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Brexit: Policy options for the UK

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Introduction

Although Parliament agreed to the UK leaving the EU on 29 March 2019, it has not approved the terms of that departure. Section 13 of the *European Union (Withdrawal) Act 2018* placed a requirement on the Government to ensure that there were votes in both Houses of Parliament to approve any withdrawal agreement with the EU; this became known as the “meaningful vote”.

It was under this provision that the vote was held on 15 January 2019 in the House of Commons and the deal rejected. But the Act goes further; it requires Ministers to report to Parliament if either no deal has been reached with the EU or the House of Commons has rejected the deal. The onus is therefore now on Ministers to set out their policy and the change in the Government’s business motion made on 9 January 2019 means that the previous time limit of 21 days in which to make a statement has been shortened to three sitting days.¹ Within seven sitting days of that statement both Houses of Parliament must have the opportunity to debate it.²

On 14 January the House of Lords also rejected the proposed deal by 321 votes to 152, a majority of 169. The resolution adopted by the Lords said that a no deal outcome to the Brexit negotiations must be rejected and it regretted that the Prime Minister’s deal would damage the future economic prosperity, internal security and global influence of the UK.

This paper considers the policy options available to the Government and to Parliament. It does not examine the Parliamentary procedural issues nor the question of whether or not a general election should be held.

Background – the legal situation

The UK gave notification on 29 March 2017 under Article 50 of the *Treaty on European Union* that it would be leaving the EU two years later. This followed the passage of the *European Union (Notification of Withdrawal) Act 2017*, which authorised the Prime Minister to give notification.³ In addition, “exit day” was defined in section 20(2) of the *Withdrawal Act* as meaning 2300 on 29 March 2019. As a result, the UK will leave the EU on the 29 March 2019 if no action is taken to stop this.

¹ For the amended business motion, see HC Deb 9 January 2019, vol 652, col 385

² *European Union (Withdrawal) Act 2018*, c. 16, s. 13(4) and (6)

³ The Act became law on 16 March 2017.

The *European Union (Withdrawal) Act 2018* specified that the House of Commons must approve any agreement with the EU, the House of Lords must debate it and there must be new legislation to implement the Withdrawal Treaty.⁴

The legal consequences of each possible option are considered below but it is important to note that, in the absence of any agreement as to the terms of the withdrawal, there will be considerable legal problems if no new legislation is enacted by Parliament before exit day to deal with a number of important issues including, for example, the status of EU citizens living in the UK.

It may be necessary for the UK to seek to delay its departure from the EU. To do this it would be necessary to legislate to remove 29 March 2019 as exit day from the *Withdrawal Act*. But there is no requirement to overturn the 2017 Notification Act as that only gave the Prime Minister the power to notify the EU of the UK's intention to leave and did not require it.⁵ Any extension of the Article 50 time period requires unanimous agreement between the EU27 and the UK.

Policy options

A further vote on the prime minister's deal or on a variant of it

It is possible that the Prime Minister will go back to the EU and ask for an amendment or amendments to the Withdrawal Treaty and that if she is successful, she will want Parliament to vote again on the agreement. The Clerk of the House told the Select Committee on Exiting the EU that there was no impediment to the House voting again on the agreement at a subsequent date, with or without any amendment to the agreement.⁶

Although media reports have hinted at the possibility of the EU making "concessions" in these circumstances, there is little evidence that EU leaders would be prepared to abandon the Northern Ireland backstop, which has been the main reason why the agreement has failed to gain sufficient support in Parliament.

No deal

Although Article 50 does not envisage a Member State leaving without agreement, it is possible for a country to do this. The main consequences in the present circumstances would be:

- there would be no transition period;
- UK citizens living in the EU and EU citizens living in the UK would lose all their rights under EU law;
- the loss of the free movement of goods would mean the return of customs and other controls for trade with the EU, including (as required by the UK's

⁴ *European Union (Withdrawal) Act 2018*, c. 16, s. 13(1)

⁵ See *European Union (Notification of Withdrawal) Act 2017*, c. 9, s. 1

⁶ House of Commons Exiting the European Union Committee, *Tenth Report of Session 2017–19: The progress of the UK's negotiations on EU withdrawal – The Withdrawal Agreement & Political Declaration*, HC 1778, 9 December 2018, pp. 39-40, para 108

membership of the World Trade Organisation, WTO), the reintroduction of tariffs on trade between the UK and the EU;

- WTO rules would also require the UK and the EU to levy third country tariff rates on trade between the two parts of Ireland;
- a hard border would be imposed between Ireland and Northern Ireland, contrary to the Good Friday/Belfast Agreement;
- travel between the UK and the EU would become more difficult because of the loss of free movement rights; how difficult would depend on the EU's response;
- the EU would no longer recognise UK approvals of products and services, so all UK exports would be subject to checks in their importing EU country; UK businesses would have to seek regulatory approval in EU Member States and possibly establish a presence in one of them to maintain trade;
- the loss of free movement of services, the loss of the right of establishment for UK businesses and the loss of mutual recognition of qualifications in the EU would hamper UK services exports to the EU;
- the EU would be likely to pursue the UK for its unpaid debts;
- greater impact on some businesses and regions, which would require differentiated responses.

This is a brief summary of the main impacts; a detailed study by the Senior European Experts in 2018 identified over 40 areas of policy where there would be problems, including data transfer, civil aviation, crime and justice co-operation, energy supply, the NHS and industrial supply chains.⁷ All these impacts would mean that a no deal departure from the EU would have major economic and social consequences. While it may be politically expedient to play up (or down) the consequences of a no deal Brexit, it must be recognised that there would be significant short-term disruption, for example at ports and airports, as well as longer-term economic, social and political impacts.⁸ Measuring those impacts is difficult because such a situation would be unprecedented but they would be real and whilst some measures might mitigate the worst effects, not all adverse consequences could be avoided even with the best planning.

In legal terms, if the Government wishes to pursue a no deal Brexit it would require primary legislation to address the legal vacuum that would otherwise result in many policy areas. The *European Union (Withdrawal) Act 2018* was written in terms that presumed that an agreement would be reached with the EU. It contains a specific prohibition on the use of the powers it grants to Ministers to legislate after Brexit in any way that would be contrary to the Good Friday/Belfast Agreement or which would lead to the reintroduction of a hard border on the island of Ireland.⁹ As a no deal Brexit would mean the reintroduction of border controls between north and south in Ireland (because of the need for the UK to comply with WTO rules) fresh legislation would be needed to authorise and regulate this.

⁷ Senior European Experts, *What does a "no deal" Brexit mean?*, September 2018

⁸ The European Commission has said that in the event of a no deal Brexit UK airlines would be able to keep flying between the UK and the EU but not between destinations within the EU.

⁹ *European Union (Withdrawal) Act 2018*, c. 16, s. 10; the Good Friday agreement is also an international treaty to which the UK remains bound unless it denounces it.

There will also be a need to make consequential, technical amendments to hundreds of legislative provisions, primary and secondary, in order to make them valid post exit. Devolved administrations and legislatures will also need to act in areas of devolved competence.

A key issue with a no deal Brexit is how the EU would respond. In December 2018 the European Commission brought forward 13 legislative measures to deal with this possibility; these followed half a dozen previously published and/or adopted measures.¹⁰ In addition, around 50 preparedness notices dealt with a wide range of issues from plant health to VAT, travel to the emissions trading scheme.¹¹ These measures are based on the assumption that the UK would be a third country and would lose all the privileges of membership after 29 March 2019. The loss of goodwill resulting from a no deal Brexit cannot be priced but it would be significant and would be worse if the UK declined to meet its financial obligations to the EU.

“Managed” no deal

In the autumn of 2018 it was suggested that, as an alternative to leaving without any form of agreement with the EU, there should be a “managed” no deal. There are no precise definitions of “managed no deal” but most proponents imply that such an approach would mean:

- the UK leaving on 29 March 2019;
- the UK making a contribution towards its outstanding liabilities (but possibly not as much as the Withdrawal Treaty allows for);
- reaching temporary agreements with the EU on a case by case basis to minimise disruption in specific sectors – for example, on customs and tariffs, civil aviation and travel;
- keeping such agreements for a short period;
- trading on WTO terms from 29 March or as soon as possible thereafter;
- leaving open the possibility of future trade talks with the EU.

Supporters of a managed no deal have suggested that it would not be as disruptive because it would include a transition period.¹² But the transition period was provided for in the now rejected Withdrawal Treaty, and the EU has been clear that it would not agree to a transition without agreement on other mutually important issues, including the Northern Ireland border and citizens’ rights.¹³

The biggest difficulty with a managed no deal departure is that it makes the UK entirely dependent on the EU’s willingness to engage in such an exercise. It is hard to envisage the EU27 and the Commission moving away from their current insistence that any agreement

¹⁰ See European Commission, ‘Legislative initiatives and other legal acts’, 13 January 2019

¹¹ See European Commission, ‘Preparedness notices’, 22 November 2018

¹² For example, Esther McVey MP: see ‘Sophy Ridge on Sunday Interview with Esther McVey MP’, *SKY*, 9 December 2018

¹³ European Commission quoted in ‘No-deal Brexit could mean ‘minimalist’ withdrawal deal, says UK minister’, Ian Geoghegan, *Politico*, 20 December 2018

with the UK has to involve the issues of Northern Ireland, citizens' rights and financial liabilities.¹⁴

Advocates of a no deal or a managed no deal scenario often posit the theory that such a situation would be just as bad for the EU as the UK and they would therefore be willing to make concessions to ensure a managed no deal. While it is true that the EU has been putting measures in place (see above) to handle a no deal situation, they have been described by leading academics as "distinctly one-sided, temporary, and intended to defend the EU against the worst of the disruption", and of limited benefit to the UK.¹⁵

European Free Trade Association & European Economic Area

A cross-party group of MPs have advocated what they call the "Norway plus" option of the UK re-joining the European Free Trade Association and remaining in the linked trading relationship that it has with the EU, called the European Economic Area. This would put the UK in the same position as Norway, Iceland and Liechtenstein. In addition, to tackle the problem of the Northern Ireland backstop, the UK would separately negotiate a customs arrangement with the EU, doing away with any need for border controls in Ireland.¹⁶

The advantages for the UK would be that it would stay in the Single Market, meaning little change for UK businesses, minimising trade disruption and protecting inward investment. As a member of the European Economic Area, UK businesses would retain their rights of establishment in the EU, mutual recognition of qualifications would continue and travel and citizens' rights would be largely unchanged. On the other hand, the UK would not be part of the Common Agriculture Policy or the Common Fisheries Policy (though the EU can be expected to insist on full reciprocal access for fishing vessels to each other's waters).

But there are substantial disadvantages. First, that the UK would be bound by EU Single Market regulations but would have no voice and no vote when they are adopted. This would make the UK a rule-taker across a large swathe of economic activity. Secondly, in a customs union the UK would not be able to have a fully independent trade policy as it would have to adopt the tariff policies of the EU. In addition, it would have to open its markets to third countries with which the EU had a trade agreement but without any guarantee of access to those third country markets itself (*i.e.* the situation Turkey is in now).

Thirdly, and perhaps most importantly in the context of the 2016 referendum, free movement of people would continue. This is because it is one of the four freedoms of the Single Market. Norway Plus advocates have suggested that free movement will be less of an issue from 2020 because the all EEA citizens in the UK are being registered as part of Brexit preparations, enabling those without a job to be deported in future. It has also been suggested that provisions in the EEA agreement would permit the UK to apply an emergency brake to free movement in certain circumstances.¹⁷ In fact, the relevant articles of the agreement have only been used once in relation to free movement of people, by the tiny country of Liechtenstein in 1995, and it was only temporarily while negotiations

¹⁴ "Managed no deal? That's just more Brexit snake oil", Anand Menon & Jonathan Portes, *The Guardian*, 6 January 2019

¹⁵ *Ibid.*

¹⁶ See 'Common Market 2.0', 11 December 2018

¹⁷ See 'Norway Plus will satisfy most of our Brexit goals', Nick Boles, *Daily Telegraph*, 3 December 2018

continued to resolve the issue. There is no general right under the EEA agreement to restrict free movement.¹⁸

Finally, the need to pay into the EU budget would be an issue too. Norway is the EU's tenth largest budget contributor.¹⁹ Norway Plus does not address the security, foreign policy and international development aspects of the UK's current relationship with the EU, elements of which are of great importance and which the Government has said it wishes to maintain.

Two versions of Norway Plus are currently being talked about. One would be a permanent alternative to EU membership and the second would be a holding place while the UK seeks a longer-term arrangement with the EU, probably based on an EU-Canada style free trade deal. It is by no means clear that the existing EFTA countries want the UK to join and if they were to agree, it is questionable whether they would do so if the UK only intended to be a temporary member. This is because the UK joining would be hugely disruptive to their long-standing arrangements, not least because the UK is a far larger country in both economic and population terms than the remaining EFTA members.

Free trade treaty

Many supporters of Brexit have suggested that the UK should negotiate a free trade treaty with the EU. This is the position of the Government; the Withdrawal Agreement was intended to be a bridge between being an EU member and a future trade agreement.

It would not be possible to negotiate such an agreement by 29 March, indeed it would be difficult to agree such a major treaty by the end of the transition period that was in the now rejected Withdrawal Treaty. It is highly unlikely that the EU would agree to a comprehensive trade treaty without the issues in the Withdrawal Treaty (*e.g.* money, citizens' rights and NI backstop) being dealt with. A trade treaty would need to be associated with some sort of customs union to enable the Irish border question to be addressed.

The EU has never agreed to a trade treaty as comprehensive as suggested by the Prime Minister in her Lancaster House speech and the EU rejected the Chequers proposals for a common rule book for trade in goods and a combined customs territory.

New referendum

Another option available, given the inability to reach agreement in Parliament, would be to hold a new referendum. This would require an extension of Article 50 to give sufficient time to enable a referendum to be organised as it requires primary legislation, consultation on the question and the formation of authorised campaigns. Previous referendum legislation, for the 2011 AV referendum and the 2016 EU referendum, took seven months to pass but that included the long summer recess in each case. It is likely that the timetable can be compacted; there were only 11 weeks between the passing of the AV legislation and the vote.²⁰

¹⁸ These issues were discussed in Senior European Experts, *Free movement of persons in the EU: An update*, January 2019

¹⁹ 'Cameron tells anti-EU campaigners: 'Norway option' won't work for Britain', Nicholas Watt & Rowena Mason, *The Guardian*, 28 October 2015

²⁰ Jess Sargeant, Alan Renwick & Meg Russell, 'How long would it take to hold a second referendum on Brexit?', UCL Constitution Unit, 30 August 2018

An added timing complication would be the May European Parliament elections if the UK were still a member of the EU at that time, although this would not be an insuperable barrier.

The most difficult issue would be what question to put to the vote. Should it include the deal that Parliament has rejected versus remaining in the EU? Or some other option or variant of that, perhaps including no deal? It has been suggested that it might be a multi-option referendum, with the Prime Minister's deal, no deal and staying in the EU all being on the ballot paper. How that would operate in practice is unclear. There are precedents for three-option referendums but they tend to be about longer-term policy questions and not about something as important and immediate as withdrawing from the EU in a matter of months.²¹ Moreover, such a three-option referendum risks ending without a clear-cut outcome which would bring closure to the issue.

There is also the question of whether or not the result of the referendum should be legally binding, as the 2011 AV referendum was but the 2016 EU referendum was not.²²

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²¹ Discussed in John Kerr, *The Roadmap to a People's Vote*, People's Vote, 18 September 2018, Annex 4

²² Parliamentary Voting System and Constituencies Act 2011, c. 1, s. 8 required its provisions on the alternative vote to be implemented if there was a "yes" vote in the referendum.



Senior European Experts

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 senioreuropeanexperts.org

 info@senioreuropeanexperts.org

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