

The power of procedure: how might the UK parliament shape Brexit?

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Summary

A contest for control of the Brexit process is playing out between the government and parliament in the UK. The complex, opaque rules of parliamentary procedure have suddenly become central to the ability of either side to dictate the tempo and content of the UK's withdrawal from the EU. Understanding these rules is key to understanding whether and how parliament can constrain government and shape its position, or whether ministers can proceed largely unchecked.

The role of parliament in shaping the UK's departure from the EU is bitterly contested. The ability of the government to begin withdrawal negotiations under Article 50 of the EU Treaty without parliamentary consent will be ruled on by the Supreme Court in the coming months.

The government must either convince the highest court in the land of its case, overturning the verdict of the High Court. Or it must gain parliamentary consent in the quickest and least disruptive way possible. For their part, parliamentarians seeking influence over Brexit are pursuing a "moment" whereby they can extract commitments and concessions from the government over the timing and content of the negotiation.

This game is being played out within the opaque, fuzzy-edged world of UK parliamentary procedure, which itself is based on convention and an unwritten constitution. It is this fuzziness which has necessitated the involvement of the courts; equally it is this murky system through which both the government and its opponents must continue to navigate.

Government's ways forward

If the government's appeal to the Supreme Court succeeds, it can proceed with Article 50 as planned by late March 2017. If the government loses, or if it decides to pre-empt the Supreme Court decision, ministers will need parliamentary consent to proceed. An examination of the procedural options alongside the High Court's ruling reveals two viable options: introduce primary legislation, i.e. a Bill, or amend a suitably relevant existing Bill making its way through parliament.

These are the only two viable options because of the argument on which the High Court based its verdict that government must get parliamentary consent. In summary, it contained three premises, one explicit conclusion, and one implicit conclusion:

- **Premise 1:** triggering Article 50 is tantamount to repealing the European Communities Act 1972, the piece of legislation which enshrines EU membership in UK law ¹.
- **Premise 2:** amending or repealing primary

¹ In some cases primary legislation includes within it the power for government to repeal or amend it through secondary legislation. These are known as "Henry VIII" clauses. The ECA 1972 contains a Henry VIII clause in [Section 2 \(2\)](#), allowing government to implement the UK's EU-derived obligations or enable any EU-derived rights. However, it does not create the power for government to repeal the Act or withdraw rights. The High Court has found that triggering Article 50 would constitute repealing the Act and withdrawing rights - and that therefore the government does not have the power to proceed without further primary legislation.

legislation can only be achieved through primary legislation (with some exceptions, which do not apply in this case).

- **Premise 3:** notifying parliament is not the same as passing primary legislation.
- **Explicit conclusion:** government cannot notify parliament.
- **Implicit conclusion:** government needs to pass primary legislation.

The argument is strictly valid: accepting the premises means accepting the conclusions. Therefore, the government's only option in contesting the case is to argue that one or more of the premises is false.

Appealing the High Court ruling

Premise 2 looks secure, as a well-established and fundamental principle of the UK's democratic system. It has never been suggested that it does not hold, including by the government. Premise 3 is an incontestable statement of fact.

This leaves premise 1 as the only potential weakness - hence recent reporting that the government's appeal will be based on the argument that triggering Article 50 is not tantamount to repealing or amending the ECA 1972. This in turn requires the argument that Article 50 can be triggered, without necessarily repealing or amending the ECA. This, in turn, requires the possibility that the withdrawal process can itself be exited - such that the clauses of the ECA continue to apply in the UK.

Jean-Claude Piris, former Director-General of the European Union's Legal Service, has argued¹ that the Article 50 process is indeed reversible. However, the High Court found the opposite - that "a notice under Article 50 cannot be withdrawn once it has been given", nor can a qualified, or "conditional" notice be given². Moreover, the ruling made it clear that the UK government explicitly accepted this to be the case. The challenge is therefore for the government to argue against a premise it accepted during the process of the High Court ruling.

A complicating factor for the government here is that the legal interpretation of Article 50, as part of an EU treaty, resides with the European Court of Justice (ECJ). This could yield a scenario in which the UK Supreme Court asks the ECJ for an opinion on whether Article 50 is indeed reversible - and therefore whether the government does or doesn't

need parliamentary consent. If the media reaction to the High Court decision was explosive, the prospect of the government's hand being forced by the ECJ is nuclear.

Non-starters for the government

Several other options have been floated as less onerous routes for the government to achieve parliamentary consent. On closer examination, these are not possibilities, unless the Supreme Court supports the government in overturning the High Court verdict:

1. Use secondary legislation. This would make for a quicker and less disruptive journey through parliament. However, the ECA does not contain a provision allowing it to be repealed by secondary legislation³.
2. "Piggyback" an amendment on an unrelated Bill progressing through parliament. While this would tick the box in terms of being primary legislation, amendments have to be within the "scope" of a Bill. The Speaker of the Chamber will rule out unrelated amendments - for example, if the government inserted an amendment into the next Finance Bill.
3. Win a motion it brings into the Commons. Simply proposing a motion to trigger Article 50, and winning the vote, could be done in a day. However, such a motion would not constitute primary legislation, and as such would not be sufficient.
4. Amending and winning an Opposition Day motion. Again, this would not constitute primary legislation.
5. Win (potentially via amending) a Backbench Business motion. These motions are voted on in debates set up to allow backbenchers - MPs not part of the government - to raise and debate priority issues. Not only would such a vote not constitute primary legislation, but Backbench Business motions are typically treated as non-binding on the government.

Parliament's calculus

For parliamentarians seeking to influence Brexit, the calculus is even more complex. Not only must they work out which parliamentary vehicle is most propitious, and within the bounds of the unwritten constitution and its legal basis. They must decide

² "Article 50 is not for ever and the UK could change its mind", [Financial Times](#), 1 September 2016.

³ R (Miller) v Secretary of State for Exiting the European Union. Summary of the judgment of the Divisional Court.

how many bites of the cherry they can create, in terms of parliamentary “moments”. They must then decide what to prioritise.

For example, forcing a vote on the triggering of Article 50 may give them greater control of the timing of this kick-off event. But if the greater prize is to influence the government’s negotiating stance, or to vote on a final withdrawal settlement, parliamentarians would need to create additional “moments” to serve these purposes further down the line. If amassing a parliamentary majority against the government can only be done once, logic suggests that it should be done when the biggest “bang” can be achieved.

Once the strategy is set, parliamentarians have three potential routes to creating a “moment”. Remember, all of these are predicated on it being able to create a temporary majority against the government:

- Introduce primary legislation. The opposition has the ability to propose new legislation via what is known as a “private members’ Bill”. However, this is unlikely to succeed in practice (see below).
- Amend a suitably relevant existing Bill making its way through parliament. A more likely scenario is that parliamentarians seek to amend a Bill proposed by the government. This could include the Bill government introduces to get parliament’s consent, should the Supreme Court require it to do so. To be amended with Brexit-related clauses, the Bill has to relate to Brexit, i.e. the amendments must be within the “scope”.
- Win a motion, i.e. a vote in parliament, either one proposed by the government or one proposed by parliamentarians during as “Opposition Day debate” (see below).
- Defeat a government motion. This more defensive strategy is more likely to prevent the government proceeding in a certain way than it is to require specific actions by the government, but is still a way parliament can influence government activity.

Winning binding motions is an option available to parliamentarians which isn’t open to government. This is because parliament can place obligations and conditions on the government’s negotiation through any binding mechanism, whereas the government is (in the High Court’s view) effectively repealing an

Act of Parliament - a higher bar to clear, and one which requires primary legislation.

Parliament’s use of debates and legislation

Opposition Day debates are treated seriously, usually with a “three line whip”, which strictly requires MPs to vote according to party instructions. The loss of a motion during an opposition day debate would be politically significant - while strictly speaking there is no legal clarity over whether a motion would bind the government to its conclusion, convention suggests that it would. In the past, the opposition have used these debates to bring motions to annul secondary legislation, for example. A minimum of 20 days per parliamentary session (or “term”) are made available to Opposition Day debates, but government decides when they are scheduled.

The opposition has already attempted to use an Opposition Day debate to shape the government’s approach. On 12 October, it proposed a motion requiring a “full and transparent debate” in parliament and “proper scrutiny of [the] plan ... before Article 50 is invoked”⁴. Rather than opposing the motion outright, the government chose to add an amendment giving it the ability to refuse scrutiny where this would “undermine” its negotiating position. This amendment was subsequently passed, giving parliament little leverage over the government. Moreover, the motion only commits the government to caveated parliamentary scrutiny of its plan - not a formal vote.

Parliamentarians could also seek to use a private members’ Bill to shape Brexit. MP Tom Brake’s “EU Citizens Resident in the UK (Right to Stay) Bill 2016-17” is an example. Private members’ Bills usually fail to become law, both due to the paucity of parliamentary time they receive, and also because they typically run contrary to government policy. However, given that they are items of primary legislation and can therefore amend and repeal any existing primary legislation, as well as make new law, a private members’ Bill is the most powerful vehicle open to the opposition - if not the most likely to succeed.

As with government, parliament has a range of options which won’t deliver:

- “Piggybacking” an amendment on an unrelated Bill progressing through Parliament. The same logic applies for the opposition as for government. For example, slipping an

⁴ [Hansard](#) 12 October 2016

amendment into a Finance Bill attaching conditions to the government's negotiating stance would likely be ruled as out of "scope" by the Speaker.

- Winning a Backbench Business motion. Since motions in these debates are not typically regarded as binding on government, winning one would not have the strength parliamentarians require to attach conditions to the Brexit negotiation or define its parameters. However, winning a Backbench Business vote would have a strong symbolic effect and would be highly embarrassing for the government.

Consent bill: minimising disruptive potential

If the government ends up seeking parliamentary consent for Article 50 - either because it has to or because it decides to do so ahead of the Supreme Court verdict - it has a strong incentive to limit the potential for it to become a source of disruption. In theory, government could present a one clause Bill which would give it the right to repeal the ECA, or to trigger Article 50 in the knowledge that this may lead to the necessity of repealing the ECA. Reports suggest that a three-line Bill is being drafted by government as a hedge against losing the appeal.

The ability of the opposition (or indeed any parliamentarian) to amend the Bill would, as noted above, depend on its scope. Unlike in the US Congress, where amendments can be inserted into a Bill even if they are unrelated, this is not an option in the UK. A Bill's scope is adjudicated by the Speaker of the chamber and is not decided in advance - it is judged on an amendment by amendment basis. Some argue that the scope of a Bill is its long-form title (i.e. An Act to make provision about...) but this isn't the case. The scope is defined by what the Bill contains, in terms of its clauses - hence why the three lines are so critical.

To illustrate, there would seem to be a difference in scope between a bill that said "Government has the power to trigger Article 50" and "Government has the power to repeal the ECA 1972". One could argue that, because the latter contains within it, effectively, the whole of the ECA 1972, then amendments could be brought on anything to do with the ECA. But in the former case, the amendment would have to relate to the triggering of Article 50 only. Or so an argument could run - the Speaker would decide.

Picking the moment

The bigger question for parliamentarians seeking a greater say on Brexit is whether targeting the

government's consent Bill is the best way to expend their capital. Labour have indicated that they would not block or delay the triggering of Article 50 - though this doesn't strictly rule out attaching conditions to it. In contrast, the Scottish National Party (SNP) has committed to voting against any bill which facilitates the triggering of Article 50, while the Liberal Democrats have promised to try to amend any Bill to mandate a second referendum on the terms of the Brexit package.

This is indicative of the trade-off between "going hard" at the consent Bill versus waiting to create a more substantive moment further down the line when the substance of Brexit - as opposed to the process - is more concretely up for grabs. How parliamentarians judge this trade-off, along with the ruling of the Supreme Court, will determine whether parliament presents a serious challenge to the triggering of Article 50 (and the terms on which it is triggered), or whether they keep their powder dry.

What is certain is that for parliament to force the government's hand, through legislation or votes, the opposition will need to be united and include a number of disaffected Conservatives. The differing strategies of Labour, the SNP and the Liberal Democrats to date suggests that the prospect of unity over a way to check the government's progress is still some way off.

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Table: Parliamentary levers

	Fresh primary legislation	Amend primary legislation	Secondary legislation	Government / Opposition motion	Backbench Business motion
How could the government get Parliamentary consent?	<p>Yes</p> <p>Only vehicle to gaining parliamentary consent according to High Court</p>	<p>Yes</p> <p>Amendment must be in “scope” of amended Bill</p>	<p>No</p> <p>Power to amend or repeal the ECA 1972 via secondary legislation doesn’t exist under the wording of the ECA</p>	<p>No</p> <p>While a government-proposed motion would be binding, motions can’t amend or repeal the ECA.</p> <p>Same applies to gov’t amending an amended Opposition Day motion.</p>	<p>No</p> <p>Gov’t can’t call but could amend.</p> <p>But BBB votes are advisory only.</p> <p>Even if not, couldn’t amend or repeal ECA.</p>
How could the opposition extract concessions from government?	<p>Yes</p> <p>A Private Members’ Bill could be used to place new requirements on government</p>	<p>Yes</p> <p>Amendment must be in scope of amended Bill - not, for example, a Finance Bill</p>	<p>No</p> <p>Only gov’t ministers can propose secondary legislation.</p> <p>Power to amend via secondary legislation doesn’t exist under the ECA.</p>	<p>Yes</p> <p>Opposition day motions are binding - could require much of gov’t except where tantamount to amending or repealing primary legislation</p>	<p>No</p> <p>BBB votes are advisory only. Would put pressure on government but wouldn’t require their compliance.</p>

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