These conditions could, for example, require the government to:

- take all necessary steps to implement an international trade agreement which enables the United Kingdom to remain a member of the European Economic Area (EEA);
- take all necessary steps to implement an international trade agreement which enables the United Kingdom to participate after exit day in a customs union with the European Union; or
- take all necessary steps to implement a free trade agreement with the European Union outside a customs union or membership of the European Economic Area.

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Even if the Commons approves the deal through the second meaningful vote, it could be argued that it should be able to make a separate decision through indicative votes on these options before the formal negotiations on the future relationship begin after exit day.

## The direct and indirect routes to indicative votes

There are two principal routes to achieve indicative votes.

The **direct route** involves taking a Government motion on Brexit (for example, the vote pencilled in for 14 February, or any future attempt to pass the agreement) and amending a combination of the Business of the House Motion and the motion itself to enable MPs to hold indicative votes on the Brexit options outlined above.

The advantage of the direct route is that it could increase the speed at which options for the Political Declaration could be considered. A disadvantage is that there is no guarantee that the amendments would be selected by the Speaker or that, even if they were, they would be considered in an order that enabled the Commons to give its verdict on all of them. The Commons could seek to amend the relevant Business of the House Motion—for example, for the debate on 27 February—to try to increase the chances that the Commons can give its verdict on each of the three main options for the future relationship.

The **indirect route** would involve the Commons amending a motion to secure a day or days on which to hold indicative votes. There are two principal ways of following the indirect route. The first involves MPs amending a government motion to specify a sitting day—in which they ensure that the Commons would control the agenda—but do not set out the rules for how the indicative votes would work. Another option could be an amendment passed to the Government motion that specifies both the day indicative votes would take place and sets out the rules for how they would work.

An advantage of the indirect routes is that they create a process distinct from Government efforts to secure support for the deal prior to the second meaningful vote. They could, therefore, be packaged as a supplementary (and helpful) process for the Government. Another would be that, by specifying a date in the future, this

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could give MPs the time to establish the rules necessary to enable the Commons to be guaranteed a decision on each of the options.

## **Indicative vote rules**

A Business Motion—which will be a necessary element of both the direct and indirect processes to indicative votes—could be amended to create a workable procedure to enable such votes to happen. This procedure would need to ensure MPs were specifically debating aspects of the future relationship, and which commanded significant support in the Commons. MPs could, for example, create threshold conditions which would specify that any amendment had to relate to the substantive issue of the future relationship, and specify that the Speaker could only select amendments which had the support of a certain number of MPs.

In Brexit votes to date, the Speaker has decided on the ordering of amendments. To enable potentially contradictory amendments to be passed, MPs would need to specify that motions were put and voted on ‘notwithstanding any decision of the House on earlier motions’. It is difficult to avoid the real possibility that multiple majorities—or no majorities at all—could complicate the instruction given to the government.

The order in which motions are chosen by the Speaker cannot completely solve this problem. One mechanism that could provide an alternative is a ballot system, as proposed in Ken Clarke’s amendment to the Government’s motion on 14 February. Every option with more than 50 signatories would be voted on by MPs in a preferential ballot system. The choice that won in a secret ballot would then be put to an immediate vote. Such a system is in use for the election of Select Committee chairs. A preferential ballot system was previously proposed in the context of House of Lords reform, but ultimately was not adopted.

Advocates of indicative votes are also keen for them to be binding. Government compliance with any majority found through the indicative vote procedure could be guaranteed if the Government was compelled, through the procedure set down by MPs, to produce a statement setting out how it intended to respond. It would also need to specify that the Government table a motion seeking support for their response.

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The timing of indicative votes is another important factor. A majority in parliament for a workable process is likely to require an extension of Article 50. The space created by an extension would give the time for indicative votes to happen. That extension would be following a further rejection of the government's approach—and the EU's demand that a forced extension have a specific purpose—is likely to mean that, if any extension is forced by the government, an indicative votes procedure is likely to come into play.

## An extension to Article 50

As the clocks ticks down, a request for an extension to the Article 50 period is looking increasingly necessary in order to complete all the procedures required under Section 13 of the EU (Withdrawal) Act and to avoid no deal.

It is not within the UK's gift to extend the Article 50 period. Rather, it requires a request by the prime minister—via a letter to the president of the European Council, Donald Tusk—which has to be approved unanimously by all 27 EU member states. It is therefore far from a given that one would be granted.

There are broadly three kinds of extension that might play out:

- A **technical extension** would be one requested by the Government on its own initiative to allow a few extra weeks to complete ratification—i.e. the passage of the EU (Withdrawal Agreement) Bill—in the UK Parliament. This assumes that the Withdrawal Agreement has already been approved.
- A **forced extension** would be one imposed on the government by MPs—most likely via the provisions in the Cooper-Letwin Bill—through changes to the procedures of the House of Common giving backbench business precedence over government business for a limited period, perhaps for as little as a day. The latest attempt to get this kind of extension legislated does not set a length for extension but leaves it for negotiation between the government and MPs.
- A **panicked extension** would be a request by the Government to extend the Article 50 period having simply run out of time to get the Withdrawal

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Agreement ratified. It is unclear in this scenario how much more time might be requested.

This, of course, does not take into account whether any of these proposals would be accepted by the EU. There are two main factors that shape the EU's response: how an extension is requested and for what purpose, and time. Any extension request ought to achieve a clear end and not drag the process on without nearing a resolution. And, as a result, the length of extension requested must not be open-ended but still give enough time for that particular resolution to be achieved.

A technical extension, because it would serve a clear purpose and wouldn't, in theory, be for more than a few weeks, would be fairly straightforward. One of the major hurdles—getting majority support in the Commons for the Withdrawal Agreement—would have already been overcome, so an orderly exit would remain a realistic outcome. There would be little problem for the EU to accept this request.

A forced extension, however, would satisfy neither criteria. It wouldn't serve any specific purpose other than to delay no deal, which puts off one outcome but doesn't bring a resolution any nearer. From an EU perspective, such an extension would run the risk of further, repeated calls to reopen the negotiations on the Withdrawal Agreement during this period and merely continue the existing uncertainty. Its length would not be driven by a specific aim, such as allowing more time for ratification, but by what is an acceptable political compromise in the House of Commons.

The original idea (rejected by MPs in January) was for an extra nine months. Such an extension would mean the UK remaining a member state for the European Parliament elections in May and the appointment of the European Commission in November. If, as still a member state, the UK didn't take part in those elections, the Parliament could be considered illegally constituted, as all member states have a right to representation, and EU citizens a right to stand and vote. Given the Parliament also approves the Commission, this could mean that both then lack legitimacy and are crippled. The key date is 2 July, when the new European Parliament term begins. If an extension runs beyond then, the UK would have to elect MEPs by that date.

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Finally, a panicked request for extension would face many of the same problems as a forced extension. It wouldn't serve a specific aim except to avoid no deal and would merely be the result of running out of time. There would be a clear risk for the EU in this scenario that, in granting this once, politicians in the UK come to believe that it is a trick that can be repeated, allowing them to avoid both no deal and approving the Withdrawal Agreement.

### **Would a motion be required in Parliament in order to request an extension?**

Unlike the revocation of Article 50, which would require primary legislation to give the Government the necessary legal power, a request to extend Article 50 could be made—legally at least—without the prior approval of MPs.

The date of the UK's exit as currently set, on 29 March 2019, refers solely to the point at which the EU treaties will cease to apply to the UK, as a result of the triggering of Article 50. The exit date in the EU (Withdrawal) Act, which many have argued forces the UK to leave on that date, merely reflects this fact. It does not in itself force the UK to withdraw from the EU treaties. Therefore, although this date would have to be adjusted if there were an extension, simply to ensure that it was consistent with the temporary continuation of our EU membership, there is no domestic legislation that would be contravened by such a request being made. Whether or not the UK is a member of the EU is defined entirely by the Article 50 process—domestic legislation merely ensures UK law is consistent with that.

The EU (Withdrawal) Act included a power (in section 20) to enable a minister to use secondary legislation—and therefore avert the need for primary legislation—to change the definition of exit day if the day in which the EU treaties cease to apply in the UK is other than 11pm on 29 March 2019. In legal terms, this could be done after the government had sought and received an extension to Article 50.

In reality the government could end up seeking the approval of the Commons through a motion on an extension before requesting one. The important point, though, is that this need not be done through legislation before the extension is sought. Nevertheless, to pass the relevant secondary legislation to amend exit day

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in the EU (Withdrawal) Act would require parliamentary approval and this would need to be done before exit day.

Yvette Cooper has set out a plan designed to ensure that the Commons could require the Government to request an extension to Article 50 before exit day. The idea is to amend the Government's motion on 27 February to secure a day in the Commons to pass a backbench Bill. The EU (Withdrawal) (No. 4) Bill—which was published in draft on 13 February—would mean, if passed, that if the Brexit deal has not been approved by 13 March 2019 the Government would have to move either one of two motions on the next sitting day (14 March) in the Commons. One would ask the Commons whether the UK should leave the EU without a deal and the other would ask MPs whether or not to request an extension to Article 50.

If the Commons rejected leaving the EU without a deal, the Government would then be under an obligation to move the other motion on an extension to Article 50. The Bill does not specify a proposed extension date. In the first instance, it would be for the Government to propose a date. If the motion was approved, the Government would then have to seek an extension from the EU to that date. If MPs voted for a different date, then the Government would have to seek an extension to that date instead. If the EU rejected the UK's proposed date and suggested an alternative, the Commons must approve any alternative extension date. Regardless of the Bill, the Government could still seeking an extension without needing the approval of MPs.



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