

# Voting on Brexit

Parliament's consideration of the withdrawal deal and future framework



# Our Brexit work

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## About this paper

By the end of this year, the Government hopes to have negotiated an agreement on the UK's withdrawal from, and future relationship with, the European Union. Ministers have promised Parliament a vote on that deal. This paper sets out what the Government will have to do in Parliament, starting with that vote, in order to approve and give effect to its deal. The paper explains the decisions Parliament will have to make, setting out the timetable for this process and identifying risks to that timetable.

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# Contents

<b>List of figures and tables</b>	<b>2</b>
<b>Key messages</b>	<b>3</b>
<b>1. Introduction</b>	<b>7</b>
<b>2. Getting the deal passed through: the task for the Government</b>	<b>9</b>
Task 1: Pass a motion assenting in principle to the withdrawal agreement and the future framework	9
Task 2: Pass the Withdrawal Agreement and Implementation Bill	12
Task 3: Pass any secondary legislation needed to implement the withdrawal agreement using powers created in the EU (Withdrawal) Bill	16
Task 4: Ratify the withdrawal agreement as a treaty	17
<b>3. Risks for the Government and opportunities for Parliament</b>	<b>19</b>
Risks in the UK Parliament	20
Risks from Europe	29
What if negotiations break down and the UK heads for 'no deal'?	31
<b>4. Matters of confidence and general elections</b>	<b>34</b>
<b>Appendix: Issues in the Withdrawal Agreement and Implementation Bill</b>	<b>36</b>
<b>References</b>	<b>41</b>

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# List of figures, tables and boxes

## Figures

### Figure 1

Total number of days between first reading and Royal Assent of bills related to EU treaties 14

### Figure 2

Active days in each house on bills relating to EU treaties 15

### Figure 3

Parliamentary progress of legislation introduced to implement Brexit 32

## Tables

### Table 1

The task for the Government in Parliament 18

## Boxes

### Box 1

Time constraints on a new referendum 24

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# Key messages

## **1. The Government's timetable for getting its deal through Parliament is ambitious**

By October ministers hope to have negotiated a withdrawal agreement on the terms of the UK's departure from the European Union (EU), and a 'framework for a future relationship' on long-term UK–EU relations. The Government has promised to seek Parliament's approval for both, in one go. However, there will be very little time in which to do so. The UK is currently set to leave the EU on 29 March 2019. That means that there will be only six months available for scrutiny and approval of the deal.

This will be enough time, providing nothing goes wrong. But if negotiations drag on past October, or Parliament raises significant objections to the deal that require a renegotiation or referendum, or if the European Parliament raises its own objections, then the timetable could be unachievable. The Government would need to consider seeking an extension of the Article 50 period in order to complete its negotiation and allow time for scrutiny and approval.

## **2. The Government's claim that the 'meaningful vote' is a 'deal or no deal' choice is wrong**

Parliament's first major decision will be on a motion to approve the withdrawal agreement and future framework. Ministers have claimed that, when voting on this motion, MPs and peers will face a choice between approving the withdrawal agreement and future framework together in their entirety, and leaving the EU without any deal. The implication is that MPs will not be able to object to the Government's plans on the UK's future trading relationship with the EU without wrecking the deal on citizens' rights and a transition period.

It is in the Government's political interest to talk up the disruption associated with voting down the deal. However, the Government's claim that the vote is a binary choice between 'deal or no deal' is wrong. Parliament won't be able to amend the content of the withdrawal agreement or future framework. But if MPs and peers are unhappy with what the Government has negotiated, they will almost certainly be able to amend the motion so as to put conditions on approval. Even if Parliament voted the Government's deal down without amendment, this could lead to a renegotiation if the Government faced insurmountable political pressure to heed Parliament's concerns, and the 27 member states of the EU (EU27) were willing to discuss the issues raised by parliamentarians.

## **3. Subsequent legislation to implement the withdrawal agreement is important, but will not give parliamentarians a chance to scrutinise the deal itself**

Parliamentary scrutiny of the detail of Brexit will not end with the motion to approve the withdrawal agreement and future framework. Provided the motion passes, the Government will then bring forward primary legislation, the so-called 'Withdrawal Agreement and Implementation Bill' (WAIB), to implement the agreement in domestic law.

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This bill will ensure that the UK can live up to its international obligations under the withdrawal agreement – for instance, by providing for the continuing application of EU law in the UK during the transition period, enshrining citizens’ rights in domestic law and giving ministers powers to make payments under the financial settlement. At least temporarily, this legislation will be an important constitutional text in the UK and parliamentarians will need to scrutinise it closely.

But the bill may not include the text of the withdrawal agreement in its entirety, if at all. It is still less likely that it will include, or even refer to, the future framework, which at this stage will probably be a high-level political declaration, rather than a legal text. This means that the WAIB may not provide opportunities for MPs and peers to influence either the content of the withdrawal agreement or the future framework.

Therefore parliamentarians wishing to influence the content of the withdrawal agreement and future framework should concentrate their energies on the initial motion.

#### **4. The Government needs to give parliamentarians plenty of time to consider and debate the motion**

Parliament will need time to look at the withdrawal agreement and future framework.

The withdrawal agreement will have significant constitutional implications, establishing new relationships between Parliament, the devolved legislatures, the executive and the judiciary. It will also outline a ‘backstop’ on the economic governance of Northern Ireland, to come into force if the future partnership between the UK and EU does not include a way to maintain a soft border between Northern Ireland and the Republic of Ireland. Though negotiators have already reached agreement on some aspects of the withdrawal agreement, allowing parliamentarians to begin the process of scrutiny, these fundamental aspects of the treaty have yet to be agreed.

The future framework will set the direction of travel for the UK’s long-term partnership with the EU, with significant implications for the UK’s economy and security. Though the standstill transition period that negotiators have agreed means the new relationship will not come into force immediately after Brexit in March 2019, the UK will lose much of its negotiating leverage when it signs up to the outline of the future relationship.

Given the significance of the decision, parliamentarians need an opportunity to scrutinise the withdrawal agreement and future framework in detail. Once the Government has tabled a motion to approve the deal in Parliament, parliamentarians should be given two weeks at the very least to look at the texts before a debate is held.

The Government will then need to allocate time for debate. In the past, the Commons has been given between 12 and 30 sitting parliamentary days to debate major changes in the UK’s obligations under the EU treaties, with more significant treaties such as Rome and Maastricht on the upper end of this scale. However, on these occasions, Parliament has been voting on bills, not motions. This makes it easier to

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allocate more time, as there are multiple clauses to debate and multiple parliamentary stages built in to the scrutiny process. A more pertinent precedent may be the motion approving the government's decision to join the European Communities in October 1971. Parliament debated this for five days before voting. There was a further day of debate in January 1972 thanks to an opposition motion.

This time, the motion will be the only real opportunity for Parliament to consider the future framework, and could be Parliament's only real opportunity to express a view on the content of the withdrawal agreement. The Government should not, therefore, try to rush the deal through. Five days of debate, in line with the 1971 precedent and similar to the time typically allocated for debate on budgets, should be the Government's starting point.

## **5. The Government is right to promise primary legislation to implement the withdrawal agreement – but this legislation raises thorny constitutional issues**

The Institute for Government previously argued that the withdrawal agreement should be implemented through primary legislation, not by statutory instrument as the Government formerly planned. It is welcome, therefore, that the Government has promised to bring forward the WAIB.

This bill will raise testing constitutional questions, many of which could generate political opposition in Parliament. The WAIB cannot give legal effect to transition in the UK, for instance, without keeping in force or effectively replicating the European Communities Act 1972 for the duration of that transition. In addition, the Government's promise, in text now agreed as part of the draft withdrawal agreement, to use this legislation to entrench EU citizens' rights in domestic law, will be complex for parliamentary draftsmen to navigate. Because the UK Parliament is sovereign, entrenchment is difficult – any Parliament can, as a general rule, reverse what any previous Parliament has done.

## **6. Even once the negotiation is complete, Brexit is an international process – and the European Parliament has a veto. As time passes, MEPs will be more tempted to use it**

The European Parliament has an important role in the approval of the Brexit deal. While Westminster's votes on the agreement will not be legally binding, that of the European Parliament will be. If Members of the European Parliament (MEPs) are not happy, the UK and the EU cannot proceed with their agreement.

While both the European Commission and the European Parliament have been keen throughout negotiations to highlight the role of the Parliament, it is less likely to go against the will of EU27 national governments than the UK Parliament is to go against the will of its own. The Commission has made a concerted effort to consult and include MEPs during negotiations in order to keep them on side.

That said, the European Parliament has an election coming up in May 2019. The closer to polling day their vote on the withdrawal and future framework takes place, the more political capital MEPs could gain by raising objections.

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## **7. The Prime Minister could try to make the meaningful vote a matter of confidence, although this would be harder than it used to be**

In the past, governments have sometimes tried to win controversial votes by making them 'matters of confidence' – that is, promising to resign and call an election if the Government loses. Thanks to the Fixed-term Parliaments Act 2011, which transferred the power to call elections from the government to Parliament, this strategy is no longer available.

However, there are ways for the Prime Minister to raise the stakes. She could promise to table a motion for a general election if she loses on the withdrawal agreement and future framework, or to resign as Conservative leader, or to resign on behalf of her Government.



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# 1. Introduction

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By autumn of this year, the UK Government hopes to have reached agreement with the European Union (EU) on two major documents. The first is the 'withdrawal agreement', an international treaty setting out the terms of the UK's exit for the short to medium term. This document, once signed and ratified, will have the force of international law. The second is the so-called 'framework for a future relationship', a political declaration on the terms of the UK's long-term relationship with the EU.

To reach agreement with the EU on these documents in so little time will be a monumental challenge for the Government – but when this challenge is complete, a new one begins. In order to give effect to what it has negotiated, the Government will have to shepherd these documents through a number of processes in Parliament. Some of these processes are legally required; others are the result of the Government's own undertakings and Parliament's demand for a 'meaningful vote' on the outcome of negotiations.

This approval process could produce some of the most elevated moments of political theatre in living memory. The exact form the process will take, however, is still unclear, even for many of those who will be required to participate in it. This paper aims to bring clarity.

In Chapter 2 we set out the Government's task in Parliament, clarifying what Parliament will be asked to decide, whether each decision will be binding on the Government, and when each decision is likely to happen.

The Government has said it will put the withdrawal agreement and future framework, together, to a vote on a motion in the House of Commons and a vote on a motion in the House of Lords. Provided Parliament assents, the Government will then bring forward a new statute to give the withdrawal agreement effect in UK law. Some emerging policy issues relating to this bill are dealt with in the Appendix. The Government may also bring forward other, secondary legislation to implement the deal. Over and above signing the treaty, the Government will also need to ratify it – the process for doing so is relatively straightforward, but will involve Parliament.

Debates on the 'meaningful vote' that the Government has promised to Parliament have often been beset by confusion. The Government has given the impression that parliamentarians will have a 'yes or no' choice when they vote on the initial motion. David Davis, the Secretary of State for Exiting the European Union, has said that "if the original motion is put but not passed, the deal falls – full stop; in toto".<sup>1</sup> A meaningful vote, he said, "is one that allows people to say whether they want or do not want the deal".

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In this chapter, we explain that parliamentarians will have more than a 'yes or no' choice. The Government's motion will almost certainly be amendable, and the political reality is that, were Parliament to amend that motion or vote it down with a view to forcing the Government to renegotiate, that could probably send ministers back to the table. However, it is overwhelmingly clear that, if parliamentarians do want to affect the outcome of the negotiation, they will need to do so as early in the parliamentary process as possible. The later they leave it, the less influence they will have, and the more uncertainty they will create.

Chapter 3 identifies 12 possible risks to the Government's timetable in Parliament. Some of these are domestic: attempts by parliamentarians to change the deal, leave without a deal, delay Brexit or reverse Brexit. Some of them are external: the European Parliament refusing to ratify the deal, the European Court of Justice ruling it is illegal or negotiations breaking down. The Government needs a plan to manage these risks – and parliamentarians need to understand the consequences of possible interventions for the overall Brexit timetable.

Finally, in Chapter 4, we address the possibility of a general election. It is rare that Parliament is asked to consider an issue of such political and constitutional significance as it will when the Government brings home its deal, the legal instrument by which the UK formally leaves the EU. In the past, ministers have sometimes designated such weighty votes as 'matters of confidence', promising a general election should the government lose. Thanks to the Fixed-term Parliaments Act 2011, however, the process for calling a general election is now very different. We explain the constitutional state of play, and argue that these new rules could make it even more difficult for the Prime Minister to impose discipline on her own MPs.

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## 2. Getting the deal through: the task for Government

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Unless the Government seeks, and obtains, an extension of the negotiating period, all parliamentary procedures required to give effect to the withdrawal agreement negotiated by the Government must be complete by 29 March 2019, the end of the two-year Article 50 period. The timetable is now very tight.

This section sets out the sequence of parliamentary proceedings that the Government needs to clear in order to deliver Brexit. There are four tasks that the Government will need to complete:

**Task 1:** Pass a motion assenting in principle to the withdrawal agreement and the future framework.

**Task 2:** Pass the Withdrawal Agreement and Implementation Bill (WAIB).

**Task 3:** Pass any secondary legislation needed to implement the withdrawal agreement, using powers created in the EU (Withdrawal) Bill.

**Task 4:** Ratify the withdrawal agreement as a treaty.

For each element of proceedings, we set out:

- what Parliament will be asked to decide
- what scope there is for parliamentarians to amend the wording of what is before them
- whether or not the decision will be binding on the Government
- when the decision will be required and how long it will take.

This chapter does not discuss in detail the possible disruptions to the Government's desired timetable as a result of defeats in Parliament or unexpected developments in the negotiation. These are examined in Chapter 3.

### **Task 1: Pass a motion assenting in principle to the withdrawal agreement and the future framework**

#### **What is Parliament being asked to decide?**

David Davis told the House of Commons last year that 'the Government has committed to hold a vote on the final deal in Parliament as soon as possible after the negotiations have concluded.'<sup>1</sup> This vote, he said, 'will take the form of a resolution in both Houses of Parliament and will cover both the withdrawal agreement and the terms for our future relationship'. Parliament will most likely be asked to vote on a short motion, making reference to texts laid before Parliament in a command paper, containing the withdrawal agreement and future framework.

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The Government has not yet said what the text of the motion itself will be. There is some precedent to provide an indication of what it may look like, however. The European Union Act (2011), which required government to seek parliamentary approval for certain changes to the EU treaties, provided that this approval would be given if 'in each House of Parliament a Minister of the Crown moves a motion that the House "approves Her Majesty's Government's intention to support the adoption of a specified draft decision"', and these motions are passed unamended.<sup>2</sup> Likewise, in October 1971, the House of Commons debated, and voted on, a motion 'that this House approves Her Majesty's Government's decision of principle to join the European Communities on the basis of the arrangements which have been negotiated'.<sup>3</sup> These texts offer some precedent.

### **Can Parliament amend the motion?**

The motion will almost certainly be amendable.

Not every motion that goes before Parliament is amendable. The Standing Orders of the House of Commons say that 'where, in the opinion of the Speaker or the Chair, a motion, That this House [...] has considered the matter, is expressed in neutral terms, no amendments to it may be tabled'.<sup>4</sup>

However, in order for the motion on the Government's negotiated agreement to be 'meaningful', as the Government has promised, it will have to be expressed in non-neutral terms – to *approve* the deal as negotiated, for instance. For this reason, it is highly likely that the motion will be amendable.

There is a further procedural trick that the Government could try in order to avoid amendment, but it is unlikely to work. Motions that are 'pursuant' to an Act of Parliament have to be passed in a very specific form in order to perform their statutory function. If, therefore, the Government amends the EU (Withdrawal) Bill to provide that the Government will not bring forward certain statutory instruments until Parliament has passed a motion on the deal, it could also specify the wording of that motion. In that case, the 'meaningful vote' would not 'activate' the relevant provision of the EU (Withdrawal) Act, as it would then be, unless the motion were worded as set out in that Act. The Government might hope this would prevent its motion being amended. However, it would not make the motion unamendable as such. Instead, it would just ensure that, if the motion were amended, its passage could not perform the statutory function set out in the relevant Act of Parliament, meaning that the Government would find itself unable to bring forward secondary legislation under the EU (Withdrawal) Act.

Assuming the motion is amendable, any amendments will have to be selected by the Speaker, or whoever is in the Chair, if they are to be debated and decided upon. To be eligible for selection, they must be within the scope of the motion. It is highly likely that amendments on any substantive issues in the withdrawal agreement or the framework for a future partnership would be considered in scope. That would include amendments directing the Government to renegotiate the length of transition, the financial settlement or 'divorce bill', provisions on citizens' rights, and the UK's future trading relationship with the EU. Amendments to the procedure for approving the UK's departure from the EU – for instance, by requiring a further referendum or a different kind of parliamentary vote – would also be likely to be in scope.

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Normally, the Speaker selects a single amendment on which to call a vote at the end of a day's debate. However, it is possible to allow divisions on more than one amendment, unless the Government has passed a motion to the contrary or there is a standing order which explicitly provides to the contrary. The calling of multiple amendments rarely happens, but if multiple and substantially different amendments have been tabled and enjoy decent support in the form of multiple and cross-party signatories, there is a strong argument for breaking with normal practice in this case. The choice between an amendment which required a new referendum on the Government's deal and one that required the UK to leave the EU without a transition, for instance, would be highly political. The Speaker might reasonably decide that both amendments merit debate – and, moreover, might struggle to make a choice between them and maintain his impartiality.

### **Will the decision be 'binding' on the Government?**

As a matter of convention, a motion of this kind carries considerable constitutional weight. A motion is not, however, enforceable before the courts. As the UK Supreme Court put it in the *Miller* judgment: "A resolution of the House of Commons is an important political act. [...] A resolution of the House of Commons is not legislation."<sup>5</sup>

If Parliament were to reject the motion, it might not be clear to what course parliamentarians were trying to bind the Government. This issue is discussed further in the next chapter.

### **When will the decision be taken and how long will it take?**

The Government intends to table the motion as soon as possible after the negotiations have concluded, but before it has ratified the agreement. It is not clear whether that will be before or after the Government has signed the agreement.

The Government's working estimate for the end of negotiations is October. It is the Government's hope, therefore, that it will be able to table the motions in the final quarter of 2018. It may well be later if talks prove difficult and there is no deal by October.

If necessary, the motion can be passed or rejected very quickly. In theory it would be possible for the Government to lay the treaty before Parliament on a Thursday, table its motion the following Monday and hold the vote on the Wednesday. However, this would be very politically risky and constitutionally undesirable, since it would barely give parliamentarians time to read the withdrawal agreement and framework for a future relationship before making up their minds on whether the documents are acceptable. From the point of view of pure feasibility and prudent parliamentary management, two weeks between laying the text before Parliament and putting it to a vote should be seen as a bare minimum.

However, the Government may want to consider offering more time for scrutiny of the agreement and future framework before asking parliamentarians to vote on the motion. The proper length of the scrutiny period is ultimately a political question about when Parliament had, has or will have its say on the substance of the UK's departure from the EU. If the Government – and enough backbench and opposition MPs – considers Parliament to have had its say when it authorised the Government to serve a notification of the UK's intention to withdraw under Article 50, or when it

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scrutinised the EU (Withdrawal) Bill, or in various debates between the referendum and the meaningful vote, then this would militate towards a shorter period for scrutiny, and then debate, of the motion. If MPs and ministers consider the motion to be the moment for Parliament to have its say, that militates towards a longer period for scrutiny and debate.

When deciding how much time to allocate for debate on the motion, the Government can look to one relevant precedent. In October 1971, the House of Commons was given five days of debate on a government motion approving the then Government's decision to join the European Communities. Today's Government should see this as a starting point. In January 1972, there was a further one day of debate on an opposition motion to stop the then Government from signing the accession treaty before it had been published to Parliament, but the Government successfully amended it to say the reverse.

## **Task 2: Pass the Withdrawal Agreement and Implementation Bill**

### **What is Parliament being asked to decide?**

In November 2017, the Government announced its intention to bring forward a Withdrawal Agreement and Implementation Bill (WAIB), a piece of primary legislation 'to enshrine the Withdrawal Agreement between the UK and the EU in domestic law'.<sup>6</sup> The Government has made clear that this is 'over and above' its commitment to asking both Houses to agree a motion assenting in principle to the withdrawal agreement and future relationship.

This bill was not in the Government's original legislative programme for this session; it made no appearance in the Queen's Speech.<sup>7</sup> However, the Government's commitment to bring forward this legislation is in line with the recommendations of a previous Institute for Government paper, *Dispute resolution after Brexit*, which argued that the withdrawal agreement should be implemented by primary legislation, rather than via secondary legislation as the Government had originally proposed.<sup>8</sup> This is for three reasons:

- First, this legislation is likely to be of constitutional significance and so warrants proper scrutiny of a kind that is not afforded to statutory instruments.
- Second, secondary legislation has a different status from primary legislation and so would be subject to judicial review. That scenario is worth avoiding, as the responsibility for setting the terms of the UK's post-Brexit constitutional order should be seen to rest with Parliament, not with the judiciary.
- Third, it is unlikely, bordering on impossible, that the courts would ever designate a provision of secondary legislation a 'constitutional statute' or 'constitutional instrument'. This is important because laws designated as 'constitutional' are not subject to 'implied repeal' by future Acts of Parliament. It is always possible for Parliament to repeal them, but in most cases only by expressly saying that it is doing so. Since the Government is seeking some degree of entrenchment for the withdrawal agreement, and the only entrenchment available to legislation in the UK constitution is as a constitutional statute, it makes sense to implement the withdrawal agreement in primary legislation to give it a chance of attaining that status.

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This legislation cannot simply be a one-line bill providing that the withdrawal agreement is enforceable in UK law. Just as signing and ratifying the EU treaties imposed international legal obligations on the UK which the UK government could only meet by passing domestic legislation, so signing and ratifying the withdrawal agreement will impose obligations that require more detailed domestic legislation.

The WAIB can be expected to have three main parts:

- First, it will give domestic legal effect to whatever transition period is agreed between the UK and the EU. In effect, this part of the WAIB will mimic the European Communities Act (1972). For instance, it will have to provide that EU law is enforceable in the UK during the transition, and that any question as to the meaning of EU law can be determined by the European Court of Justice (ECJ) during the transition.
- Second, the WAIB will need to give effect to the agreement on citizens' rights. The draft withdrawal agreement, agreed in principle by the UK and the EU in March 2018, set out the rights that EU citizens would enjoy in the UK after Brexit, and provided that these would be made enforceable in UK law. That is a job for the WAIB. It also said that, where the interpretation of citizens' rights provisions of the withdrawal agreement are concerned, the UK courts shall 'have due regard to relevant decisions' of the ECJ after Brexit. This will need to be provided for in the WAIB, since the EU (Withdrawal) Bill as currently drafted makes considerably weaker provision for the UK courts to look to Luxembourg, saying that 'a court or tribunal need not have regard to anything done on or after exit day by the European Court, another EU entity or the EU but may do so if it considers it appropriate to do so'.<sup>9</sup>
- Third, the WAIB will need to lay the legal groundwork for other separation provisions to be dealt with. For example, if the Treasury needs a power to make payments in order to satisfy the UK's obligations under the financial settlement in the withdrawal agreement, the WAIB will have to create that power.

### **What scope is there for Parliament to amend the wording of the WAIB?**

As a matter of procedure, any bill is amendable, provided the amendments are within the scope of the bill.

### **Once passed, will the WAIB be 'binding' on the government?**

The WAIB will be binding on anyone in the UK, including the government. If granted Royal Assent and so made an Act of Parliament, this legislation would have legal force and be enforceable by the UK courts.

### **When will the WAIB be introduced and how long will it take to become law?**

There are some precedents relating to previous treaties that provide a guide as to how much time the Government might be expected to allocate for debate on the WAIB. However, in many of these cases, there was a single statute to approve and implement a new treaty. In this case, the Government has chosen a different approach, with a motion to approve the treaty and a statute (the WAIB) to implement it. As well as deciding how to get the WAIB through Parliament on time, the Government will have



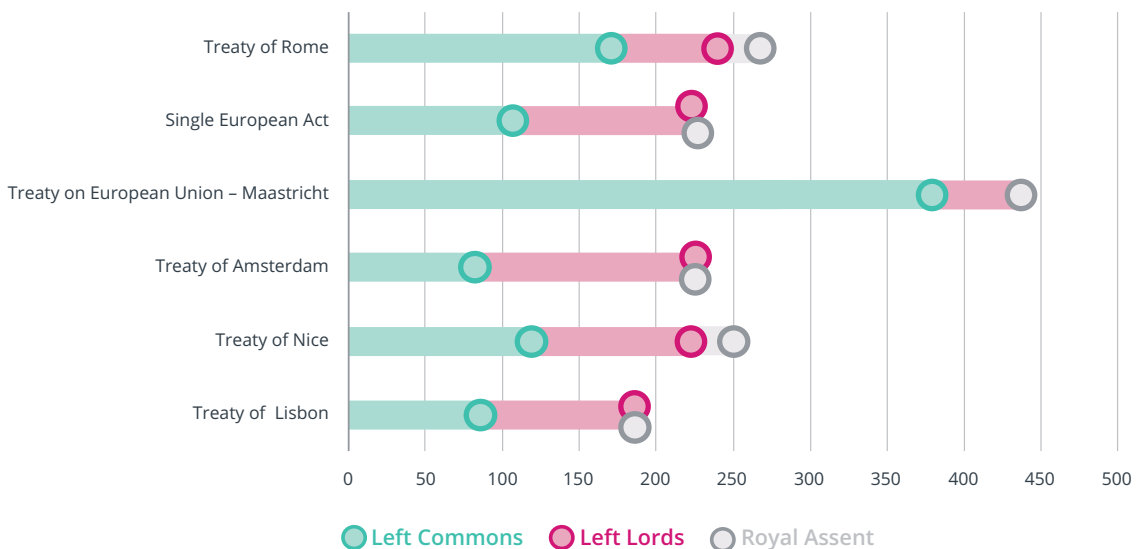
to make a prior decision about how it distributes parliamentary time between the motion (discussed above) and the WAIB.

There are constraints on both ends of the timetable for the WAIB. At the front end, the bill cannot be written and brought forward until the withdrawal agreement has been negotiated. This, according to Government plans, will be around October 2018; although, as David Davis has acknowledged, it may in fact be later.<sup>10</sup>

At the back end, the bill must receive Royal Assent and so become law by the date of the UK's exit from the EU. This is for two reasons. First, if the UK is bound by a new international treaty, the withdrawal agreement, but has not passed the domestic legislation needed to implement that agreement, then the UK could be in breach of its obligations in international law. Second, this situation would be detrimental to legal certainty, with citizens and companies unsure whether the terms of the withdrawal agreement apply to them or not.

The Government has not yet said how much time it will allocate for Parliament to consider the WAIB. If negotiations go to plan, the Government will have five months (180 calendar days) to get the WAIB through Parliament. As Figure 1 shows, this is less time than Parliament has typically taken to pass statutes which approve EU treaty changes (a relevant if imperfect precedent), but not by much.

**Figure 1: Total number of days between first reading and Royal Assent of bills related to EU treaties**



Source: Institute for Government analysis

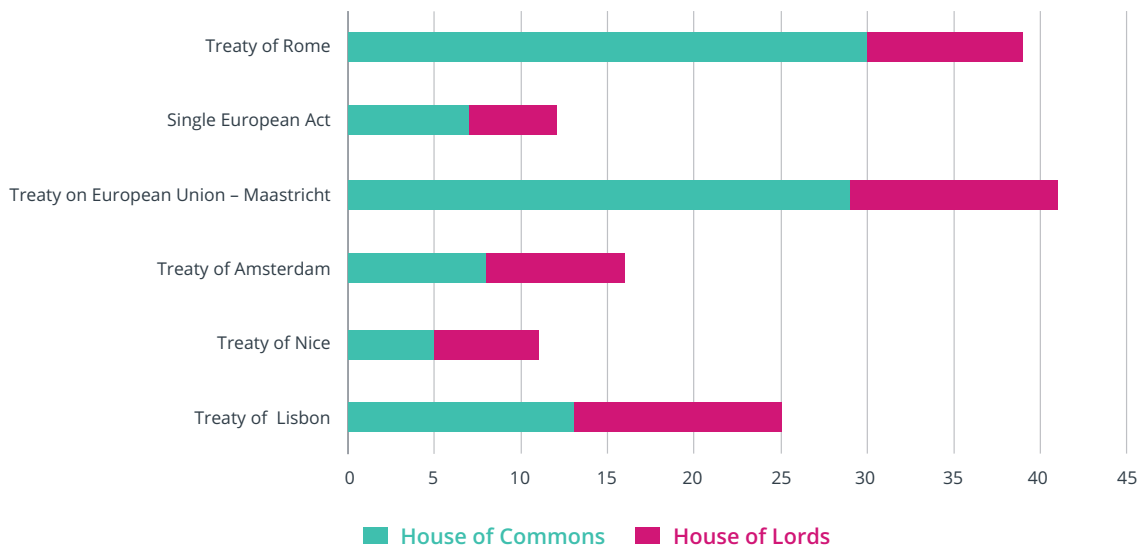
However, these figures disguise the practical realities of allocating parliamentary time. First, there is a distinction between calendar days and days on which Parliament sits. Assuming that the February and Easter recesses broadly follow the pattern of previous years, and that the Government does not table government business for Fridays, then there will be approximately 84 sitting days in the House of Commons between the beginning of October 2018 and the end of March 2019. If there is time



allocated for opposition days and backbench business during this period, as would be normal, the Government will have slightly fewer days at its disposal. The Government will also have to use some of this time for other government business, like the debate on the Autumn Budget. This normally lasts for four or five days.

Figure 2 shows the number of *sitting parliamentary* days previous governments have taken to take through statutes approving major EU treaty changes.

**Figure 2: Active days in each house on bills relating to EU treaties**



Source: Institute for Government analysis

Assuming the Government allocates a length of time for the WAIB that is broadly in line with previous significant treaty changes, it will need to use a substantial proportion of its Commons time this year and in the first few months of next year for this bill. If negotiations slip, the Government could find itself allocating almost all Commons time for the WAIB.

The Government has much less control over the allocation of time in the Lords, which is negotiated between the parties informally, so ministers will need to be mindful of the timetable risks in the upper house. Hold-ups in the Lords are a particularly important consideration when timetabling the WAIB, as much of this statute will be constitutionally significant, altering the relations between institutions and branches of government (see the Appendix on policy issues for more detail), and the experience of passing the EU (Withdrawal) Bill suggests that such provisions can generate particular controversy in the Lords.

In sum, the timetable for passing the WAIB looks extremely compressed. If negotiations slip by much, it will look heroic. Though it is currently Government policy that the UK will leave the EU on 29 March 2019, if the Government fails to get the WAIB passed in time, that date could be changed with the consent of the EU. Under the terms of Article 50, the UK will remain in the EU until the date of entry into force of the

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withdrawal agreement. If Parliament has voted for the withdrawal agreement in principle on a motion, but the WAIB has not completed its passage, the Government will have to attempt a renegotiation of the date of entry into force of the withdrawal agreement. That would ensure that, until the WAIB has received Royal Assent, the UK remains in the EU.

### **Task 3: Pass any secondary legislation needed to implement the withdrawal agreement using powers created in the EU (Withdrawal) Bill**

#### **What is Parliament being asked to decide?**

Clause 9 of the EU (Withdrawal) Bill, as it currently stands, gives a Minister of the Crown the power to make, by regulations, 'such provision as the Minister considers appropriate for the purposes of implementing the withdrawal agreement if the Minister considers that such provision should be in force on or before exit day, subject to the prior enactment of a statute by Parliament approving the final terms of withdrawal of the United Kingdom from the European Union.'<sup>11</sup> This wording reflects an amendment made to the original text of the bill by Dominic Grieve QC MP, the Conservative backbencher. Before this amendment was made, a minister's ability to make secondary legislation under this power was not conditional on a previous parliamentary vote.

The new formulation means that the Government retains the power to pass secondary legislation which does the same job as the WAIB, but only after the WAIB (or a similar statute) has been passed. This means that the power will probably not be used much. Speaking specifically about transition, Steve Baker MP, a minister at the Department for Exiting the European Union (DExEU), told the Lords Constitution Committee in December 2017 that "the substance of the implementation period is really a matter for that subsequent piece of legislation [the WAIB] and would not be dealt with in this Bill [the EU (Withdrawal) Bill] and I would not expect us to use the Clause 9 powers to bring it forward."<sup>12</sup>

Lord Callanan, the Government's Brexit spokesman in the Lords, has said that Clause 9 "is not intended to implement major elements of the withdrawal agreement," but may be used for "more technical separation issues" such as ongoing proceedings on competition and anti-trust, procedures on the concentration of undertakings and mergers, and the privileges and immunities of EU staff in the UK.<sup>13</sup>

#### **What scope is there for Parliament to amend the wording of secondary legislation made under the EU (Withdrawal) Bill?**

None. Statutory instruments are not amendable.

#### **Would secondary legislation made under the EU (Withdrawal) Bill be 'binding' on Government?**

Yes. Statutory instruments, once passed, have the force of law.

#### **When will secondary legislation be introduced and how long will it take to become law?**

Statutory instruments can only be introduced under Clause 9 of the EU (Withdrawal) Bill once the EU (Withdrawal) Bill has received Royal Assent. According to the current

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wording of Clause 9, the statutory instruments can only be brought into force once the WAIB, or a similar statute, as received Royal Assent.

## **Task 4: Ratify the withdrawal agreement as a treaty**

### **What is Parliament being asked to decide?**

The Constitutional Reform and Governance Act 2010 (CRAG) formalises a convention that dates from 1924, known as the 'Ponsonby Rule'. It says the government must lay international treaties before both Houses of Parliament 21 days before the intended date of ratification. If neither House raises objections in that period, the deal is ratified. However, Section 20(1)(c) of the Act sets out that a treaty is not to be ratified if the House of Commons has 'resolved, within [21 days], that the treaty should not be ratified'. If the House of Commons does vote against the treaty, a minister must explain to Parliament why the government wants to ratify the treaty. That triggers a further 21-day scrutiny period, after which the government can ratify if neither House raises objections. This process can be repeated indefinitely. In theory, therefore, Parliament could stop the Government from ratifying a CRAG-applicable treaty indefinitely. However, Parliament has yet to use this power to delay a treaty ratification.

In fact, treaties are often not debated and voted upon at all. CRAG does not oblige the government to allocate time to a debate, even if parliamentarians have objected to ratification. The Opposition could, in theory, provide time if it controlled any of the parliamentary time in the 21-day period.

CRAG does not apply to 'exceptional cases', in which the government may ratify treaties without consulting Parliament. Where the government believes there is an exceptional case, it must explain why. There is no explanation in the legislation itself of what 'exceptional' means, but it seems unlikely that the Government would risk provoking controversy by preventing Parliament from exercising its weak influence over ratification in this way. The withdrawal agreement is therefore expected to require ratification under CRAG.<sup>14</sup>

### **What scope is there for Parliament to amend the withdrawal agreement during the ratification process?**

If Parliament did resolve that the deal should not be ratified, it could, in its resolution, explain what would be needed for it to approve ratification. The resolution itself could not amend the deal.

### **Would a parliamentary resolution regarding ratification of the withdrawal agreement be 'binding' on the Government?**

Yes. It would be illegal for the Government to ratify the withdrawal agreement if Parliament had resolved that the Government should not do so.

### **When will a ratification vote under CRAG happen and how long will it take?**

As soon as the Government lays the treaty before Parliament, there is a 21-day window in which a vote under CRAG (to prevent the Government from ratifying the treaty) could take place. However, such a vote will only take place if the Government or the Opposition allocates time for it. If they do not, then a vote on a motion under CRAG against ratifying the withdrawal agreement will never happen.

If the Government has already allocated time for debate and 'meaningful vote' on its motion, it is unlikely it will allocate further time for a debate on a motion under CRAG against ratifying the withdrawal agreement. In all probability, therefore, a vote under CRAG will never happen.

**Table 1: The task for the Government in Parliament**

<b>Parliamentary proceeding</b>	<b>Effect</b>	<b>Proceeding will be required if...</b>	<b>Outcome legally binding?</b>	<b>Amendable?</b>	<b>Government's intended timing</b>
Motion in both Houses on withdrawal agreement and future framework	Approve the withdrawal agreement and future framework	The Government secures an agreement with the EU	No	Yes	Q4 2018
Withdrawal Agreement and Implementation Bill (WAIB)	Give effect to withdrawal agreement in domestic law	The motion (above) passes	Yes	Yes	October 2018 – March 2019
Statutory instruments to implement the withdrawal agreement	Implement any aspects of the withdrawal agreement not adequately addressed by the WAIB	The Government thinks of something it should have put in the WAIB, or the Government decides to implement technical aspects of the withdrawal agreement with secondary legislation	Yes	No	Introduced after EU (Withdrawal) Bill receives Royal Assent, becomes law after WAIB (above) receives Royal Assent
Ratification under the Constitutional Reform and Governance Act 2010	Ratification of the withdrawal agreement as a treaty	The motion (above) passes and the Government signs the treaty. A vote will only happen if the Government or the Opposition allocates time within 21 days of treaty being laid before Parliament	Yes	No	Never

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## 3. Risks for the Government and opportunities for Parliament

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In Chapter 2 we set out the parliamentary obstacle course that the Government needs to complete in order to give effect to its negotiated deal. In this chapter we set out the ways in which the process might be disrupted by those dissatisfied with the Government's deal, explaining the extent and limits of Parliament's powers to influence the process, and the implications of various possible interventions for the negotiation and for the overall Brexit timetable.

We first set out nine risks to the Government's planned timetable that might arise if it loses votes in the UK Parliament:

1. The Commons votes against the motion.
2. The Commons amends the motion, seeking a renegotiation of the withdrawal agreement.
3. The Commons amends the motion, seeking a renegotiation of the future framework.
4. The Commons amends the motion, seeking to keep the UK in the EU.
5. The Commons amends the motion, instructing the Government to take the UK out of the EU with no deal.
6. The Commons amends the motion, seeking a new referendum on the deal.
7. The Lords passes the motion in a different form from the Commons or takes a long time over other parts of the process.
8. Opposition or backbenchers seek to force a decision outside the timetable set by the Government.
9. Parliament passes the motion, but will not pass the WAIB or secondary legislation made under powers in the EU (Withdrawal) Bill.

Most of these risks concern the initial motion, rather than subsequent points of parliamentary engagement with the deal. If the motion passes, the remainder of Parliament's opportunities to scrutinise the agreement will allow it less direct engagement with the negotiated agreements. The WAIB will implement the withdrawal agreement in domestic law, but will not cover the future framework.

In any event, the Government has said that it will only bring forward the WAIB if the motion has passed, meaning that Parliament will already have made a major political statement about the acceptability of the deal by the time it gets to scrutinising this

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legislation. Votes on statutory instruments and ratification under CRAG are still lesser opportunities for parliamentary influence, as these votes may never happen. The motion, therefore, is both the point of maximum vulnerability for the Government, and the point of maximum opportunity for parliamentarians who wish to influence the course of events.

The process of the UK's withdrawal will be affected not just by actors within the UK, but also by the other party to the negotiation: the EU. We therefore go on to discuss a further three risks that may arise if the process does not go to plan at an international level:

10. The withdrawal negotiation takes much longer than anticipated and there isn't a finished deal to show Parliament by the end of 2018.
11. The European Parliament fails to approve the deal (in time for the UK's planned exit).
12. The withdrawal agreement is referred to the European Court of Justice for an opinion.

The majority of this report tackles the parliamentary process that the Government will face if it succeeds in negotiating a deal with the EU. However, the Government must also prepare for failure. At the end of this chapter, we therefore discuss what role Parliament will have if negotiations break down and the UK heads for 'no deal'.

## **Risks in the UK Parliament**

### **1. The Commons votes against the motion**

Parliament could simply vote against the Government's motion. It is not entirely settled, however, what this would mean.

As we explained above, the Government has said that a rejection of the deal would ensure that "the deal falls – full stop; in toto". Ministers have previously gone further still, implying that if Parliament were to reject the Government's deal, the Government would take the view that Parliament had endorsed a 'no deal' outcome. Addressing the House of Commons in February 2017, when he was Minister of State for Exiting the EU, David Jones said: "The vote will be either to accept the deal that the Government will have achieved [...] or for there to be no deal."<sup>1</sup>

There is an obvious political incentive for the Government to take this line. The more disruptive a 'no' vote appears, the stronger the argument for voting 'yes'. However, it is inaccurate to suggest that Parliament's only options are to accept the Government's deal as negotiated, or reject it in its entirety and shepherd the UK out of the EU without a deal. In reality, Parliament might reject the deal on the basis of narrower objections, to specific provisions of the withdrawal agreement or future framework.

It is possible that, in the course of parliamentary debate, it would become clear what Parliament intended by its rejection. For example, a majority could emerge for revoking the UK's Article 50 notice, or for renegotiating some particular element of the withdrawal agreement or future framework. Sir Keir Starmer, the Shadow Secretary of State for Exiting the European Union, has promised to bring forward an amendment to the EU (Withdrawal) Bill which ensures that, if the Government's deal is voted down,

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the Government “can only proceed on terms then agreed by Parliament”. But even if this is not set out in statute, the Government would find it politically difficult to ignore the express wishes of Parliament, should the Commons vote down the deal. In this case, it would be up to the EU27 whether they were prepared to negotiate on the changes suggested by the Westminster Parliament. If they were prepared to do so, there would be nothing to prevent the UK Government from returning to the negotiating table.

If, however, various factions in the Commons voted ‘no’ for different reasons – some seeking a ‘no deal’ outcome, some seeking Remain, and others seeking some form of renegotiation – then the situation would be extremely murky. The Government could attempt to chart a way forward, but it is difficult to see how it could avoid a general election and, in all likelihood, a request to extend the Article 50 period.

It would ultimately be a political question for any parliamentarian who opposed the Government’s deal whether they preferred to oppose it by amendment, or by voting against the motion. In the sections below we discuss what amendments to the motion might seek to achieve.

## **2. The Commons amends the motion, seeking a renegotiation of the withdrawal agreement**

Parliamentarians may not be happy with the withdrawal deal the Government has negotiated. While parliamentarians cannot renegotiate the treaty, they could amend the motion the Government tables with a view to changing the content of the deal. An amendment that, for instance, instructed the Government to renegotiate the length of transition, the terms of transition, the agreement on citizens’ rights or the financial settlement, would almost certainly be in order.

As a matter of constitutional law, an amendment to the motion would have no effect on the actual text, or draft text, of the treaty. The most Parliament could do is instruct the Government to renegotiate the text in a certain way.

If Parliament does attempt to send the Government back to the negotiating table, there will be a powerful political imperative for the Government to give effect to Parliament’s decision. At this point, the ball would be in the EU’s court. It would fall to EU leaders to decide whether the changes requested by Parliament were acceptable.

In theory, the Government could press on in the Lords and table its original motion regardless of any amendments in the Commons. There would be little point in this, however, since the Government would likely have to return to both Houses after its renegotiation in any event.

A renegotiation at Parliament’s urging would, in all likelihood, mean that Brexit would have to be delayed. According to Article 50 of the Lisbon Treaty, ‘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 [of intention to withdraw], unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.’ Since the UK served notice of its intention to withdraw on 29 March 2017, it is set to leave the EU on 29 March 2019. This will only change if:



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1. The Government and the EU27 agree that the date of entry into force of the withdrawal agreement is to be some other date, which would require a qualified majority of the European Council (15 member states representing at least 65% of the EU27 population).
  2. The Government attempts to revoke its Article 50 notification altogether, and is successful.
  3. The Government requests an extension of the Article 50 negotiating period, which would require the unanimous agreement of the EU27.

The second and third of these would be likely to require primary legislation.

If Parliament instructed the Government to return to the negotiating table in order to change provisions of the withdrawal agreement, the most sensible approach would be the third of these options: to request an extension of the negotiating period in order to complete the renegotiation.

### **3. The Commons amends the motion, seeking a renegotiation of the future framework**

Parliament may be satisfied by the withdrawal agreement the Government has negotiated, but not by the two sides' political declaration on the future UK–EU relationship. The Government's motion is set to seek parliamentary approval for both the withdrawal agreement and the framework for a future relationship. Though the Government initially argued that this framework could, in effect, be the final agreement on the long-term UK–EU relationship, this is now looking unlikely in the extreme.

At the most, the framework is likely to be a legally non-binding political declaration that signals a direction of travel towards the future relationship. Parliament might raise two kinds of objection to this framework. First, it might object to substantive provisions. For instance, the framework might articulate the Government's intention to pull the UK out of the EU's single market and its customs union, the UK's intention not to enter any future customs union with the EU, and the UK's intention to negotiate a free trade agreement with the EU. Parliamentarians might object to any of those policies, and so seek to amend the motion so as to compel the Government to renegotiate them.

The Government might be tempted to avoid objections to the future framework by making it extremely vague. In theory it could contain even less detail than the Prime Minister's speeches on Brexit, making extremely high-level commitments to continuing economic and security co-operation, but without spelling out what that would mean in practice.

This strategy would be attended with its own risks, exposing the Government to a second possible parliamentary objection to the future framework. Parliamentarians might object that the framework is too vague for them to be able to make a meaningful decision, arguing that the UK should not leave the EU unless it knows where it is going instead.



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If parliamentarians argued that they could not, in good conscience, authorise the UK's formal withdrawal in March 2019 without a better or clearer deal on the future relationship, but did not object to the terms of the withdrawal agreement itself, the Government could reflect these preferences in its approach to the EU. Ministers could seek to change the date of entry into force of the withdrawal agreement, rather than requesting an extension of the negotiating period under Article 50. This would make it clear that the UK was leaving the EU in any event, and so could be more politically saleable at home. This approach would also have the advantage of not requiring the unanimous consent of the EU27.

#### **4. The Commons amends the motion, seeking to keep the UK in the EU**

The Government has claimed that, when parliamentarians vote on the motion, they will face a binary choice between the deal the Government has negotiated and leaving the EU without a deal.

However, senior EU decision makers – including Jean-Claude Juncker, President of the European Commission, Donald Tusk, President of the European Council and Emmanuel Macron, President of France – have all said in public that, before the two-year deadline specified in Article 50 arrives, the EU27 would be happy for the UK to remain in the EU. They have said, respectively, that the door is still open, that the door could be re-opened, and that the hearts of European leaders are still open.<sup>2</sup>

Parliament could therefore amend the motion to make clear that it wanted the UK to stay in the EU. It might then be necessary to pass further legislation, instructing the Government to revoke its Article 50 notice.

The remarks of senior EU decision makers do not amount to a cast-iron guarantee that the EU27 would consent to a revocation, and it is certainly not a cast-iron guarantee that they would consent without attempting to extract some concessions from the UK (at the least, they might seek recompense for the administrative costs incurred by the Article 50 process to date). However, leaders' remarks provide a strong steer as to EU27 thinking.

In the unlikely event the EU27 did reject the UK's request to revoke its Article 50 notice, the UK might be able to revoke anyway. There has been a vigorous scholarly debate over whether the UK can unilaterally rescind its notice of intention to withdraw from the Union under Article 50, and what constitutional manoeuvre would constitute a revocation. No court has ever decided this question. Neither side in the *Miller* case argued that an Article 50 notice is unilaterally revocable, so it was not necessary for the court to decide that issue, and it did not do so. Ultimately, if the UK believed its notice to be unilaterally revocable according to EU law but the European Council did not, the UK would have to try to enforce its right to revoke before the ECJ.

#### **5. The Commons amends the motion, instructing the Government to take the UK out of the EU with no deal**

If Parliament did want to force the UK out of the EU without a deal, it could make this clear by amending the motion, and then declining to pass any legislation designed to implement the Government's negotiated withdrawal agreement. In this case, the Government would need urgently to bring forward other legislation to ensure the UK

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was ready on 'day one' outside the EU, and massively accelerate the implementation programmes, for instance on customs, borders and immigration, that are currently called 'contingency planning'.

## **6. The Commons amends the motion, seeking a new referendum on the deal**

This is the most technically complex option available to parliamentarians. They could amend the motion to defer their approval of the Government's withdrawal agreement and framework for a future relationship until both have been approved in a new national referendum.

If this happened in early October, it would be technically feasible to hold a referendum before 29 March 2019, avoiding the need to extend the Article 50 period. As Alan Renwick at University College London has noted, it is possible to hold referendums very quickly. In 2015, Greece held a referendum on a bailout package in eight days; and in 2014, Crimea held a referendum on accession to Russia in 10 days.<sup>3</sup> However, there are several time periods relating to referendums set out in statute and official guidance, which would need to be abridged by Parliament in order to achieve this (see Box 1).

### **Box 1: Time constraints on a new referendum**

#### **1. Legislation**

Primary legislation providing for the referendum would need to get through Parliament.<sup>4</sup> The legislation would determine the question on the ballot paper, among other things. In theory, the legislation could go from First Reading to Royal Assent in a single day. However, this would not give the Electoral Commission time to analyse, and report to Parliament on, the intelligibility of the referendum question. This process, which involves intensive qualitative research with voters, ordinarily takes 12 weeks. For the three most recent referendums, the Electoral Commission was given the time it needed to carry out this work, and recommended changes to the question in each case. This process could be accelerated a little, but that could mean a less intelligible, fair or robust question on the ballot paper.

#### **2. Campaign period**

There would need to be a period for the regulated referendum campaign. This is the period in which campaigners establish themselves, make their case and engage in a meaningful dialogue with voters. Under the framework laid down by Parliament in Political Parties, Elections and Referendums Act (PPERA) 2000, referendum campaigns last for 10 weeks, including six weeks during which campaigners apply to the Electoral Commission to be designated the 'official' campaign. For the EU referendum in 2016, these timelines were extended. Parliament decided that there should be a six-week period for designations *before* the start of the official 10-week campaigning period, effectively increasing the overall duration of the referendum campaign to 16 weeks. ►

### **Box 1: Time constraints on a new referendum – continued**

Just as Parliament extended the PPERA periods for that referendum, it could contract them for a new poll if time was short. However, this would carry risks. The Electoral Commission would have less of a chance to communicate the rules to campaigners, raising the chances of unintended breaches and subsequent litigation. The public would also have less time to engage substantively with campaigners' arguments. For the EU referendum in 2016, the period between setting a date for the ballot and polling day was four months. The Electoral Commission recommended in a subsequent report that six months should be allowed for future referendums.

#### **3. Administration**

The Electoral Commission would need time to physically administer the ballot. This involves the printing and distribution of ballot papers, as well as giving postal voters time to cast their votes. This process normally takes about six weeks. It could happen faster, but the risk of administrative errors would be higher as a result.

Accelerating the process for a referendum, while technically possible, would be constitutionally risky and administratively fiendish. A rushed legislative process could result in a sub-standard referendum question, while a rushed campaign would pose serious dangers to the effective administration of the referendum, the quality of public debate, the perceived legitimacy of the result (particularly if it was close) and public confidence in the UK democracy in general. In addition, the Government would have no option but to press on with preparations for leaving the EU while the referendum campaign took place as, should the public vote to leave again, the Government would need to be ready. Ministers' and officials' attention would be divided between campaigning and governing, posing risks to the quality of those preparations. If one of the options on the ballot paper involved leaving without a transition period or without a preferential trade agreement, this problem would be vastly more acute: the Government would have a mountain to climb to be ready on 'day one'.

Therefore, if the will of Parliament was to hold a new referendum, MPs would need to make this clear at the very earliest opportunity – in all probability, by amending the motion on the withdrawal agreement and future framework. If a majority for a new referendum in Parliament only coalesced after that motion, it would still be possible for Parliament to provide for a new referendum – by amending the WAIB, or in separate legislation – but this would probably require an extension of the Article 50 period, for which the consent of all EU member states would be needed.

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## **7. The Lords passes the motion in a different form from the Commons or takes a long time over other parts of the process**

Most of this section has discussed the process in the House of Commons. Although there is sure to be vigorous debate on the Government's deal in the House of Lords, it is the Commons that will likely set the direction of travel. If the Commons opposes the deal, the Lords will feel emboldened to set out its own objections. If the Commons approves, the Lords is likely to pull its punches.

The Government has promised to seek a resolution of both Houses. It is therefore likely that the Government will table an identical motion in the Commons and the Lords at the same time, but schedule its business such that the debates and votes in the Commons come before those in the Lords. By doing that, the Government can allow the Commons to set the terms of debate.

If the Commons amends the motion and then passes it, the obvious course for Government would be to table an amendment in the Lords identical to the one tabled in the Commons, or simply re-table the motion as amended by the Commons for the Lords to consider. If the two Houses do not pass the motion in the same form, there is no means for the two Houses to agree a shared version, unlike with primary legislation where the 'ping pong' process enables the two Houses to iron out their differences. If the two Houses do pass motions with different wording, the Government has two options. First, it could have a second try in one of the Houses, tabling a new motion with the wording passed by the other. Second, it could ignore one of the Houses (which, in all likelihood, would be the Lords). As explained above, this motion, although politically forceful, is not legally binding.

The Government needs to be mindful of timetabling risks in the Lords. Whereas the processes for allocating time in the Commons are formalised and clear, in the Lords the process is much more informal. The Lords leaders of the opposition parties could take the view, on either the motion or the WAIB, that the amount of time allocated by the Government for scrutiny and debate was insufficient. It is pretty unlikely that this would cause so great a hold-up as to require a rejig of the negotiation timetable, such as an extension of Article 50. But if there was a real breakdown in relations between the parties in Parliament, this could, in theory, happen.

## **8. Opposition or backbenchers seek to force a decision outside the timetable set by the Government**

Most parliamentary time is controlled by the government, but not all. In an ordinary, one-year parliamentary session, the opposition parties also get 20 days to table their own motions for debate. Exactly when these days fall is negotiated between the leader of the house and the shadow leader of the house, though the government has the upper hand in these negotiations. As Parliament is currently sitting in an extended, two-year session, the Opposition is expected to get more than 20 days, but there has been no definitive agreement on how many days it will get.

Some parliamentary time is also allocated for 'backbench business' – motions tabled not by members of the cabinet or shadow cabinet, but other MPs. This time is managed by the Backbench Business Committee (BBCOM) of MPs.

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The Opposition, or the BBCom, could decide to use some of their time to table a motion on the Government's deal, or on the progress of negotiations, before the Government does. This could be a motion to amend or reject a treaty text, if there is a text in the public domain, but it need not be. The Opposition or BBCom could equally table a motion instructing the Government to request an Article 50 period extension, or to revoke its Article 50 notice, or to U-turn on a major component of its negotiating strategy, for instance by attempting to negotiate a customs union agreement with the EU.

There is a precedent. Though Parliament passed a motion approving the Heath Government's decision to join the European Communities in 1971, the Opposition tabled a further motion on an opposition day in January 1972. The motion was "that, recognising the unique character of Treaty, this House calls upon Her Majesty's Government not to sign the Treaty of Accession to the European Economic Community until the full text has been published and its contents laid before this House for its consideration." The Government amended that motion and got it passed in a form that did not stop it signing the treaty two days later. In the end, the House resolved "that recognising that under international law the Treaty of Accession to the European Communities would not become operative until ratified, this House approves the intention of Her Majesty's Government to lay before the House the full and agreed English text of the Treaty when signed and the Government's proposals for the legislation required for its implementation."<sup>5</sup>

An opposition or backbench motion, should it pass, would no doubt be politically embarrassing for the Government. However, it could not force the Government to change its negotiating position. The present Government routinely tells its MPs not to turn up to opposition day debates. Whether MPs from the party of government turn up or not, votes on opposition business do not have binding legal force. Neither do votes on BBCom business. It is questionable whether ministers are living up to their constitutional responsibilities to Parliament and the public by treating the House in this dismissive way, but beyond exerting political pressure, there is little that parliamentarians on either side of the House can do to force the Government to engage with opposition business.

It is also worth noting that, whereas the Speaker would be likely to select multiple amendments on a government motion, they would normally select only a single – normally government – amendment on an opposition or BBCom motion.

There is one situation in which the Opposition could use its time to bind the Government's hands. If the Government had negotiated a treaty and laid it before Parliament, fewer than 21 days had elapsed and the vote on the Government's motion had not yet taken place, then the Opposition could table a motion in the Commons 'that the treaty should not be ratified'. This would temporarily prevent the Government from ratifying the treaty under the CRAG. However, if this happened, a minister could simply make a statement explaining why the Government wanted to ratify the treaty and lay it for a second time. From this point, a further 21-day period would be triggered and, if it passed without the Commons resolving again that the treaty should not be ratified, the Government would be at liberty to ratify.

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Backbenchers could not use backbench business time to stop the Government from ratifying the treaty in this way. Backbench business time is defined so as to exclude all proceedings pursuant to an Act of Parliament, and a motion resolving not to ratify would be pursuant to CRAG.<sup>6</sup>

### **9. Parliament passes the motion, but will not pass the WAIB or secondary legislation made under powers in the EU (Withdrawal) Bill**

If the motion passes in both the Commons and the Lords, Parliament could still attempt to influence the content of the withdrawal agreement and framework for a future relationship further down the line, but that will become ever more difficult. Having passed the motion, parliamentarians could try to make changes to the WAIB, for instance. However, the WAIB will be chiefly concerned with the manner in which the withdrawal agreement is implemented in UK law. The withdrawal agreement may not feature in its entirety and the framework for a future relationship may not feature at all. There may be no opportunity to vote on secondary legislation introduced under Clause 9, and even if there is, Parliament won't be able to amend the motions the Government proposes. The same applies to any votes on ratification under CRAG.

In addition, Parliament will need to consider the implications of any amendments to the WAIB for the UK's ability to discharge its international obligations. Legal advice from both government and parliamentary officials will be made available on these questions. Ordinarily, if the House and the Speaker had been advised that an amendment would render the UK in breach of its international obligations, this would be grounds for the Speaker not to select the amendment for debate.

In the past, statutes implementing treaties have rarely been substantially amended in either the Commons or the Lords. The Maastricht Treaty is an exception. There was an amendment to exclude the Protocol on Social Policy from the implementing legislation. The Foreign and Commonwealth Office (FCO) initially claimed that this would be legally problematic, but the Attorney General later clarified that it would not. Other amendments concerned the mechanics of domestic implementation rather than the scope of substantive obligations. For instance, one changed some reporting requirements on the Bank of England relating to economic and monetary union, and another provided that only elected members of local authorities could represent the UK on the Committee of the Regions.<sup>7</sup>

The determination of the legal implications of any amendments to the WAIB could be complex. For instance, Article 152 of the draft withdrawal agreement commits the UK to establishing 'an independent authority' to monitor its application of the citizens' rights part of the withdrawal agreement. How this body is organised, where it sits in Whitehall and its relationship to political decision makers might be considered a matter of domestic law for Parliament to consider but, at the same time, it will affect whether the authority is 'independent' as demanded by the treaty.

If Parliament does amend the WAIB to such an extent that, in the view of legal experts, it would not give effect to the UK's international obligations, then the Government will either need to enter a renegotiation with the EU, or seek a mandate for its own, unamended deal in a new general election. David Davis has signalled that he favours the former approach, saying that, if the bill were amended, "the Government would



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take that as an instruction to go back and speak to the European Union”.<sup>8</sup> If either outcome came to pass late in the day, however, it would damage international perceptions of the UK as a reliable partner which can deliver on its promises. Both legal certainty and the UK’s international reputation would be better served if parliamentarians brought any objections to the fore early in the process, focusing their energies on the initial motion.

## **Risks from Europe**

### **10. The withdrawal negotiation takes much longer than anticipated and there isn’t a finished deal to show Parliament by the end of 2018**

The negotiation timetable has consistently slipped, and it is likely to slip again.

The Government has previously said it would like to see a deal by October 2018. However, David Davis acknowledged in Parliament last year that negotiations could be delayed to such an extent that there is no time for parliamentary scrutiny of the exit deal before the UK’s formal date of exit on 29 March 2019.<sup>9</sup> Though his remarks were promptly repudiated by Downing Street, Mr Davis was right that treaty negotiations are unpredictable and rarely run to time. The Government does need a plan for a scenario in which there is no final deal to show Parliament in October 2018.

This is both because the Government needs to make good on its promise to allow Parliament to scrutinise the agreement, and because the Government must have time to pass the WAIB before withdrawal in order to avoid a situation in which the UK is in breach of its international obligations.

There are three main options for the Government in this scenario.

One option would be to attempt to accelerate proceedings by introducing the WAIB before the motion has passed. The Government could press on with the WAIB in the final months of 2018, even if elements of the withdrawal agreement or future framework were yet to be negotiated, in order to make some headway with giving effect to the parts that had been. The WAIB could include a provision that it is only to come into force after both Houses of Parliament had passed a motion approving the withdrawal agreement and framework for a future relationship. The motion could then be tabled once the remainder of the agreement or agreements had been negotiated. The advantage of this approach would be to preserve Parliament’s vote in its most meaningful form, by ensuring that the motion covered everything the Government had negotiated. The disadvantage would be the logical absurdity in asking Parliament to implement the Government’s deal (by voting on the WAIB) before approving it in principle by agreeing the motion.

A second option would be for the Government to maintain its plan to table the motion before the WAIB, but for the motion to refer to an incomplete withdrawal agreement, or a withdrawal agreement without a future partnership framework. The political risks of this approach would be substantial. MPs who lean towards Remain would be uncomfortable about approving withdrawal in principle, until they had some idea of the future relationship. MPs who lean towards Leave, by contrast, would be uncomfortable about approving a transition period in which Britain remains subject to EU rules and structures, before the end destination was clear.

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A third option would be to delay all the votes, but accept that it will be necessary to extend the Article 50 period in order to give Parliament a chance to vote after the negotiation is concluded. This carries its own political risks, particularly from those MPs and cabinet ministers who are keen to accelerate the process of withdrawal. It would also require consent from the EU side. From the point of view of proper scrutiny, however, this would evidently be the best option. It is for the Government, Parliament and the EU27 to decide how important scrutiny is, measured against the importance of keeping to timetable.

### **11. The European Parliament fails to approve the deal (in time for the UK's planned exit)**

The UK Parliament is not the only legislature to get a vote on the withdrawal agreement and future framework. The European Parliament will get a vote too. The UK Government has promised that the Westminster Parliament's vote will take place before the European Parliament's vote.

The European Parliament has been keen to insert itself into the Brexit process. It has been kept abreast of negotiations and issued statements throughout. In the first phase of negotiations, it campaigned chiefly on citizens' rights-related issues; it is now in the process of articulating its priorities for the second phase, on the framework for a future relationship.

The European Parliament has rarely had to ratify an international agreement in so little time, and there is some uncertainty over whether it will be able to move fast enough. One instructive example is the economic part of the EU–Ukraine Association Agreement, which the Parliament ratified unusually quickly thanks to intense political pressure from the European Commission and the European Council. The EU and Ukraine (under its new president, following a revolution) signed in June 2014; the European Parliament ratified in September.<sup>10</sup> It would therefore be wise to give the European Parliament *at least three months* to scrutinise and ratify the withdrawal agreement.

If there is a strong and wide consensus in the European Council for the withdrawal agreement and framework for a future relationship that the European Commission has negotiated, it is unlikely that Members of the European Parliament (MEPs) would defy the express policies of their elected national governments and vote the agreement down. This said, it would be legally possible for them to do so. The European Parliament has leveraged its veto power to influence the course of international negotiations in the past – notably on the investment provisions of the Comprehensive Economic and Trade Agreement (CETA), the EU's trade deal with Canada. As in that negotiation, if there is no strong consensus for approving the agreement in the European Parliament, this is likely to become clear quite early in the scrutiny process, allowing for a period of 'shuttlecock diplomacy' between the European Parliament, the European Council, the European Commission and the UK to address the European Parliament's concerns.

It is worth noting that, if the negotiation is delayed, the European Parliament is more likely to become obstructive. The next European Parliament elections will be held in May 2019. The closer the ratification vote is to polling day, the keener MEPs will be to



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show a domestic audience that they are actively representing constituents' interests – and for those who are unlikely to win re-election, the more aware they will be that they have nothing left to lose.

Whichever way the European Parliament votes, its 'yes/no' verdict will be accompanied by a substantive political resolution. In the unlikely event that it does vote the agreement down, the Parliament is likely to make its rationale clear in that document. This would then act as a prompt for renegotiation. It is likely that an extension of the Article 50 period would be required in this scenario, requiring the unanimous agreement of the 28 EU member states. If any member state, including the UK, were to withhold its assent for an extension and the European Parliament did not give in, it is theoretically possible that the UK could be forced to leave with no deal. This is, however, an extremely remote possibility.

If the European Parliament does force a renegotiation, the UK Government will need to decide whether any new deal is so different from the old one that the Westminster Parliament should be allowed to vote on it again.

## **12. The withdrawal agreement is referred to the European Court of Justice for an opinion**

The European Parliament, in turn, is not the only EU institution that could block the withdrawal agreement. As we explained in *Dispute resolution after Brexit*,<sup>11</sup> it is also possible that a member state government, or the European Parliament, could ask the ECJ to rule on the legality of the European Council's decision to adopt the agreement. This would not be unprecedented. Albeit under a slightly different legal procedure, an ECJ opinion in 1991 forced a renegotiation of the European Economic Area (EEA) Agreement between the EU member states, Norway, Liechtenstein and Iceland.<sup>12</sup> The ECJ has also been asked for an opinion on many other EU international agreements.\*

It is difficult to predict how quickly the ECJ could be persuaded to move in this context. If it was dragging its feet, or the opinion was negative, then the implications for the parliamentary timetable would be similar to those discussed in the previous section on the European Parliament. An extension of the Article 50 period would be negotiators' likely recourse.

## **What if negotiations break down and the UK heads for 'no deal'?**

Parliament has been promised a vote on the deal the Government negotiates. It has not, however, been promised a vote on a 'no deal' outcome if negotiations break down.

As the Institute has previously argued,<sup>13</sup> 'no deal' could mean different things. A 'bad-tempered' no deal would mean no agreement on preferential trade, but also no agreements on aviation and data-sharing, no transition period, no agreed framework for citizens' rights, and a hard border between Ireland and Northern Ireland. A so-called 'amicable' no deal could include some agreements on data, aviation, customs co-operation and citizens' rights, and a short transition period in

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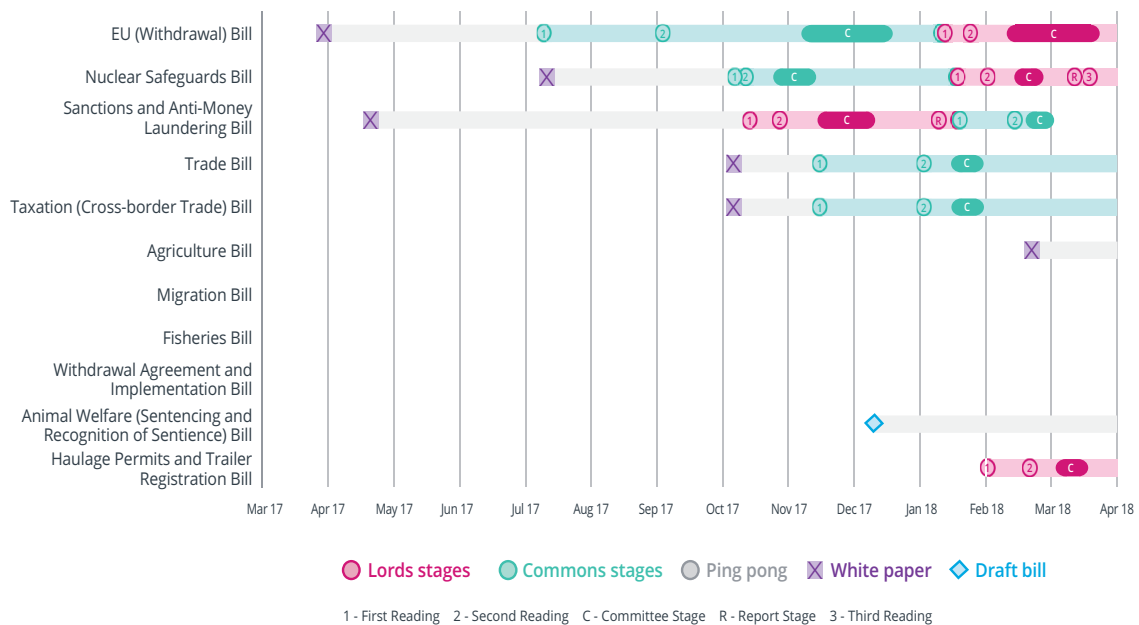
\* According to a search on InfoCuria for ECJ opinions and judgments on EU international agreements, there have been 32 such cases.

which to adapt to the new arrangements. Either kind of no deal would mean that UK exporters would face the EU's 'most favoured nation' (MFN) tariffs for third countries, and the UK would be legally obliged to charge its own MFN tariffs on EU imports – though the UK would gain the freedom to set these tariffs.

If the Government decided to steer the country towards a 'bad-tempered' no deal scenario, Parliament would not automatically get an opportunity to express a view on this decision, as there would be no treaty on which to vote. However, it is difficult to imagine that the Government could deny Parliament the opportunity to express a view in the wake of such an incendiary decision. If the Government did attempt to deny Parliament such an opportunity, and avoided a vote of no confidence, parliamentarians would likely attempt to create the conditions for such a vote themselves in either opposition or backbench time. As ever, Parliament's resolutions in this context would have political force on the Government but no legal effect.

Parliament would have a crucial role to play in preparations for 'day one', however. In a 'bad-tempered' no deal scenario, it would become very much more urgent to pass a range of domestic legislation, including the EU (Withdrawal) Bill, the Taxation (Cross-border Trade) Bill, the Trade Bill, the Road Haulage Bill, the Fisheries Bill and the Agriculture Bill (see Figure 3). Many of these bills construct a domestic legal framework where there was an EU one previously, avoiding a legal vacuum. Further emergency legislation might also be necessary.

**Figure 3: Parliamentary progress of legislation introduced to implement Brexit**



Source: Institute for Government analysis of parliament.uk.

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In an 'amicable' no deal scenario, there would be some UK–EU treaty or treaties (on aviation and customs co-operation, for instance). However, Parliament would still not have an automatic vote on these treaties. The Government will have to lay them before Parliament, and they would be subject to the ordinary ratification rules under CRAG. This means that the Government would be able to ratify the treaties 21 days after laying them before Parliament, unless Parliament had resolved to the contrary – something Parliament would only have the opportunity to do if the Government, or the Opposition, provided time for a debate and vote.

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## 4. Matters of confidence and general elections

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There have been some suggestions that, in order to avert a rebellion in Parliament, the Government could make its vote on the motion a matter of confidence, as John Major did with one of Parliament's votes on the Maastricht Treaty. At that time, making a motion a matter of confidence meant that, if the House voted it down, the government would automatically have resigned and thereby triggered a general election. In the past, governments have used confidence motions as a high-risk, high-reward strategy to get controversial legislation through Parliament.

However, as a result of the Fixed-term Parliaments Act (FTPA) 2011, this is no longer an option available to any government. The FTPA provided that an early general election could be triggered in only two ways.

First, a general election is triggered if two thirds of the whole House of Commons (meaning 434 members of 650) vote for a motion 'that there shall be an early parliamentary general election'.

Second, the FTPA provides for a procedure in which the House of Commons, according to ordinary voting procedures, either passes a motion 'that this House has no confidence in Her Majesty's Government' or fails to pass a motion 'that this House has confidence in Her Majesty's Government'. If this happens, there is a 14-day period in which MPs can attempt to form a new government. If, at the end of the period, there is a government which can command the confidence of the House in a new confidence motion, it can proceed to govern and there is no general election. If, at the end of the 14-day period, there is no such government, there is an early general election.

As the Institute has explained elsewhere,<sup>1</sup> these provisions of the FTPA mean that, should the Prime Minister designate the vote on the Government's Brexit deal as a 'matter of confidence' vote, she could not guarantee that there would be an election if she lost it. She would, instead, have to say that if the Government lost the vote on its deal, then one of the following would happen:

1. The Government would table a motion for a new election (which would require a two-thirds majority of the whole House).
2. The Government would table a motion of no confidence in itself (which would require a simple majority of those present, potentially triggering a 14-day period for the formation of a new government).

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3. The Prime Minister would resign (in which case it would fall to her party to select a new leader).
  4. The entire Government would resign. In this case, the Queen would invite the 'person who appears most likely to be able to command the confidence of the House to serve as Prime Minister' to form a government.<sup>2</sup> This is quite likely to be the Leader of the Opposition.

The point of making a vote a matter of confidence has, in the past, been to instil discipline in rebellious members of a prime minister's own party. The message is that, by voting against the government's motion, they are voting against the survival of their own party's government.

If the Prime Minister told her party that, should the Government lose the 'meaningful vote' on Brexit, she would table either kind of motion available under the FTPA, Conservative rebels might not be frightened off rebelling on the Brexit vote. They could still vote for the Government when it came to the vote under FTPA, and thus avoid prompting an election.

If the Prime Minister told them that she would resign as prime minister, this might not scare them off rebellion either. They might simply seek to install an alternative member of their party as prime minister after the vote.

If the Prime Minister told them that the Government would resign, this would likely have more of a chilling effect, since it would shorten the odds of the Opposition gaining power. However, whether the Prime Minister could convincingly make such a threat would be dependent on the internal politics of her party. If Conservative rebels believed that, in the wake of the Government's resignation, the Conservative Party would still have a better chance of convincing the Queen it could command a majority in the House than the opposition parties would, they could decide to rebel on Brexit nevertheless.

Of course, *in extremis*, even if the Prime Minister could convincingly make this threat, it may not help her to secure her Brexit deal in Parliament. Members of her own party might decide that a period outside Government was preferable to Brexit, or a form of Brexit, that they did not want.

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# Appendix: Issues in the Withdrawal Agreement and Implementation Bill

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The Withdrawal Agreement and Implementation Bill (WAIB) will be a constitutionally significant piece of legislation. However, there has been very little public debate about the substance of the bill so far. This Appendix pinpoints four policy issues relating to the WAIB that ministers and parliamentarians need to consider. As greater clarity emerges about the content of the withdrawal agreement and the content of the WAIB, further substantive policy questions will come to light.

## How does the withdrawal agreement feature in the bill?

The Government has three main options for how it includes treaty provisions in the bill. Crucially, these are distinctions of form and not of substance. Whichever option the Government chooses, Parliament will not be able to amend the withdrawal agreement simply by amending the bill.

The first option is to include withdrawal agreement provisions in the main body of the bill. This is the approach that governments have sometimes taken in statutory instruments to implement EU law, which have literally 'copied out' directives.

The second option is to attach treaty provisions as a schedule to the bill. This was the approach in, for instance, the Cultural Property (Armed Conflicts) Act 2017; legislation to create new offences and powers in accordance with the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and its 1954 and 1999 Protocols. The texts of the convention and its protocols appear in the schedules to the bill.<sup>1</sup> Statutory instruments that implement double taxation agreements take the same approach. The Human Rights Act (1998), the bill that incorporated the European Convention on Human Rights into UK law, also included convention rights in an annex. However, in this act, the annex did not copy out the entire treaty, setting out only certain European Conventions on Human Rights provisions.

The third option is to reference the treaty in the bill, but to omit the treaty text itself from the bill. The European Communities Act 1972, for instance, provided that 'all such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for, by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly'. The treaties themselves did not appear in the bill. Their titles were listed in a schedule, but their texts not copied out.

Though where to locate treaty provisions in the legislation is principally a question of form, not substance, the Government does have substantive questions to answer about the legal status which the bill affords those treaty provisions. This is important, because there are different ways to implement treaty obligations, and the EU may have views about which are acceptable in this case.

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One form of implementation is incorporation: making the words of the treaty part of UK law in some way. However, there are also other, weaker forms of implementation. The UK ratified the United Nations Convention on the Rights of the Child (UNCRC) in 1991, but has never incorporated the convention into UK law as such. Rather, it has implemented the convention by taking a number of policy measures in a series of Acts of Parliament, including the Children Act 1989, the Children Act 2004 and the Children and Families Act 2014. The last of these, for example, created a Children's Commissioner, who must 'have regard to the United Nations Convention on the Rights of the Child' in the exercise of their duties.

Different forms of implementation will likely be appropriate to different parts of the withdrawal. The citizens' rights provisions, for instance, could be replicated word-for-word along the lines of the European Communities Act, Human Rights Act or double taxation agreements. However, this is unlikely to work for the financial settlement, since this will impose international obligations on the UK as a whole and will not be appropriate to domestic statute. There, the Government is more likely to implement the treaty by taking powers to make payments to the EU.

### **How does the bill provide for transition?**

The UK and the EU have agreed on a legal text providing for a 'standstill' transition, in which most Union *acquis* continues to apply to and in the UK as it does at present. This agreement also requires the UK to maintain its current relationship with the ECJ during transition, and to adopt EU laws.

At the moment, the application of EU law and the UK's relationship with the EU institutions are governed by the European Communities Act (ECA). However, the EU (Withdrawal) Bill, currently on its way through Parliament, provides that the ECA is repealed on exit day.

There are three broad approaches that the Government could take to providing for transition in the WAIB:

- 1. Keep the ECA in force, with modifications.** The WAIB could repeal Clause 1 of the EU (Withdrawal) Bill for the duration of the transition, effectively keeping the ECA in force during this period. Some modifications to the ECA would be required in this case, since that legislation is set up for the UK as a member state, not as a transitioning state. For instance, it makes enforceable all 'rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the [EU] Treaties'. But those treaties will no longer be the basis for the UK's obligations during the transition. Instead, the withdrawal agreement will. In addition, the ECA as it currently stands does not make any provision for elements of the *acquis* that will no longer apply to or in the UK during the transition period. For example, under Article 124 of the draft withdrawal agreement, the UK will be able to negotiate and sign trade agreements during the transition, which it cannot do as a member state.
- 2. Replicate the ECA with modifications.** Undoing the repeal of the ECA would be politically incendiary. The Government initially dubbed the EU (Withdrawal) Bill a 'Great Repeal Bill' on the basis that it will repeal the ECA 'and in so doing, return power to UK politicians and institutions'.<sup>2</sup> A less incendiary approach would be for

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the Government to include provisions in the WAIB that were near identical in substance to the ECA. There are considerable advantages to this approach. The ECA has posed enormous challenges of interpretation for the judiciary, for instance in the reading of Section 2(4), which provides that future Acts of Parliament 'shall be construed and have effect subject to the foregoing provisions of this section'. If the WAIB used near-identical language to the ECA when providing for transition, this would amount to a strong steer to the courts that they should use the same interpretative toolkit for the application of the acquis during transition. This would be good for legal certainty.

- 3. Do something different from the ECA.** The Government may consider it too politically difficult to replicate the substance of the ECA in the transition provisions of the WAIB. It may therefore try to use new language to achieve the same outcomes. However, this poses considerable risks for legal certainty, and the Government should treat this approach with some caution. If the purpose of negotiating a 'standstill' transition in the withdrawal agreement is to ensure that citizens and businesses need only adjust to one major set of legal changes, then this is best achieved by a legislative approach that aims for a 'standstill' in domestic law too. Deviating significantly from the language of the ECA would make this difficult to achieve.

## Can the UK give legislative effect to its commitments on citizens' rights?

In the sections of the draft withdrawal agreement on citizens' rights, the authors clearly attempted to mimic two important features of EU law. First, as far as the EU institutions are concerned, EU law enjoys **direct effect**. This means that individuals can directly invoke many EU legislative acts before their national courts. Article 4(1) of the draft withdrawal agreement says that 'Where this Agreement provides for the application of Union law in the United Kingdom, it shall produce in respect of and in the United Kingdom the same legal effects as those which it produces within the Union and its Member States. In particular, Union citizens and United Kingdom nationals shall be able to rely directly on the provisions contained or referred to in Part Two'.<sup>3</sup> Citizens' rights provisions will therefore have what David Davis has called 'direct effect if you like'.<sup>4</sup>

Second, EU law enjoys **supremacy** over national law. This means that, if a rule of EU law contradicts a rule of domestic law, the member state must apply the EU law, not the domestic one. Article 4(1) of the draft withdrawal agreement also says that 'any provisions inconsistent or incompatible with that Part shall be disapplied'. David Davis has not called this 'supremacy if you like', but might as well have done.

However, as Professor Michael Gordon from the University of Liverpool has noted, it is 'a matter for debate whether it is even constitutionally possible' for Parliament to give effect to this latter commitment.<sup>5</sup>

It might not be. The doctrine of the supremacy of EU law was always difficult to accommodate in the UK, because the UK Parliament is sovereign and can always make or unmake whatever law it likes. It was accommodated, however, through an alchemic dialogue between Parliament and the courts. Parliament provided in the ECA that any future Act of Parliament should be construed by the courts in a way that was



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compatible with the rest of the Act. The courts subsequently established that it was 'the duty of a United Kingdom court [...] to override any rule of national law found to be in conflict with any directly enforceable rule of Community [EU] law.'<sup>6</sup>

However, in *Thoburn*, Lord Justice Laws said that this was not simply because Parliament had said that EU law should have this status, since Parliament 'cannot stipulate against implied repeal any more than it can stipulate against express repeal'.<sup>7</sup> Instead, he argued, the ECA could only be repealed by 'express words' or 'words so specific that the inference of an actual determination to effect the result contended for was irresistible', by virtue of its status as a 'constitutional statute'. A constitutional statute, he said, is one which '(a) conditions the legal relationship between citizen and State in some general, overarching manner, or (b) enlarges or diminishes the scope of what we would now regard as fundamental constitutional rights.' It was the fact that the ECA satisfied those requirements that gave EU law its special status in the UK. The relevant passage of the *Thoburn* judgment was referenced approvingly in the majority judgment in the *Miller* case.<sup>8</sup>

If this account is right, then it is up to the courts, not Parliament, to decide what statutes are immune to implied repeal and which are not, by applying these tests of constitutionality. Parliament can enlarge or diminish the probability of the courts coming to the conclusion that a statute is constitutional, by altering its content, but cannot provide that a statute is constitutional. That would mean that Parliament cannot lawfully provide, in the WAIB, that the citizens' rights provisions therein are immune to implied repeal.

On another account, it would be possible for Parliament to immunise citizens' rights provisions against implied repeal, all by itself. Michael Gordon says that 'it would be a remarkably bold court that concluded this was not constitutionally possible. It would also be a court which was arguably overreaching, to interfere with Parliament's self-definition of its legislative sovereignty.' However, legislating against implied repeal would also carry risks. Professor Mark Elliott of the University of Cambridge and Michael Gordon both note that the wording of the Joint Report goes further than Lord Justice Laws did in *Thoburn*. The Joint Report, a political agreement of December 2017 which uses similar language to the draft withdrawal agreement, 'suggests that nothing short of express repeal would suffice'.<sup>9</sup> Laws, however, said that 'words so specific that the inference of an actual determination to effect the result contended for was irresistible' would be fine too. Therefore, while the ECA probably left room for 'notwithstanding' clauses – 'clauses that, without purporting (expressly or otherwise) to repeal a constitutional statute, or a provision therein, explicitly assert priority over them to the extent of any inconsistency'<sup>10</sup> – the Joint Report and draft withdrawal agreement do not.

That means that it may not be possible to repeal only part of the citizens' rights part, in Michael Gordon's words, 'while retaining a broader commitment to the terms of the Agreement itself. Instead, Parliament might need to repudiate the entire system of rights contained in the Withdrawal Agreement, applicable to UK and EU citizens alike, to circumvent the otherwise prevailing domestic legal effects of the Withdrawal Agreement and Implementation Bill'.<sup>11</sup> It is not clear that this kind of 'guillotine' approach is what the Government is after.

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## Does the WAIB satisfy the requirements of the Grieve amendment?

Dominic Grieve's amendment to Clause 9 of the EU (Withdrawal) Bill added the section in bold to the following provision: 'A Minister of the Crown may by regulations make such provision as the Minister considers appropriate for the purposes of implementing the withdrawal agreement if the Minister considers that such provision should be in force on or before exit day, **subject to the prior enactment of a statute by Parliament approving the final terms of withdrawal of the United Kingdom from the European Union.**'

The intention of this amendment was, in large part, to embed in the EU (Withdrawal) Bill a statutory commitment to a so-called 'meaningful vote' on the withdrawal agreement. By specifying a requirement for statute, it went further than amendment 47, tabled by Hilary Benn MP, which said that the power could only be used if 'the terms of the withdrawal agreement have been approved by both Houses of Parliament'.

This could cause problems, however. While Dominic Grieve anticipated that the WAIB would count as a statute approving the final terms of withdrawal, the Government interpreted his motion as requiring a *further* bill, 'in addition to Parliament's meaningful vote [...] and on top of the new withdrawal agreement and implementation Bill'.

Parliament has not so far removed the ambiguities of Clause 9. This is fine if the Government has no intention of using the Clause 9 power. If the Government does intend to make use of it, as Lord Callanan has implied, the Lords needs to remove the ambiguous language. It could result in uncertainty over the Government's powers in the final moments of the negotiation and, *in extremis*, generate legal challenges.

There are two options for remedying the ambiguity. First, Parliament could amend Clause 9 further, to use more precise language. For instance, it could require a vote on a motion approving the terms of withdrawal, rather than a vote on a statute. Or, it could require a vote on a statute implementing the withdrawal agreement in UK law, to make it clear that it is referring to the WAIB.

Second, Parliament could get rid of Clause 9 entirely. This would be politically difficult, as it would delete the only statutory commitment to a vote on the terms of withdrawal. However, Parliament could at the same time amend the bill elsewhere to include a commitment to a vote.

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### 3. Risks for the Government and opportunities for Parliament

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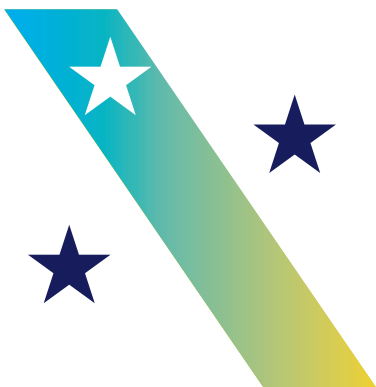
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