



Autumn surprises: possible scenarios for the next phase of Brexit

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Brexit negotiations are entering the end game. Over the next few months, the Government must conclude a withdrawal agreement with the European Union (EU) before seeking approval from Parliament in the form of a motion – the so-called ‘meaningful vote’ – on the deal. Only if both these challenges are met, legislation is passed to give effect to the agreement and both the UK and European Parliaments ratify the withdrawal treaty, will the UK leave the EU on 29 March 2019 in an orderly manner and with a transition in place. None of this is certain at the moment. There are multiple scenarios in play. This paper looks at those scenarios and what stands between the Prime Minister and her preferred Brexit in March 2019.

Possible scenarios

Figure 1 sets out possible scenarios for the conclusion of the first phase of the Brexit negotiations.

There are five basic scenarios but the key backdrop to all of this is that there are currently two defaults in place, which mean that, if nothing else happens, the UK will exit the EU without a deal on 29 March 2019:

The Prime Minister triggered the UK's exit from the EU with her letter to the President of the European Council, Donald Tusk, on 29 March 2017 giving notice under Article 50 of the Treaty on European Union. This means that, unless the UK asks for an extension and the European Council unanimously agrees, the UK will leave the EU on 29 March 2019 at the end of the specified two-year process, with or without an agreement on the terms of departure.

The European Union (Withdrawal) Act, passed by Parliament in June this year, set the date of 29 March 2019 for the UK's withdrawal from the EU in statute. Ministers can change this by secondary legislation if another date is contained in the withdrawal agreement or if an Article 50 extension is secured. But if there is no deal, and therefore no withdrawal agreement, they would have to change the date through new primary legislation.

All of the Brexit scenarios depend on whether:

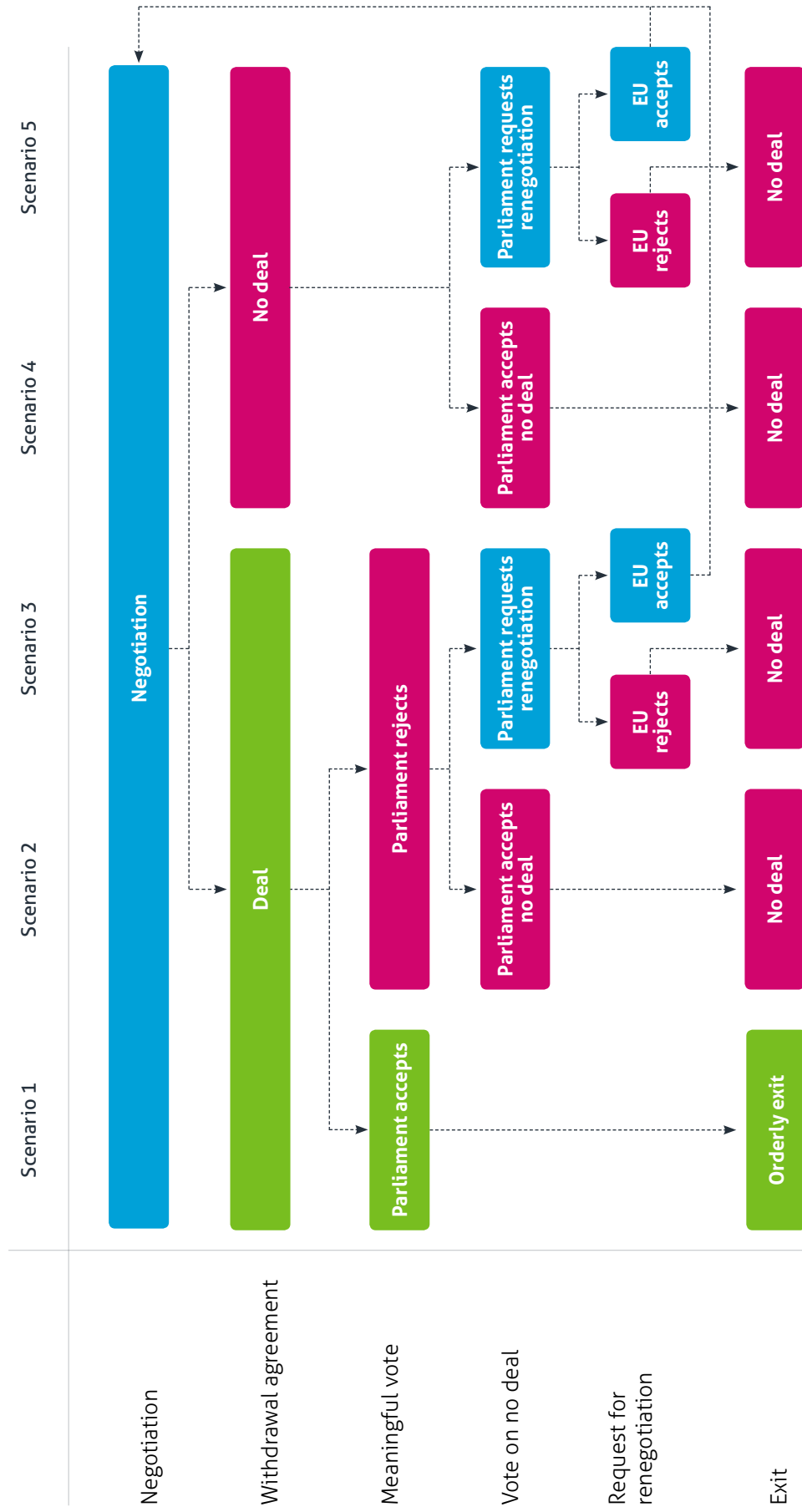
- the Prime Minister concludes a withdrawal agreement with the EU27 (deal) or not (no deal)
- Parliament accepts the agreement (yes) or rejects it (no)
- Parliament asks the Government to renegotiate.

To simplify matters for this paper we have made two assumptions, neither of which can be taken as given:

- that if Parliament passes the motion endorsing the withdrawal agreement, it passes the Withdrawal Agreement Bill without wrecking amendments and ratifies the withdrawal treaty
- that the European Parliament also ratifies a deal that has been agreed by the European Council and the UK Government and endorsed by the UK Parliament.

The timings assume that the Government will not seek to extend the Article 50 period, which it might need to do to accommodate a renegotiation. They also assume that neither this Government, nor any other government that might come to power before the UK leaves the EU, will seek to stop Brexit by revoking the Article 50 letter, either with the agreement of the European Council or unilaterally.

Figure 1: Possible scenarios for the next phase of Brexit



Source: Institute for Government analysis.

Scenario 1: Deal/yes: the Prime Minister gets her way

In this scenario, the Prime Minister and the EU27 agree a withdrawal agreement at a European Council meeting (maybe as soon as October – potentially later). That agreement then successfully passes all of its parliamentary hurdles and the UK leaves the political institutions of the EU on 29 March 2019, beginning a 21-month standstill transition and detailed negotiations on the future relationship. This scenario is the smooth course painted on the far left-hand side of Figure 1. There is, of course, the possibility that Parliament accepts the deal in principle, and then tries to amend the Withdrawal Agreement Bill either to scupper the withdrawal agreement or to bind the Government's hands on the future relationship (but, as noted above, we assume for this scenario that once it has passed the motion approving the deal, Parliament can be persuaded to pass the bill).

Scenario 2: Deal/no: Parliament rejects the Prime Minister's deal and settles for a no-deal Brexit

Parliament may, on the other hand, decide to reject the Prime Minister's deal and accept a no-deal Brexit. The Prime Minister would not be able to bring forward the Withdrawal Agreement Bill. The EU Withdrawal Act obliges the Government to make a statement within 21 days of such a rejection on how it intends to proceed and table a neutral motion in both Houses no longer than seven sitting days later, which would take note of the Government's position. The Prime Minister might decide to see if she can renegotiate the deal – or persuade Parliament change its mind – or there would be a political crisis. But, under the Withdrawal Act, if the deal is shot down by Parliament and no new deal has emerged by 21 January 2019, the Government must make a statement within five days to Parliament setting out its proposed route forward, accompanied by a 'neutral motion' on which MPs and peers would vote. In this case, the Government accepts that Parliament will not approve a deal and Parliament is content to leave with no agreement in place.

Scenario 3: Deal/no/renegotiate: Parliament rejects the Prime Minister's deal and sends the Government back to renegotiate

If Parliament rejects the Prime Minister's deal and sends the Government back to renegotiate, how this scenario plays out would depend on what Parliament rejects (for example, how it decides to amend the motion approving the Prime Minister's deal). If Parliament objects to something fundamental in the withdrawal agreement – either the payment of the financial settlement or the proposed form of the Northern Irish backstop* – then the Prime Minister's room for manoeuvre may be limited. If it is the language in the declaration on the 'future framework' that is the issue, there may be more room to seek changes. But there are three problems for the Government with this scenario: time to negotiate (particularly if the final deal has been done late in the year); the EU's willingness to reopen negotiations; and the need for any renegotiated package

* How both sides agree to meet the commitments in last December's joint report to avoid a hard border in the island of Ireland after Brexit, which is one of the key areas under dispute in the withdrawal agreement. For more detail see Durrant T and Stojanovic A, *The Irish border after Brexit*, Institute for Government, June 2018, www.instituteforgovernment.org.uk/publications/irish-border-after-brexit

to come back to Parliament for subsequent approval – in which case we are back potentially to scenarios 1 or 2. If the Government fails to do this in the time available, the UK would still be heading out of the EU with no deal.

Scenario 4: No deal/yes: the Prime Minister declares that it is impossible to do a deal with the EU and Parliament accepts this

In the fourth scenario, the negotiating stand-off in Brussels continues and the Prime Minister and the EU27 find it impossible to close the gap to reach a withdrawal agreement. As in scenario 2, if there is no agreement with the EU, the Government is committed to making a statement to the Parliament on its planned way forward, accompanied by a neutral motion, on the January timetable set out above. Parliament duly takes note, and the UK heads for a no-deal Brexit.

Scenario 5: No deal/no/renege: the Prime Minister fails to reach a deal with the EU and Parliament sends the Government back to renegotiate

The final scenario sees Parliament intervening to reject “no deal” and sending the Government back to renegotiate. Precisely how Parliament would intervene is less clear. One of the battles over the so-called Grieve amendment during the passage of the European Union (Withdrawal) Act 2018 was about Parliament’s role if there is no deal – the Government had originally promised during the passage of the Withdrawal from the European Union (Article 50) Bill 2016–17 that Parliament would vote on a deal, but made no parallel commitment in the case of no deal. The fudge at the end of the parliamentary process for the Act committed the Government to lay a motion in January 2019 if there was no deal. This might well be a ‘take note’ motion, which would not be amendable but the final decision would be up to the Speaker of the House of Commons (as ‘take note’ motions are generally unamendable). It is likely that if the motion is neutral (as required in the legislation), the Speaker would try to find another way to allow Parliament to express its opinion on what should happen next. In this scenario there would be the same issues around renegotiation as in scenario 3, although potentially on a much more compressed timetable.

What do these scenarios mean?

The risks of either a deliberate or an accidental no deal are quite high, given the apparent stalemate in the negotiations, the precariousness of the Prime Minister’s parliamentary position and the defaults now incorporated in the system.

The defaults tend to **strengthen the Prime Minister’s hand if she has a deal**, of which the legally binding provisions would be in terms of withdrawal from the EU, not the future relationship. Her aim would be to bind together her majority – by persuading her Brexiteer colleagues (and the four Labour MPs who have routinely supported the Government on key Brexit votes) that the alternative route is no Brexit and by persuading her ‘soft Brexit’ colleagues that the alternative is no deal. Her risk is that the deal on Ireland alienates the Democratic Unionist Party (DUP) and that, however mad

many in the Labour Party thinks it would be to leave the EU without a deal, its priority is to bring down the Government and then hope that an incoming Labour Government will pick up the pieces.

But it is generally thought that there is **no parliamentary majority for no deal**, so if Parliament does not like the deal on offer, it will try to send the Government back to negotiate a better deal. But time and the EU will not be on Parliament's side here. The Prime Minister **needs to find a parliamentary majority for something other than no deal**, which is easier said than done, to avoid the defaults coming into play.

There is a **high risk of a stalemate**: Parliament will not vote for what is on offer, but equally it is impossible to crystallise a majority around an alternative to "no deal". In other words, Parliament can unite around what it does not want, but there is no consensus on what kind of deal it does want. In the next section we look at the options available to the Government and MPs, and the external pressure that might break the stalemate between the two.

No deal under the circumstances set out here would be acrimonious – and thus potentially disruptive

A no deal that arises from a failure to reach a withdrawal agreement, or Parliament's failure to pass it, would undoubtedly be the most acrimonious of "no deals". The UK would, from an EU perspective, be failing to both honour its financial obligations and respect its commitments under the 1998 Belfast/Good Friday Agreement.

So as well as the UK having no trade agreement with the EU in place (which would force the UK and the EU to treat each other as 'most favoured nations' for tariffs – that is, as unfavourably as they treat any third country with whom they have no special deals), the EU may be reluctant to conclude the narrower deals that it has with other important trading partners on, for example, data, customs facilitation and aviation. UK businesses might expect substantial foot dragging on the Commission decisions they need to be able to operate in the EU; UK agencies might find the EU taking its time to recognise them; and UK citizens might find their position as third-country nationals living in EU member states unclear, for example on such issues as access to public services and welfare benefits, as the citizens' rights agreement negotiated in the withdrawal process had not entered into force. Potentially there would be very significant hold-ups for UK goods entering EU ports, whatever the UK decided to do at its border.

The UK would also need to rush to roll over as many third-country agreements as it could. The draft text of the withdrawal agreement¹ contains an agreement that the EU notify all signatories to third country agreements with the EU, asking them to continue to treat the UK as an EU member for the duration of the transition. But this is dependent on satisfactory conclusion of the withdrawal agreement.² No deal means no notification.

How might the stalemate be broken?

Options open to the Prime Minister to get a deal through

Make the vote a confidence vote

When, as Prime Minister, John Major was facing defeat over the Maastricht Treaty (an early dress rehearsal for the agonies that the current Prime Minister is going through), he used the trick of making a key vote a confidence vote to force his party into line. Back then, if the Government lost a confidence vote, as the Callaghan Government did in 1979, the next step was a general election.

However, the Fixed-term Parliaments Act 2011 means that the Prime Minister can no longer make votes into formal votes of confidence in the same way: the Act requires specific votes to trigger a general election so governments can feasibly survive motions of confidence and censure tabled in other ways. However, it also means that using this option as a threat is a lot more difficult for the Prime Minister. Unless a number of Conservatives and the DUP were prepared to vote down the Government on such a motion, or the Government itself wanted to trigger a general election as it did in 2017, this is unlikely to pass.

The Prime Minister could say that a vote is akin to a vote of confidence in her; that she will resign if she loses a key vote. But that would trigger either a Conservative leadership election (something the Prime Minister may face in any case) or the prospect of the Queen asking someone else to form a government. The Prime Minister could also threaten to table a motion for a general election, but that would still require two thirds of the House of Commons (a majority of both her Conservative Party and the Labour Party) to vote for it.

The changes to these traditional weapons of last resort for the Prime Minister give Conservative MPs a greater ability to vote against her plans for Brexit, without risking being pitched into an early general election.

Allow a free vote

Edward Heath as Prime Minister used the free vote to get Parliament to agree to the UK's accession to the EU, conceding that a free vote gave licence to some Labour supporters of UK membership of the EU to cross the House of Commons floor and support the Government.³ The current Labour leadership looks set to declare that any deal that the Prime Minister reaches fails Labour's six tests for Brexit (although those tests apply to the long-term relationship, not the withdrawal agreement). It will also seek to stop the Prime Minister from leaving the EU with no deal. The Prime Minister has to date been able to win key votes, for example on the Trade and Customs Bills, thanks to a number of Labour Leavers (those who backed the 'Leave' campaign in the EU referendum). It is far from clear that there is a majority that the Prime Minister could assemble through this route, but it is notable that 494 MPs voted at Third Reading for the legislation to give the Prime Minister the power to trigger Article 50,⁴ and if she could present opponents as

'frustrating Brexit' or 'risking the economy' she might be able to pull more MPs across the floor to offset her rebels.

Go down to the wire

Time is a constraint – but it could also be the Prime Minister's friend.

Even if the UK initially rejected the EU's final offer, and any renegotiations went nowhere, the EU might reckon that the looming pressure of a no-deal Brexit might force the Government back – not to renegotiate but to accept the deal on offer.

But leaving everything until the last minute could also strengthen the Government's hand to push the deal through Parliament – assuming that it had been able to resist mounting external pressure until then. If the UK held out against acceptance or ratification of the deal until the last minute, the EU could offer a brief extension to the Article 50 period to allow for the necessary ratifications. In extremis, Parliament could be forced to sit to pass all stages of the Withdrawal Agreement Bill in a day.

Agree a very vague formulation of the future relationship

The autumn/winter Brexit decisions are about the withdrawal agreement and the transition. However, David Davis as Secretary of State for Exiting the European Union reportedly argued⁵ that there was a strong case for including as much detail as possible in the future framework declaration – to get Pro-Brexit colleagues to vote for the withdrawal agreement. And his successor, Dominic Raab, argued at his first appearance in front of the Exiting the EU Committee on 24 July 2018⁶ that the withdrawal agreement might need to include a specific link to make payment of the financial settlement conditional on having a satisfactory long-term arrangement.

Given the glacial progress of negotiations, it is hard to see a detailed future framework being agreed by October or December. Dominic Raab may succeed in inserting his linkage or making the future framework an annex to the withdrawal agreement, but that may open up a new set of complications in terms of the treaty base for the negotiations and the necessary ratification processes. The Prime Minister may ultimately be best served by kicking the issue of the long-term relationship into the distance – especially if she and the EU can fudge a formula on Ireland. MPs may find it hard to vote against a transition on the basis of a high-level commitment to a 'deep/special/ambitious relationship': the Prime Minister found it easier to maintain unity after her Mansion House speech in March of this year, in which she set out her vision for the UK's relationship with the EU after Brexit,⁷ than after the much more detailed white paper on the UK's future relationship with the EU that was agreed at Chequers in July.⁸ The non-binding nature of the future framework declaration is both a disadvantage (the UK commits to the money with no long-term guarantees) but also an advantage for those who want a different form of relationship with the EU after Brexit.

Offer/accept legislative concessions in the Withdrawal Agreement Bill to restrict the Government's hand on the future framework

A final option open to the Prime Minister to persuade Parliament to approve the withdrawal agreement – the key task before 29 March 2019 – is to offer legislative concessions on the future framework in the Withdrawal Agreement Bill. The Government could commit to provisions that would help to set the direction for those detailed negotiations – and it could put into statute that Parliament will have the final say on approving the future relationship agreement, beyond the usual provisions for treaty ratification in the Constitutional Reform and Governance Act 2010. But as the EU would require the withdrawal agreement to be ratified and implemented before starting those talks, it might be a rather toothless concession.

Options open to the Prime Minister's opponents

At the time of writing, it is not clear whether the Prime Minister will face greater internal opposition from her pro-Brexit colleagues unhappy with the withdrawal agreement and future framework she has negotiated with the EU, or from her 'soft Brexit', former Remain colleagues who are either terrified at the prospect of a no deal or concerned about the future framework. The Opposition will try to use the Government's Brexit travails to trigger a general election. So, against that backdrop, how might MPs try to change the course of the Government's approach to Brexit?

Change the Conservative leader

What the Fixed-term Parliaments Act 2011 does not prevent is a leadership challenge within the Conservative Party, so avoiding a general election does not guarantee Theresa May's longevity.

Changing leader does not necessarily mean another election – changes of prime minister under the UK system often occur without a general election (as the case of Theresa May shows when she took over from David Cameron) even when the party in power does not have a majority – so this is a much less scary prospect for Conservative MPs. But any candidate must be confident they can muster enough support to defeat the Prime Minister in a confidence vote and then survive the two-stage electoral process (rounds of voting among Conservative MPs, with the top two candidates put to the party membership). To do that, they will need to persuade a large number of their colleagues that an alternative leader is desirable and more likely to deliver their preferred Brexit outcome – with many likely to be concerned that it would, in fact, do the opposite. Nonetheless, this still looks a more plausible route to challenge the Prime Minister than the prospect of Conservative MPs voting to bring down the Government.

Amend the motions to require the Government to negotiate an alternative

If Parliament rejects the Prime Minister's deal, it might send her back to renegotiate the deal – or the Government itself might decide to have another go. The motion to approve the deal will be amendable so Parliament could set conditions that the Government

would need to fulfil before bringing back a better deal to Parliament. But although the Government could ask, it would be open to the EU to refuse to reopen a deal that the Government had already accepted – and it might also expect that the UK would be obliged to accept the original, unamended deal as the clock ticked down towards a messy exit.

Parliament has limited ability to mandate the outcome of a deal, as everything needs to be negotiated with the EU. If it wants to change the outcome that the Government offers, it would be at its strongest if it mandated an option that the EU27 have made clear is already available – whether that be negotiating a replica customs union, joining the European Economic Area or simply leaving with no deal.⁹ The EU has made clear that other options are available if the UK position “evolves”.¹⁰

Simply renegotiating is, of course, no guarantee that a new deal will be any more successful than its predecessor, so there is a risk of continuing stalemate if there is no parliamentary majority for any renegotiated deal.

Trigger a political crisis and a general election

At the moment, the prospect of Conservative MPs voting in a way that triggers a general election seems improbable. But the Government depends on the support of the Democratic Unionists (and will lose one crucial vote during MP Ian Paisley Jr’s current suspension). It is possible that, at some point, defections will create conditions where the Prime Minister either decides or cannot resist pressure to hold a general election. But an election does not, in itself, solve the problem of the need for a positive alternative to a no deal to emerge from Parliament – and it would eat into the time for negotiation.

Option available to either the Prime Minister or MPs: put the issue back to voters in a new referendum

All the scenarios presented in this paper assume that Parliament has the last word on how the UK leaves the EU on 29 March 2019. But it could decide to give the choice back to the electorate. This could be an option that the Government chooses to break a parliamentary deadlock where it cannot get its deal (or no deal) through – but also cannot get agreement on what should happen next. But a more likely scenario is that MPs amend the motion or the Withdrawal Agreement Bill to require the Government to call a referendum. While not legally binding, this would have substantial political force. The vote on the motion would not be legally binding, but an amendment to the bill would be.

But it is not a simple way out of the impasse

While a referendum may appear to solve some of the problems of Parliament failing to find an agreed way forward on Brexit, the mechanics of referendums are far from easy.

First, the UK does not have a comprehensive blueprint on referendums: important process details need to be decided every time it has one. It is perfectly possible that

there would be proxy battles over such issues as timing and the franchise (there was an attempt to allow 16- and 17-year-olds to vote in 2016 EU referendum, and many EU residents in the UK¹¹ and UK residents in EU countries¹² feel they were disenfranchised). Since any change may tip the result one way or another, each would be highly contentious – and be played out in a polarised Parliament.

Second, and even more problematic, what would the referendum be about? Former Education Secretary Justine Greening has suggested a three-choice referendum: on leaving the EU with no deal, the Prime Minister's 'final negotiated deal' or staying in the EU.¹³ Of these options, only remaining in the EU is relatively clear cut (and it would depend on the EU accepting the UK withdrawing its Article 50 letter before it left if the UK is to remain on the same terms as it enjoys now). The Prime Minister will not have a deal on the long-term relationship between now and the time the UK leaves the EU – not least since the EU has been clear that it has many problems with the white paper agreed at Chequers. The issue in the autumn is whether or not to accept a withdrawal agreement. There would still be many other options for the longer-term relationship: officially Labour wants to stay in a customs union and have a 'strong' relationship with the Single Market (how to square that with ending the free movement of people has not been specified)¹⁴; meanwhile, many MPs might want to see the European Economic Area on the ballot paper, and others would want a Canada-style free trade agreement. Three options could rapidly become five.

Third, the Electoral Commission has made it clear that it takes time (six months) for a referendum to be well conducted.¹⁵ If a parliamentary majority for a referendum crystallises late in the autumn, there is unlikely to be enough time to agree the details and run a vote ahead of the March 2019 deadline. The UK may be forced to ask the EU for an Article 50 extension to buy additional time, with no guarantees that Brussels will want to prolong uncertainty, particularly if it could increase the likelihood of no deal.

In short, a Greening-style referendum on the timescale Greening appears to propose (before the UK formally leaves the EU) would only work if it produces a majority for Remain. It would not settle the issue for any other outcome. But it is not practical to ask people to vote on the arcane issues of the withdrawal agreement (which would come down to a fight about the 'divorce bill'). So, in practice, unless there is a clearly emerging majority (which can survive a bitter referendum campaign) for Remain, a referendum would solve nothing.

Conclusion

The unsatisfactory conclusion is that it is extremely hard to predict how the period between October 2018 and March 2019 will play out. The interaction of continuing negotiations with the EU27, the remaining real difficulties over the Irish backstop, the lack of progress on the future framework, the internal divisions in the Conservative Party, the Prime Minister's fragile position and the number of parliamentary hurdles any agreement has to pass to take effect, mean that charting a clear path through to an orderly Brexit with a transition period is hard. The fixed points are the defaults already enshrined in legislation. These raise the risk of a no-deal Brexit, but they also may be the constraints that ultimately help the Prime Minister to secure parliamentary approval for whatever withdrawal agreement the UK finally concludes with the EU27.

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