

The Roadmap to a People's Vote



Advisory Committee

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Foreword

More than two years since the 2016 referendum, a political, economic and possibly constitutional crisis is gathering across the United Kingdom. Our view is that the most viable and democratic way of resolving it is to allow the public to have their say on Brexit. To deny them a voice challenges the basic principle of informed consent.

People want the right to decide. Polling by YouGov this summer has demonstrated clear backing, by 45 per cent to 35 per cent, for a public vote on the outcome of Brexit negotiations. This rises to a margin of two-to-one - 50 per cent to 25 per cent – if talks break down and the UK leaves without any deal (see Annexe 1).

Such levels of support have inevitably raised questions about the feasibility, legality and practicality of a People's Vote. We welcome this scrutiny because it is a further sign of how people from all parties and of none, including many who previously opposed a public vote, are now turning towards it as the best – if not the only – way forward.

Drawing on discussions with constitutional and legal experts, as well as politicians, in the UK and elsewhere in the EU, this paper seeks to address these questions with the seriousness each of them deserves. Our conclusions are that the die is not irrevocably cast, there is still time and, until the UK has left the EU, the Article 50 letter can be withdrawn. If there is a majority in Parliament for a People's Vote, there are multiple routes to securing one and, as the process unfolds, more opportunities for the House of Commons to assert its will may emerge. Should the UK need more time for a People's Vote, there is little doubt that the other 27 Member States would agree the necessary extension of the Article 50 timetable.

Given the gravity of the situation our country and our democracy are facing, it is important that no decisions are made in haste. And yet we do not have the luxury of time. Of course, it will ultimately be for our elected representatives to determine the precise route to a People's Vote and the mechanics by which it would operate. Equally, the urgency of this crisis means that these decisions should prioritise speed, clarity and simplicity at every stage.

Indeed, to waste time or to do nothing are perhaps the worst options of all. History will not, in our opinion, be kind to any politician who hides behind purely logistical arguments, legalese or arcane parliamentary procedure in order to deny people a vote on the outcome of these Brexit negotiations at such a fragile and crucial moment for our country.

John Kerr

Introduction

The People’s Vote campaign believes that the public has as much right to give its verdict on the outcome of the Brexit negotiations as on the question in the 2016 referendum. If it made sense for Parliament to ask the people for their view on the principle, it makes sense to give them a say on what Brexit would mean in practice. Indeed, it is arguably more important that the people should vote on what lies ahead, when the consequences have become clearer, than before any of them were known.

This paper explains the pathway to a People’s Vote, step by step, answering the principal questions about practicalities and timetables, and setting out the democratic arguments, guided by the need for simplicity, speed and clarity. It addresses important issues, including:

The Article 50 process: whether the process can be stopped, and what the implications would be.

Legislating for a People’s Vote: how Parliament could either force or encourage the Government to legislate for a People’s Vote, and if necessary secure an extension of the Article 50 timetable.

The question, franchise and rules: what the question on the ballot paper might be, and what the voting rules and franchise should be.

The constitutional expert Vernon Bogdanor has written that “our exit from the EU depends on the continuing consent of the people”.¹ The key word here is “continuing”. We agree with this view. Democracy is a process, not a single event; at any stage the public can – and must – have the right to stop political leaders from doing irrevocable harm. David Davis, the former Secretary of State for Exiting the EU, put it well when he said, in 2012, that “if a democracy cannot change its mind, it ceases to be a democracy.”²

1 <https://www.ft.com/content/9b00bca0-bd61-11e6-8b45-b8b81dd5d080>

2 <http://www.daviddavismp.com/david-davis-mp-delivers-speech-on-the-opportunities-for-a-referendum-on-europe/>

Is it too late to think again?

The process of departure from the European Union is laid down in Article 50 of the Lisbon Treaty (full text at Annexe 2), which says that a member state which decides to withdraw from the EU “shall notify the European Council of its intention” and that “the Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification”. The Prime Minister, Theresa May, invoked Article 50 by sending a letter to the President of the European Council, Donald Tusk, on 29th March, 2017. The deadline is therefore 29th March, 2019.

The UK is the first member state to invoke Article 50, so there are no precedents for its implementation, nor for circumstances in which a country decides to withdraw the letter. What is clear is that invoking Article 50 notified the EU of our intention to withdraw. But intentions can change. We still have all the rights of a member-state, including the right to change our minds and our votes, as member states frequently do, for example after elections. As Lord Kerr, who was Secretary-General of the European Constitutional Convention (2002-3) which drafted Article 50, has said: “The Article is about voluntary withdrawal, not about expulsion: we don’t have to go if at any stage, within the two years, we decide we don’t want to.”⁶

The Director of the EU Council’s Legal Service at the time of drafting Article 50 was Jean-Claude Piris. He makes the same point: “The Article 50 procedure provides for notification by the interested state only of its ‘intention’ to leave... In law, the word ‘intention’ cannot be interpreted as a final and irreversible decision. Legally, you may withdraw an intention, or change it or transform it into a decision.” Therefore, if the UK withdrew its intention, “in legal terms this would stop the two-year clock, removing the possibility that Brexit would occur automatically after these two years... The UK would still be in the club.”⁷

EU leaders agree that we can still withdraw the Article 50 letter (see Box 1). So, it is important to emphasise at the outset that there is no legal obstacle or real opposition within the EU to the UK deciding to stay in the EU if it takes that decision before it has left.

Since we would not have left, our terms of membership would not have changed. We would remain a member state under current arrangements which cannot be changed without our agreement as a member state. The UK’s budget rebate, for example, is set in legislation that would need unanimity to amend. Non-participation in the Euro and Schengen and the opt-outs from aspects of police and justice cooperation are set out in treaties or their

‘If the British people, the British parliament, the British government, wish for another way than Brexit, we would be prepared to discuss it. We are not throwing out the British, we want them to stay. And if they want to, they should be able to.’³

Jean-Claude Juncker, President of the European Commission, 17 January 2018

‘Brexit will become a reality – with all its negative consequences - in March next year. Unless there is a change of heart among our British friends. Wasn’t it David Davis himself who said: ‘If a democracy cannot change its mind, it ceases to be a democracy.’ We, here on the continent, haven’t had a change of heart. Our hearts are still open to you.’⁴

Donald Tusk, President of the European Council, 16 January 2018

‘If the UK decided to change their position...it will be highly welcome.’⁵

Mark Rutte, Dutch Prime Minister, 22 March 2018

3 <https://uk.reuters.com/article/uk-britain-eu-juncker/juncker-says-would-like-britain-to-rejoin-eu-after-brexit-idUKKBN1F60XX>

4 <https://www.theguardian.com/politics/2018/jan/16/eu-leaders-say-uk-can-reverse-brexit-decision-if-it-wants-to>

5 <https://www.theguardian.com/politics/2017/apr/20/european-parliament-will-welcome-britain-back-if-voters-veto-brexit>

6 https://www.open-britain.co.uk/full_text_of_lord_kerr_s_speech_article_50_the_facts

7 <https://www.ft.com/content/b9fc30c8-6edb-11e6-a0c9-1365ce54b926>

protocols, which would also require unanimity to amend.

Taking a time-out isn't possible. We couldn't leave the EU and then, if we found it cold outside, come back in on the old terms: Article 50(5) (See Annexe 2) is clear that a full Accession negotiation would be required. Once we'd left, the UK's budget rebate, secured by Margaret Thatcher in 1984, would be gone. If we were at some point to re-apply for membership, the terms would have to be negotiated afresh: a much more difficult prospect than having negotiated them while a member of the EU with all the leverage that goes with the UK's weight and power as one of the biggest member states.

The Government insisted, against House of Lords advice, on writing the 29th March exit date into the EU (Withdrawal) Act. However, if the Government were to change its position, either voluntarily or because it was forced to do so by Parliament, it can propose an affirmative resolution changing the date. The die is not irrevocably cast.

Conclusions

The UK's Article 50 letter notified the EU of our intention to leave, but intentions can change. Up until the date the Article 50 deadline expires, we still have all the rights of a member-state, including the right to change our minds.

Revoking the Article 50 letter would be cost free, since the terms of our EU membership cannot be changed without our agreement as a member state. However, if we were to leave and then at some future stage re-apply for membership, the terms would have to be negotiated afresh.

Roadmap to a People's Vote

Polling by YouGov for the People's Vote campaign has shown that the public support having a vote on the deal by 45 per cent to 35 per cent. This rises to a margin of two-to-one – 50 per cent to 25 per cent – if talks break down and the UK leaves without any deal.

Securing a People's Vote will require primary legislation to be passed in Parliament. Although support for it is growing by the day, there is currently no majority for this in the House of Commons. But it is also becoming apparent that there may be no majority for any particular form of Brexit. Whether the outcome of the Article 50 negotiations is an agreement resembling the Prime Minister's Chequers proposals, or a "blindfold Brexit" that delays negotiation of the key issues until after we have left, or some form of "no deal", the chances of the Government securing sufficient support for any of these options to pass through the House of Commons now look poor.

The prospect of parliamentary gridlock has already caused MPs from both sides of the House to call for a People's Vote. Once the proposed terms of Brexit are known later this year, many more MPs may conclude that the best way to resolve the situation is to put the matter back to the public. That is, after all, what the public wants (see Annex 1). It is not entirely implausible that the Prime Minister herself may arrive at the same conclusion.

Amendments to the EU (Withdrawal) Bill, and commitments made by the Government, mean that any deal must be put to Parliament through a meaningful vote, and that any deal must be ratified through an Act of Parliament before it can come into force. Should there be a majority of MPs in favour of a People's Vote, the Commons will therefore have a series of opportunities to either encourage or even force the Government to legislate for it. A number of these routes are outlined below.

Once the principle of holding a People's Vote is secured, the necessary legislation to make it happen would have to be taken through Parliament. The Bill process would set the question, the rules, the franchise and the date of the vote – a process that Parliament would of course not want to rush. But if there was any possibility of the UK crashing out of the EU without a deal, there would be a major incentive – at least for the vast majority of MPs who oppose a "no deal" Brexit – to proceed relatively swiftly.

There is no set time for a Bill to move through both Houses; legislation can receive its second and third readings in the same day in the House of Commons, and there are many precedents for this. A "cut and paste" of the legislation from the 2016 referendum could help make the progress through both Houses more straightforward, as could retaining the same franchise and legislating for a simple and straightforward question and format (see Chapter 3).

Once the Bill is published with the proposed referendum question, the Electoral Commission would be required – in accordance with the Political Parties, Elections and Referendums Act 2000 – to

– to consider the wording of the question and to publish a statement on its intelligibility. It may, as in 2015, recommend alternative wording, and the Bill could be amended accordingly.⁸ As Meg Russell, Alan Renwick, and Jess Sargeant at the UCL Constitution Unit have pointed out, given the tight timescale it may be possible for the Electoral Commission to “condense” the timetable for testing the question.⁹ Following that, a designation period would be required to determine the respective campaigns, followed by the campaign period itself.

No one would want any of these stages unduly rushed but, crucially, they must allow for the People’s Vote to take place before the Article 50 deadline expires. It would therefore make sense to begin making preparations immediately and, although it is possible to hold a vote before March 29th, the Government could consider obtaining an extension of the Article 50 timetable to allow time for the process to play out. There would be little problem securing an extension from the EU in such circumstances, as is discussed on page 14. And, although the EU (Withdrawal) Act states that the UK will leave the EU on March 29th, 2019, it also gives the Government power to propose an affirmative order to Parliament ‘to amend the definition of exit day’ to a later date.

If, when the outcome of the negotiations is known, a majority of MPs favour a People's Vote, it will be up to the Government to respect the sovereignty of Parliament and respond by producing the necessary draft legislation.

⁸ https://www.electoralcommission.org.uk/__data/assets/pdf_file/0005/82625/Referendum-Questions-our-approach.pdf

⁹ <https://constitution-unit.com/2018/08/30/how-long-would-it-take-to-hold-a-second-referendum-on-brexit/>

Legislating for a People's Vote: Parliamentary Options

Generally, in the British parliamentary system, the Government has almost full control of the timetable and agenda of the House of Commons. Provided it can command a majority, it usually cannot be forced to act against its will. Therefore, if the Prime Minister is determined to prevent the Commons from resolving that the public should be given a final say on the Brexit deal, that is a high bar to overcome.

However, even with its deal with the Democratic Unionist Party, the Government only has a working majority of just 13. Already in this Parliament we have seen two examples of it failing to command a majority in the House of Commons on Brexit-related issues. The first was on Dominic Grieve MP's "meaningful vote" Amendment 7 to the EU Withdrawal Bill at the end of 2017. The second was when the House of Commons inserted Phillip Lee MP's New Clause 17 at the Report Stage of the Trade Bill, which commits the Government to continuing UK participation in the EEA medicines regulatory network.

The combination of Parliament having meaningful votes, together with the Government's lack of a reliable majority, means that MPs will play a central role in scrutinising any deal and could yet reject it. Although it is impossible to predict how the process will play out – or to second guess how the Prime Minister, the political parties, or the different groupings within them, will react to the changing circumstances – events over the coming months will create a number of possible routes to legislating for a People's Vote. We have identified at least six plausible scenarios (these are further examined in Annex 2).

First, MPs could amend the motion put forward by the Government if/when it presents its deal to Parliament. The vote on this motion is expected to take place shortly after agreement has been reached with the EU. An amendment from the Opposition, Conservative backbenchers or cross-party (if allowed by the Speaker) could require that the deal be subject to a People's Vote.

Second, in the event of that motion being rejected by Parliament, or there being no final deal between the UK and EU by January 21st 2019, the Government is committed to tabling a statement on how it intends to proceed. Parliament will have an opportunity to vote on this in the form of a motion. It will be for the Speaker to determine whether or not that motion is in "neutral terms" and therefore whether it is amendable. Should it be determined that it is not in neutral terms then a People's Vote amendment could be proposed and voted on.

Third, if the Government's motion on the deal has passed, the Government will have to legislate for its implementation through an Act of Parliament. This European Union (Withdrawal Agreement) Bill would be subject to amendments throughout its passage through Parliament, meaning an amendment could be passed that would make the Bill conditional on approval of a People's Vote.

Fourth, the Prime Minister could decide that with the Labour Party and many Conservative MPs threatening to vote down her deal, the only way to secure a mandate for it is to put it to the public through a People's Vote. She may choose to do this proactively or reactively after her deal has been rejected by the House of Commons.

Fifth, it is also possible that having failed to secure a deal with the EU, the Prime Minister decides to put to the people the decision over whether the UK should leave the EU with no deal. Such a decision would be a last resort and would likely come late in the Article 50 process, following failed attempts to force a change of position from the EU.

Sixth, a People's Vote could be legislated for following a snap General Election. This outcome today seems very unlikely, but it is not inconceivable. The most plausible route to an election would be for the Prime Minister to seek one, and to secure the necessary two-thirds majority in the House of Commons. Any other routes to an election would require Conservative and/or Democratic Unionist Party MPs to vote to bring down the Government and are therefore extremely unlikely.

As events and possible chaos unfolds, more possibilities may open up for the House of Commons to assert its view that the final decision over whether to accept the deal – or impose no deal – should be handed back to the people. If a People's Vote is not granted by Parliament, it will not be due to procedural impediments or a lack of time, but because MPs have chosen not to take these opportunities.

Extending the Article 50 process

Article 50(3) says that a member state leaves the EU two years after notifying its intention to withdraw “unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period” (see Annexe 1).

The People’s Vote campaign is in regular contact with politicians and officials from across Brussels and key European capitals. In our conversations it has been made clear repeatedly that there would be no difficulty about obtaining an extension for a defined period sufficient to permit consulting the people in a democratic vote. Should the UK need to request such an extension to allow for a public consultation to approve a deal, we are confident it would be granted. Therefore, it is our clear conclusion that there is no obstacle either in the politics or the procedure of Brexit to the UK delaying the March 29th 2019 deadline if this delay was judged necessary by Parliament in order to consult the people in a democratic vote.

There is another timetable question to be answered: what about the European Parliament elections taking place two months after the Article 50 deadline, between May 23rd and 26th, 2019? As things stand, if the UK has left the EU on March 29th, the UK’s seats will be distributed among the EU27 and there will be no European Parliament elections in the UK. The EU has decided how it would allocate the ex-UK seats.

In the event of a People’s Vote, the simplest and clearest thing would be for it to take place before March 29th 2019. If that is not possible, it could take place between March 29th and May 26th, or potentially even on the same day as the European Parliament elections.

If the People’s Vote is scheduled to take place after May 26th, we would most likely elect our representatives to the European Parliament and, if we subsequently left the EU following a referendum, those UK MEPs would be withdrawn. The reallocation of seats to the EU27 would happen at that point. Indeed, the EU legislation on the reallocation of seats provides specifically for its entry into force to be the date of Brexit, so there are no legal problems with a delayed Brexit (or no Brexit).

We do not underestimate the complications, both political and practical, in holding European parliamentary elections to elect MEPs who may or may not sit for more than a few months. This is one of the genuine issues which could arise. However, the long-term problems for our country and our democracy that will follow from a badly negotiated Brexit, are ultimately of far greater significance. Indeed, should the UK vote to stay in the EU these elections are essential to ensuring that the British people maintain a democratic voice in Brussels and Strasbourg. If the UK leaves the EU, the European Parliament election of 2019 will be seen as a perhaps unnecessary, but small, footnote in history. They should not be used as an excuse to undermine the democratic imperative of ensuring that Britain’s future is decided by the people.

Conclusions

MPs will have a series of opportunities to either encourage or even force the Government to legislate for a People's Vote. There are currently at least six plausible parliamentary routes to this outcome, but events over the coming months may create further possibilities.

In passing the legislation for a People's Vote, nothing should be rushed, but given the urgency of the situation there would be a major incentive for MPs and the Government to proceed relatively swiftly. The principles of clarity, speed and simplicity should be applied at every stage.

There would be no difficulty obtaining an extension of the Article 50 timetable to allow a People's Vote to take place. If Parliament judged that it was necessary to delay the March 29th deadline so that it could consult the people in a democratic vote, the Government would not face no insurmountable political or procedural obstacle.

The question, franchise and rules

If Parliament votes in favour of a People's Vote, it will then have to take a view on what the question should be, and on the rules and franchise of the vote. These are important decisions and should be guided by the need for legitimacy, as well as the principles of clarity, speed and simplicity that have underpinned this report.

Whatever happens in the Brexit debate in the coming months, the People's Vote campaign is clear that, in principle, the most democratic – and possibly only – way forward is for the public to have a say on the outcome of the negotiations. This point of principle is not contingent on other factors, for example, whether or not the deal has first been rejected by Parliament.

The question

The question to be put to the public in a People's Vote would be a matter for our elected representatives to decide. There are currently three plausible options for consideration in a referendum on Brexit: a deal; no deal; or staying in the EU. But given there may not be a deal, it is too early for anyone to specify the exact question.

The various options for consideration have been summarised by Meg Russell, Alan Renwick, and Jess Sargeant at the UCL Constitution Unit in the following way¹⁰:

Type of Question	Options
Single Yes/No question	Accept negotiated deal vs. reject negotiated deal
Single two-option question	Negotiated deal vs. remain Negotiated deal vs. no deal No deal vs. remain
Single multi-option referendum	Negotiated deal vs. no deal vs. remain
Two-question referendum	1) Accept negotiated deal vs. reject negotiated deal If deal is rejected...
	2) Remain vs. no deal
	1) Leave vs. remain If majority for leave...
	2) Negotiated deal vs. no deal

If there is no deal

If the Government fails to reach a negotiated agreement with the EU, or if its deal is rejected by Parliament, there will be a clear binary choice to put to the public. In these circumstances, the only options that could be on the ballot paper for a would be to leave the EU without any agreement, or to stay in the EU – no deal or no Brexit. (The precise wording of the question would be subject to the views of the Electoral Commission).

¹⁰ <https://constitution-unit.com/2018/09/13/if-theres-a-second-referendum-on-brexit-what-question-should-might-be-put-to-voters/#more-7039>

The Government does not have a mandate to take the UK out of the EU without a deal. The mandate provided by the 2016 referendum was for the Government to negotiate a deal with the EU which voters were told would be easy and would deliver the “exact same benefits” as membership of the Single Market and the Customs Union. The case for leaving without any agreement was neither on the ballot paper nor debated in the 2016 campaign. A no deal outcome would be such a radical departure from what was promised, with such profound and long-lasting implications, that not allowing the public a say over whether or not to proceed would be deeply undemocratic.

As Bob Kerslake, the former Head of the Civil Service has said, “The consequences of a no deal would be so serious, I think Parliament would have to seriously consider whether it could contemplate this... [if] we end up in this position, then we have to reopen the question of whether we go forward with Brexit at all.”¹¹ We agree. In the event of no deal, the case for a People’s Vote with a binary question will be overwhelming.

If there is a deal

In the event that there is a deal, it has been suggested that the Government might seek to win a mandate for it through a referendum that offers the public only a choice between taking the deal or crashing out of the EU with no deal. But such a vote would exclude what every public opinion poll now shows is the most popular option. Given the facts which have come to light since the 2016 referendum, the option of staying in the EU must be on the ballot paper.

A stronger case can be made for a People’s Vote to be held if the Government has secured a deal so that the public finally has the opportunity to compare the reality of Brexit with our current terms of EU membership. We remain concerned that the Government may yet seek a “blindfold Brexit” in which the terms of the relationship remain undecided until after the UK has left. In these circumstances, the case for the public to be given its voice is even more powerful because such a deal would deserve the most intense democratic scrutiny.

Another option would be to ask the electorate to choose from three options: to endorse the deal, to stay in the EU, or to leave the EU with no deal. There are at least ten different ways of formulating this question. One such possibility would be to use an Alternative Vote system, in which voters rank the options in order of preference, with the option that comes third being eliminated and voters second preferences then being allocated to the top two options.

Alternatively, as has been suggested by Dominic Grieve MP, voters could be asked a Yes-or-No question on whether to accept the deal. If the answer is No, there would then be another ballot on whether to leave with no-deal or stay in the EU.¹² Vernon Bogdanor has proposed a different order, that the first stage would be to ask voters if they still wished to leave the EU, and if they did, the second stage “perhaps a week later” would ask whether voters favoured a deal negotiated by the government, or “some alternative form [of Brexit]”. The alternative in such a scenario would

¹¹ <https://www.theguardian.com/politics/2018/aug/18/rethink-of-brexit-vote-may-be-necessary-ex-civil-service-head-warns-lord-kerslake>

¹² <https://www.independent.co.uk/voices/brexit-second-referendum-eu-theresa-may-deal-trade-talks-immigration-a8461076.html>

almost certainly have to be no deal as there would be little time to re-negotiate.

The attraction of a multi-option referendum is that it provides a wider choice for voters. However, there are downsides. The process is time consuming and would require an awareness campaign to explain the procedure. This might turn off voters and lead to apathy, and a consequent lack of legitimacy. There are few precedents in the UK context for such a vote. When a three-way choice was suggested for the Scottish referendum of 2014, it was rejected as unduly complicated. As Meg Russell, Alan Renwick, and Jess Sargeant have written: “Such votes are unfamiliar in the UK, so administrators would probably need more time to plan for the poll and for regulating the campaign.”¹⁴

For simplicity of understanding, clarity of outcome and legitimacy of the result, most referendums offer voters a binary choice. Each of the three most recent referendums in the UK – the 2016 EU referendum, the 2014 Scottish referendum, and the 2011 Alternative Vote referendum – offered voters a simple and binary question.

The Electoral Commission, whose role is to assess the proposed question in a referendum, says in its guidelines that the question should “be easy to understand, be to the point, be unambiguous, avoid encouraging voters to consider one response more favourably than the other, avoid misleading voters”. For this reason, we would expect it to favour a binary question once again.

Our preference would be for a binary choice, between either “no deal versus stay” or “the deal versus stay”. In our view, if there is a deal, the most pressing question for the country would be whether that deal is better than the one we already have inside the EU. And if there is no deal, the country undoubtedly deserves the right to say whether it nevertheless still wants Brexit.

However, we recognise there are arguments in favour of other formulations and we do not entirely rule out, for instance, a referendum with three options, if it could command a majority of support in Parliament. But, for reasons of simplicity, speed and clarity, as well as past experience, it is unlikely such a proposal would prevail.

The franchise

There is a strong case for extending the franchise to three groups who are profoundly affected by Brexit: expatriate (for longer than 15 years) UK citizens; EU citizens resident in the UK, and young people, aged 16 and 17.

One of the most divisive legacies of the 2016 referendum is the sense of frustration among the young, who overwhelmingly want to stay in the EU and will have to live with this decision longest, over how their futures had been decided by older voters (who voted by a majority for Brexit). There is also recent precedent in the 2014 Scottish referendum for voting by 16 and 17-year-olds.

¹³ <https://www.theguardian.com/commentisfree/2018/jul/23/brexit-broke-parliament-people-fix-election-dilemma>

¹⁴ <https://constitution-unit.com/2018/09/13/if-theres-a-second-referendum-on-brexit-what-question-should-might-be-put-to-voters/#more-7039>

There is also recent precedent in the 2014 Scottish referendum for voting by 16 and 17-year-olds.

Meanwhile, the need to remedy the injustice done to expatriates has been underlined since 2016 by the great uncertainties suffered by the millions affected, as the Government has failed to guarantee their rights in the negotiations with the EU.

We would support considering these extensions of the franchise. But there may be practical limits on what changes could be made in the short timescale for legislation on a referendum. This report has repeatedly emphasised the need for simplicity, speed and clarity in the weeks ahead and, given the fierce urgency of even bigger democratic questions around Brexit, we do not want efforts to widen the franchise to become a barrier to the imperative of giving the people a vote on the outcome of the negotiations.

Social media rules

A similar argument should apply to the debate around tightening the rules on the use of social media in political campaigning. There is a strong democratic case for much better regulation and transparency in political advertising on the internet, or even going further. Such arguments have been made even more relevant given the controversy over digital advertising and the data used by the Vote Leave and Leave.EU campaigns in 2016.

However, we also recognise that there may not be time for legislation in this area if we are to give people a democratic voice on the outcome of Brexit negotiations. Instead, the companies running social media platforms should be challenged to show that they are taking all actions within their power to prevent abuse; and if not, subsequent legislation will be tougher in proportion to their failures. They should be on notice of the reputational damage that will be done if they are called out for slack vigilance of activities that subvert the democratic process.

The Electoral Commission's recent report on digital campaigning said: "Social media companies should work with us to improve their policies on campaign material and advertising for elections and referendums in the UK."¹² This should begin without waiting for legislation.

The chair of the Commission, Sir John Holmes, underlined the companies' responsibility in his foreword to its recent report: "We also call on social media companies to play their part in transforming the transparency of digital political advertising and removing messages which do not meet the right standards. If this turns out to be insufficient, the UK's governments and parliaments should be ready to consider direct regulation."¹³

¹⁵ <https://www.electoralcommission.org.uk/find-information-by-subject/political-parties-campaigning-and-donations/digital-campaigning>
¹⁶ Ibid.

Conclusions

The simplest solution would be a binary choice on the ballot paper, either “no deal versus stay” or “the deal versus stay”. In our view, if there is a deal, the most pressing question for the country would be whether that deal is better than the one we already have inside the EU. And if there is no deal, the country deserves the right to say whether it nevertheless still wants Brexit.

However, we recognise there are arguments in favour of other formulations and we do not entirely rule out, for instance, a referendum with three options, if it could command majority support in Parliament. But, for reasons of simplicity, speed and clarity, as well as past experience, it is unlikely such a proposal would prevail.

There is a case for widening the franchise, and for tighter rules on campaigning on social media. But given the tight timescale and the need for speed, clarity and simplicity, there may be practical limits on what changes could be made. Changes must not become a barrier to the imperative of giving the people a vote on the outcome of the negotiations.

Conclusions

Withdrawing the Article 50 letter

- The Article 50 letter notified the EU of our intention to leave, but intentions can change. Up until the date the Article 50 deadline expires, we still have all the rights of a member-state, and can, if necessary, withdraw the letter.
- Withdrawing the Article 50 letter would be cost free, since the terms of our EU membership cannot be changed without our agreement as a member state. However, if we were to leave and then at some future stage re-apply for membership, the terms would have to be negotiated afresh.

Parliamentary routes

- MPs will have a series of opportunities to either encourage or force the Government to legislate for a People's Vote. There are currently at least six plausible parliamentary routes, but events over the coming months may create further possibilities.
- In passing the necessary legislation, nothing should be rushed, but the urgency of the situation would create a big incentive for MPs and the Government to proceed swiftly. The principles of clarity, speed and simplicity should be applied at every stage.
- There would be no difficulty obtaining an extension of the Article 50 timetable to allow a People's Vote to take place. If Parliament judged that it was necessary to delay the March 29th deadline so that it could consult the people in a democratic vote, the Government would not face any political or procedural obstacle to this.

The question, franchise and rules

- The simplest solution would be a binary choice on the ballot paper, either “no deal versus stay” or “the deal versus stay”. In our view, if there is a deal, the most pressing question for the country would be whether that deal is better than the one we already have inside the EU. And if there is no deal, the country deserves the right to say whether it nevertheless still wants Brexit.
- However, we recognise there are arguments in favour of other formulations and we do not entirely rule out, for instance, a referendum with three options, if it could command majority support in Parliament. But, for reasons of simplicity, speed and clarity, as well as past experience, it is unlikely such a proposal would prevail.
- There is a strong case for widening the franchise, and for tighter rules on campaigning on social media. But given the tight timescale and the need for speed, clarity and simplicity, there may be practical limits on what changes could be made. Changes must not become a barrier to the imperative of giving the people a vote on the outcome of the negotiations.

Annexe 1 – Polling

Overview of recent polling by YouGov for the People’s Vote campaign. Fieldwork carried out on 31st July - 7th August 2018.

- There is strong support for a People’s Vote on the outcome of Brexit negotiations, according to YouGov opinion polls, with 45 per cent backing the idea against 35 per cent who oppose it.
- If talks break down and the UK faces leaving the EU without a deal in place, that margin rises to two-to-one – 50 per cent against 25 per cent.
- The public are deeply hostile to the idea of a “blindfold Brexit”, in which the UK leaves the EU without knowing what the future relationship will be and how it will work. They divide 72 to 11 per cent in favour of being told the consequences of any Brexit deal.
- Almost three-quarters of the public now say they think promises made by those campaigning for a Leave vote are likely to be broken.

Annexe 2 - Text of Article 50

1. Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.

2. A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.

3. The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.

4. For the purposes of paragraphs 2 and 3, the member of the European Council or of the Council representing the withdrawing Member State shall not participate in the discussions of the European Council or Council or in decisions concerning it.

A qualified majority shall be defined in accordance with Article 238(3)(b) of the Treaty on the Functioning of the European Union.

5. If a State which has withdrawn from the Union asks to rejoin, its request shall be subject to the procedure referred to in Article 49.

Annex 3 - Parliamentary routes to a People's Vote

1. Amendment to the Motion on the Final Deal (the 'Deal Motion')

- Over the course of the EU Withdrawal Bill the Government conceded that they would bring forward a Motion on the final deal to be voted upon and approved by Parliament.
- This Motion will be amendable.
- The number of amendments selected for debate is a matter for the Speaker.
- An amendment from the Opposition, Conservative back-benches or cross-party (if allowed by the Speaker) could require the final deal be subject to a People's Vote.

The Government has committed to giving Parliament a vote on a motion on any Brexit deal. This is expected to take place shortly after agreement has been reached with the EU, if indeed there is such an agreement. On 7th February 2017, the then DExEU Minister, David Jones MP, confirmed that “The Government will bring forward a motion on the final agreement to be approved by both Houses of Parliament before it is concluded... We expect and intend that this will happen before the European parliament debates and votes on the final agreement.”¹⁷

By agreeing to table a Deal Motion, the Government have created an expectation that this vote will be a crucial part of the withdrawal process, and that it will provide the main opportunity for the House of Commons to have a meaningful say on any Brexit deal.

Crucially, the Deal Motion will be amendable. Should the position of the Labour Party have shifted by then, it is possible that the Opposition might table an amendment that would make acceptance of the deal contingent on the outcome of a People's Vote. It is also possible that a backbench amendment from either side or across the Commons would be considered. It will be for the Speaker to decide which amendments are to be 'selected' and put to a vote at the end of the debate.

An amendment passed at this stage would be seen as binding on the Government and therefore the question of whether there should be a People's Vote would be resolved, and it would then become a matter of how best to pave the way for it to take place.

¹⁷[https://hansard.parliament.uk/commons/2017-02-07/debates/63BA059F-1DF7-4FE0-818D-3E34E34A5501/EuropeanUnion\(NotificationOfWithdrawal\)Bill](https://hansard.parliament.uk/commons/2017-02-07/debates/63BA059F-1DF7-4FE0-818D-3E34E34A5501/EuropeanUnion(NotificationOfWithdrawal)Bill)

2. Amendment to the Government's Motion if the Deal Motion is defeated, or in the event of no deal

- In the event of the Deal Motion being rejected by Parliament or there being no final deal between the UK and EU by 21st January 2019, the Government is committed to tabling a Statement on how it intends to proceed. Parliament will then vote on this in the form of a Motion.
- The Government could propose to continue negotiations and require an extension of Article 50, or to leave the EU on 29th March 2019 without a deal and on WTO terms.
- The Government intended for such a Motion to be in 'neutral terms' (i.e. unamendable) but have conceded that it will be for the Speaker to determine if the Motion is in 'neutral terms' and whether amendments will be selected.
- Should the Speaker decide the Motion is not in neutral terms then a People's Vote amendment could be proposed.

It is possible that the Government could defeat any amendments to the Deal Motion, only to see the Deal Motion itself be defeated in the House of Commons.

As the EU (Withdrawal) Bill passed through the House of Commons, there was a lack of certainty as to what would happen in the event that Parliament rejected the Government's deal. Ministers' insistence that it would simply result in the UK leaving without a deal was rightly deemed unacceptable, and led to a drive for further clarity. The issue was eventually settled at the eleventh hour of proceedings on the EU (Withdrawal) Bill in June 2018, with a last-minute amendment by the Government guaranteeing that, if Parliament rejects the deal, a minister will make a statement setting out how the Government "proposes to proceed" within 28 days. The Government also conceded that the Commons would have a vote on a motion to consider this ministerial statement, whether there is or is not a deal.

There is some debate as to whether that motion would be "in neutral terms", and therefore whether it would be amendable. Ministers initially said that it would be in neutral terms. But under pressure from the Commons, the Government subsequently published a written statement confirming that "it will be for the Speaker to determine whether a motion when it is introduced by the Government under the European Union (Withdrawal) Bill is or is not in fact cast in neutral terms and hence whether the motion is or is not amendable."¹⁸ If the Speaker were to determine that the motion is not in neutral terms, MPs would have the opportunity to propose an amendment which demands a People's Vote.

As well as parliamentary procedure, politics and public opinion will, of course, be key. Should there be clear public and parliamentary support for a People's Vote, it would be extremely difficult for a Government that had already either failed to reach a final deal or secured a deal but failed to

¹⁸ Written Ministerial Statement by then DEXEU Secretary David Davis MP, 20th June 2018.

<https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2018-06-21/HCWS781/>

command sufficient support for it, to then merely make a non-amendable statement to Parliament on the next steps without any further accountability. The reality, in such circumstances, would be that should the clear will of Parliament be that there should be a People's Vote, the Government would come under immense pressure to respond and to act accordingly.

3. Amendment to the European Union (Withdrawal Agreement) Bill

- Dominic Grieve MP's 'Amendment 7' to the EU (Withdrawal) Act secured a statutory vote on the withdrawal deal.
- The Government clarified that when Parliament had approved the Deal Motion, a Bill would be brought before Parliament to implement the final withdrawal deal.
- The Bill would be subject to amendments throughout its stages, meaning an amendment could be passed that would make the Bill conditional on approval of a People's Vote.

A further opportunity to secure a People's Vote could arise early next year. Dominic Grieve MP's successful 'Amendment 7' to the EU (Withdrawal) Act 2018 secured the requirement that an Act of Parliament must be passed to implement any withdrawal agreement 'deal' into UK law. Section 9 (1) of that Act now states that any deal can only be brought into force "subject to the prior enactment of a statute by Parliament approving the final terms of withdrawal of the United Kingdom from the EU."¹⁹

So, even if Parliament were to approve the Deal Motion in its original form, it is possible that a People's Vote could be proposed through an amendment to the subsequent EU Withdrawal and Implementation Bill. The fact that the Deal Motion was passed by a majority would be no guarantee that the Government would still have the numbers to stave off a People's Vote amendment at this stage. With the real impact of the proposed Brexit deal becoming clearer to the public, it is not inconceivable that some MPs could change their view on the necessity of a People's Vote.

4. The Prime Minister proposes a People's Vote on her deal

- The Prime Minister could decide that to secure a mandate from the public for her deal, she will put it to the country through a People's Vote.
- Alternatively, she may arrive at this view having first seen her deal rejected by Parliament.

Up to this point, the Prime Minister has been insistent that there should not be a referendum on the outcome of the Brexit negotiations. There are at least two key reasons for this. First, flirting with the idea of a People's Vote would up to this point have increased the likelihood of a leadership challenge from within her own party. And second, an argument has been pushed by Eurosceptic MPs and commentators that committing to a People's Vote would encourage the EU to offer the UK a bad deal (though given how consistent the EU's position has been throughout the negotiations, this is an argument that has little merit). The Prime Minister and several Cabinet ministers have insisted that

¹⁹ Section 9, (1) of the European Union Withdrawal Act. <http://www.legislation.gov.uk/ukpga/2018/16/section/9/enacted>

should Parliament reject the deal, the UK will simply leave with no deal.

However, the Prime Minister's calculus may change over the coming weeks. It is still possible that, with public opinion increasingly in support of a People's Vote, whatever the outcome of the negotiations, the Prime Minister could decide that this is the only way of securing a strong mandate for any deal. She could proactively offer a People's Vote before the negotiations have concluded, or at least before Parliament has had an opportunity to vote on it.

Alternatively, in the event that the deal is first put to Parliament and then rejected, the Prime Minister may feel that a People's Vote offers the best way out of the ensuing constitutional crisis. Facing the very real possibility of overseeing a deeply unpopular and potentially disastrous no deal Brexit, she may decide that the only way to avert this outcome is to put her deal to the public through a People's Vote. Unlike the other parliamentary routes to a People's Vote, which would require a Government defeat of some kind, either through the amendment or rejection of the final deal (or no deal), this eventuality would be the decision of the Prime Minister and her Cabinet.

The Prime Minister would of course have to convince the public to support her position from an extremely negative starting point, given Parliament would have already rejected it. So, much would depend on what the alternatives to her deal were. It is possible that the Government would want such a vote to be between leaving with the deal and leaving with no deal. The exact question would ultimately be a matter for Parliament to decide, but two things are clear. First, a majority of the British public now believe it was a mistake to vote to leave the EU, and MPs would want to ensure that view was represented on any ballot paper. Second, it would be difficult to see Parliament sanctioning a 'deal versus no deal' referendum.

Proposing a vote would be a gamble for the Prime Minister. But it may come to be seen as her best option. Without the sanction of a People's Vote, and the opportunity for the public to refuse a deal that is not in the country's interests, she would not be empowered to stand up against the Brextremists in her party who would by this point be fervently pushing for a no deal exit.

5. The Prime Minister proposes a People's Vote on no deal

- Having failed to secure a deal with the EU, the Prime Minister decides to put the decision over whether the UK should leave the EU with no deal to the public.
- Such a decision would be a last resort, and would likely come late in the Article 50 process, following repeated failed attempts to force a change of position from the EU.

In the event that no deal has been agreed by 21 January 2019, the default outcome would be for the UK to crash out of the EU nine weeks later with no deal in place. While the Government has belatedly sought to give the impression to the EU and to the British public that the UK is prepared to leave with no deal and that "it wouldn't be the end of the world", the reality is that the UK is

is woefully ill-equipped and underprepared for such an outcome. Despite tough talk about how “no deal is better than a bad deal”, few believe that the Prime Minister would seriously welcome this option. Given the lack of support for no deal

The Government will have to make a statement to the House of Commons on how it intends to proceed. At this stage, facing severe opposition to leaving with no deal both in Parliament and in the country, putting the decision to the public through a referendum may be the best option available. In these circumstances, debate over what the question on the ballot paper should be would be more straightforward. Given that a renegotiation would not be possible within the time frame, and that the EU would not grant an extension of Article 50 merely to allow for further negotiations to take place, the only plausible alternative to leaving with no deal would be to revoke Article 50 and stay in the EU on existing terms.

6. A People’s Vote manifesto commitment at a General Election

- A general election could potentially be triggered either by the Prime Minister choosing to call one and securing the necessary two-thirds majority for it in the House of Commons, or through the Government losing a vote of confidence.
- One or other of the main parties could make a manifesto commitment to hold a People’s Vote.

Although it may today seem highly unlikely, it is plausible that a general election could take place before the Article 50 period has expired. The 2011 Fixed Term Parliaments Act changed the way general elections can be triggered. There are two routes.

The first is that the House of Commons passes a specifically worded confidence motion (or ‘no confidence’ if proposed by the Opposition). Such motions require a simple majority to pass, and in this case they would therefore require a number of Conservative and/or Democratic Unionist Party MPs to vote to bring down the Government. In the unlikely event that Parliament decided it did not have confidence in the Government, there would then follow a period of 14 days for the establishment of an alternative government that can command the confidence of the House. Failing that, a general election would be triggered.

It is conceivable that, in the event that Parliament rejects the motion on the final withdrawal deal, the Prime Minister could stand down. However, for the Opposition to force an election a ‘no confidence’ motion would still need to be passed, otherwise the Conservative Party would continue in government while it elected a new leader who would become prime minister.

The second route is for a two thirds majority of the House of Commons (434 MPs) to vote in favour of a motion calling for an election. This could arise through the Prime Minister proactively seeking a general election, as she did in 2017, and relying on the support of Opposition MPs to

secure a sufficient majority. However there is little – if any - indication that the Prime Minister is considering this path or given the divisions in her Party and close result of the last election, why she would.

It has also been suggested that the opposition could force a general election by pushing a motion and winning it. Given this would require a large number of Conservative MPs to vote against the Government, it is extremely unlikely.

Unless the Prime Minister proposes an election, the only routes to securing one before 29 March 2019 require Conservative and/or Democratic Unionist Party MPs to vote to bring down the Government. It is therefore difficult, though not impossible, to envisage a general election as a route to a People's Vote.

Annex 4 - Precedents for three-way referendums

There are precedents for three-way referendums. A Swedish referendum on nuclear power in 1980 resulted in 18.9% voting for option 1, 39.1% for option 2, and 38.7% for option 3, using first past the post voting. Such an outcome in a three-way UK referendum would have failed to resolve the issue, regardless of which option finished less than 1% ahead. One commentator dismissed that Swedish referendum as essentially meaningless, serving primarily as a delaying tactic, and the referendum was seen as being ‘manipulated by the parties to serve their own interests’ (P Mark Little quoted in Vernon Bogdanor, *Western Europe*, in David Butler and Austin Ranney (Editors), *Referendums Around the World: The Growing Use of Direct Democracy*, London: Macmillan, 1994, pp. 24-97 at p. 76.)

Multi-option referendums have also been used in Puerto Rico to determine the future constitutional status of the US Dependency. In 1998, 50.5 per cent voted for ‘none of the above’, with other options of statehood, status quo and independence far behind (source: Professor Matt Qvortrup, *Referendums and Ethnic Conflict*, University of Pennsylvania Press, Philadelphia, 2014). Given the problems with multi option referendums, ie that they rarely provide a winner with more than 50% support (Puerto Rico is a rare example), some jurisdictions have experimented with multi option run-offs.

Thus in Newfoundland in 1948, there were three options (status quo, independence or becoming a Canadian province). The two most popular options – independence and becoming a province – were presented to the voters three months after the first vote. Voters opted to become a Canadian province. Likewise, in New Zealand in 1992-1993 there was first a referendum on 1) whether to change the electoral system and 2) a menu of options for electoral systems. The following year there was a run off between first-past-the-post and the mixed-member system, with the latter prevailing. Another referendum using the same format was held in 2011 but it fell at the first hurdle as a majority voted to retain the status quo.

