



# THE MECHANICS OF A FURTHER REFERENDUM ON BREXIT

JESS SARGEANT, ALAN RENWICK & MEG RUSSELL



The Constitution Unit



The UK in a  
Changing Europe



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Front cover image of the 'People's Vote' march, 23 June 2018, originally taken by user 'ilovetheeu', cropped by the Constitution Unit and used under creative commons licence.

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# Foreword

For well over two years UK politics has been dominated by ‘Brexit’ – the term coined to describe the decision taken in a referendum on 23 June 2016 that the UK should leave the EU. This has opened up profound questions about the UK’s international relations, economy and constitutional arrangements, as well as serious divisions within the main political parties. Ever since the original vote there have been some calls for a further referendum on Brexit, including claims that there should be a final public vote once the deal negotiated between the UK government and the EU is known. In recent months these calls have grown in frequency and intensity.

Given the increasing attention on the idea of a further such referendum, but the relative lack of detail and clarity among both proponents and opponents about what it might entail, the Constitution Unit chose in early summer 2018 to research and produce this report. Its purpose is not to take a view on whether a further Brexit referendum should be held, but to consider carefully and objectively the options for such a poll, and their viability in practical terms. During the three short months of this report’s preparation, discussion of the prospects for a further Brexit referendum (dubbed by some a ‘People’s Vote’) has grown further, and is clearly being seriously considered by at least some senior politicians. We hope that our report can be useful in informing these debates and deliberations. Like much else in the Constitution Unit’s work, we do not seek to promote particular political outcomes, but to ensure that politicians’ decisions are carefully thought through and based on sound evidence.

In sum, the report concludes that a further Brexit referendum is practically possible (as are most things in British politics, given the political will), but that decision-making about any future referendum must take account of the need for its outcome to have maximum legitimacy, particularly at a time when politics is fractious and divided. In that context, some routes to a referendum would be far preferable to others.

We are tremendously grateful to the many people who have helped inform the analysis in this report – through meeting with us, sending us materials or commenting on our words and ideas. These include, among others, Catherine Barnard, David Beamish, Vernon Bogdanor, Richard Corbett, Adam Cygan, Sionaidh Douglas-Scott, Paul Evans, Adam Fleming, Francis Grove White, James McGrory, Edward McMillan Scott, Lucinda Maer, Anand Menon, Dick Newby, James Rhys, Mark Sandford, Jack Simson Caird, Simon Usherwood and Nick Wright. We are also indebted to volunteers and other staff at the Constitution Unit who helped with preparation of this report, and with the [series of associated blog posts](#) that appeared on the Constitution Unit blog over the summer, summarising some of the arguments within it. They include Dave Busfield-Birch, Mercy Muroki, Will Parsons, Edd Rowe and Basma Yaghi. Despite their invaluable help, any errors of fact or judgement in this report are our own.

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# Executive summary

- Ever since the referendum decision on 23 June 2016 that the UK should leave the EU (i.e. embark on ‘Brexit’), some have proposed that there should be a further referendum on the details of any Brexit deal. In recent months those claims have become more prominent, frequently dominating the news. The purpose of this report is not to argue for or against a further Brexit referendum, but to examine objectively the options for such a poll, and which of these might work best. Given the contested nature of the politics of Brexit, any further poll would need to be designed carefully in order to maximise public legitimacy for the decision taken.
- Section 1 of the report explores the likely timetable required to prepare for a referendum. It notes that there are various essential processes including the passing of a bill to authorise the referendum, the testing of the question by the Electoral Commission, and the campaign period. While preparations for a new referendum could take place more quickly than those for previous polls, the minimum time for these combined processes would be around 22 weeks, with additional time required if the referendum question were to follow a multi-option format.
- As this timetable would make it all but impossible to hold a referendum before the currently planned ‘exit day’ of 29 March 2019, section 2 of the report explores whether the Article 50 period could be extended and what the consequences of that would be. It concludes that agreement by the EU27 to extending article 50 would likely be forthcoming, but that an extension would create complexities around the UK’s participation in the European Parliament elections due in May 2019, and possibly for the negotiation of the EU budget. Nonetheless, with political will, these obstacles could likely be overcome.
- Section 3 explores the possible trigger points for a referendum, taking into consideration the Brexit process and the various opportunities that parliament has to intervene. If a majority of MPs favoured a referendum, there are five basic scenarios in which this could be triggered; first, through an amendment to the ‘meaningful vote’ motion on the Brexit deal; second, through an amendment to the bill that implements that deal; third, if parliament prevents the government from ratifying the withdrawal agreement; fourth, following a failure of the UK government and the EU to reach a deal; or fifth, at some later stage if negotiations continue beyond the current expected timetable.
- Section 4 asks what the viable options are that could be put to a future referendum. It identifies three such options: accepting the deal negotiated by the government, remaining in the EU, or leaving without a deal. A possible fourth option of negotiating a different deal is judged unsuitable for putting to a referendum.
- Section 5 considers the different question formats which could be presented to voters, in order for them to choose between two or more of these options. It concludes that a ‘yes/no’ referendum on a deal negotiated by the government would be very unwise, as the meaning of a ‘no’ vote would be unclear. Many proponents of a referendum would favour a choice between ‘remain’ and ‘deal’, which would be straightforward but could prove politically risky if many previous ‘leave’ voters felt disenfranchised. A choice between ‘deal’ and ‘no deal’ would similarly disenfranchise ‘remain’ supporters, and seems very unlikely to gain parliamentary backing. If a deal remains on the table a three-option referendum may attract political support,



in which case a preferential ballot using the Alternative Vote (AV) seems the most plausible option. If no deal is reached, a straightforward ‘remain’ versus ‘no deal’ ballot could be held.

- Section 6 explores the potential legal and regulatory framework for a new referendum. The referendum legislation would need to include both the question and the franchise. While some might propose that the franchise for a further Brexit referendum should include 16- and 17-year-olds, and/or EU citizens resident in the UK, these groups were not included in the 2016 franchise and it would be unwise to alter that at this stage. In addition, various proposals exist for improving the conduct and regulation of referendums, some of which should be incorporated even though time would be short. These include crucial steps for improving the regulation of online campaigning.
- Section 7 puts all these pieces together, to develop various alternative scenarios and timetables for a possible further Brexit referendum, taking into account the required timescale for preparation, the trigger point and the question to be put to voters. It concludes that a referendum triggered at the earliest possible point, when the ‘meaningful vote’ motion on a deal is considered by the House of Commons could potentially take place as early as May 2019. This could allow the UK to hold European Parliament elections in the event of a ‘remain’ vote before the start of the Parliament’s new term on 2 July 2019. A referendum triggered during Commons scrutiny of the bill implementing the deal might take place early enough to avoid serious difficulties in the European Parliament, as might a referendum triggered through rejection of the ‘meaningful vote’ motion, or following a failure to reach a deal. A referendum triggered during the Lords stages of the implementation bill could prove more problematic. In all cases, the extra time needed for a three-option ballot would slow the timetable down somewhat. Any of these scenarios would require an extension to the Article 50 period, of six to nine months beyond 29 March 2019. Time to prepare for leaving the EU following a referendum, should the result renew the commitment to leave, would need to be built into the extension period.

# Introduction

On 23 June 2016 the UK electorate voted narrowly to leave the European Union in a referendum. Calls for a second vote began almost immediately: within days, over four million people signed a petition to support such a vote (UK Government and Parliament 2016). However, opinion polls at the time indicated that less than a third of the public (31%) felt that there should be a second referendum, with 58% thinking that there should not (Moore 2016).

Divergent opinions emerged in the parties too. Immediately after the vote, amidst speculation that he would run to replace David Cameron, current Foreign Secretary Jeremy Hunt suggested that a vote on the outcome of negotiations should be held (BBC 2016). However, when Theresa May (2016) launched her leadership bid, she dismissed the idea, declaring that ‘Brexit means Brexit’. Labour leadership contender Owen Smith pledged to support a referendum on the ratification of the deal if elected (Asthana and Stewart 2016). Conversely, incumbent Jeremy Corbyn argued that there had already been a referendum and the result should be respected (Waugh 2016). Even the Liberal Democrats were divided: at their September 2016 conference, party leader Tim Farron made the case for a second referendum, but other senior figures, including Vince Cable, expressed scepticism at that point (Stewart and Elgot 2016).

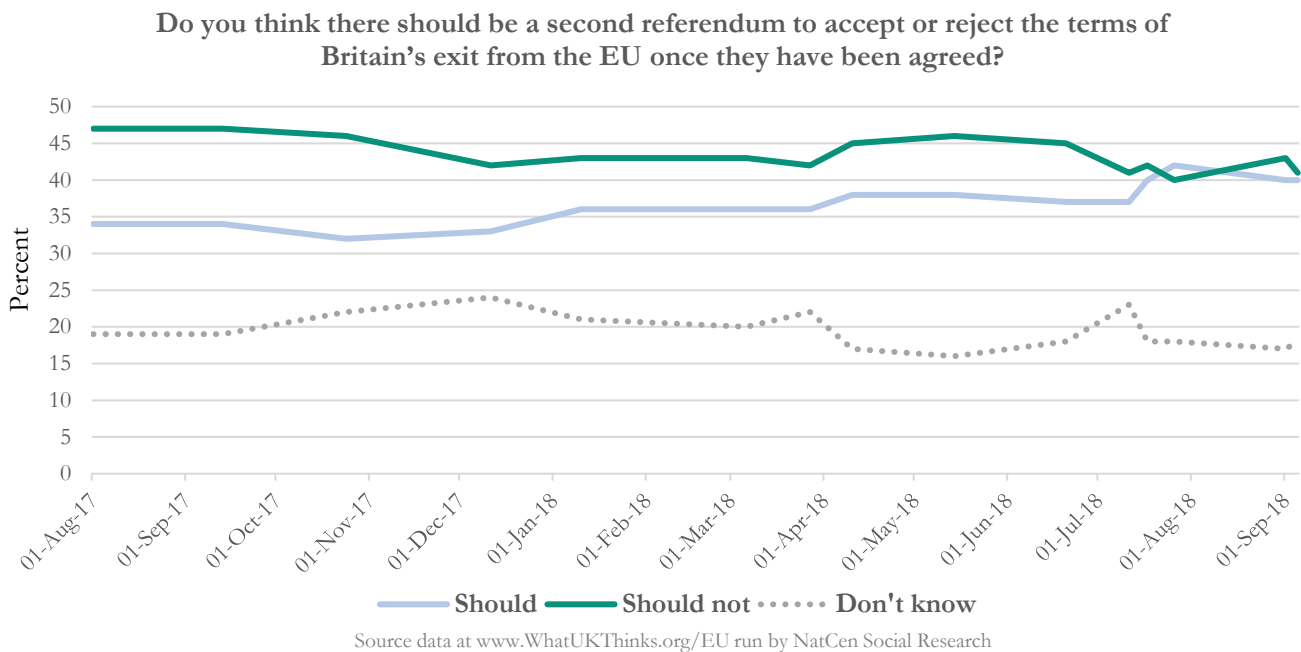
Proponents of a second referendum argue that, with parliament currently so divided on the UK’s future, the public should be given the opportunity to decide whether or not to accept the deal negotiated by the government (e.g. Blair 2018; Cable 2018; Grieve 2018; Greening 2018; Umunna 2018). Conversely, opponents are concerned that another vote would be even more divisive than the last. Shadow international trade secretary Barry Gardiner has warned that a second referendum could lead to social unrest (Sparrow 2018) and Theresa May (2018) has suggested that it would be ‘a gross betrayal of democracy’.

In recent months, notwithstanding these objections, interest in the prospect of a further Brexit referendum has grown. The organisation ‘People’s Vote’, demanding such a referendum, held campaign rallies throughout the UK in summer 2018 and set out a ‘roadmap’ for this in September (People’s Vote 2018). In the autumn, apparently following pressure from over 100 constituencies, the Labour Party conference debated and agreed a resolution arguing that the option of a referendum should be seriously considered once the government’s negotiations with the EU are complete (BBC 2018c).

As exit day draws nearer, public opinion on a second referendum appears to have shifted somewhat, as shown in Figure 1. Since July 2018, the percentage of those who think that there *should* be a second referendum and the percentage who think that there *should not* have both wavered around 40%. However, there is still no clear majority in favour.

Given the state of the parties, and of public opinion, it is possible that political events may precipitate a parliamentary vote in favour of a referendum at short notice. Yet if a referendum does take place, it is crucial that it should be structured and organised in a way that commands public respect. To date, very little detailed consideration has been given to the practicalities involved.

**Figure 1. Public opinion on a second Brexit referendum, August 2017 to September 2018**



The purpose of this report is hence not to consider whether a further referendum should be held – that is a question which will be decided by politicians. Rather, it examines how, if such a referendum were called, it would best be conducted.

The report begins by considering whether it is possible to hold a referendum before the UK leaves the European Union. Section 1 examines how long it would take to hold such a vote, outlining all the necessary processes – such as passing primary legislation, testing the question, preparing for the poll – and considering the minimum time needed to complete these. It concludes that it would be very difficult to hold a referendum before the UK is due to leave the EU on 29 March 2019. Section 2 therefore considers whether the Article 50 period could be extended, concluding that it almost certainly could be. It indicates some difficulties that this might cause, and what solutions might be available.

By examining the steps due to take place before the UK leaves the EU, section 3 then considers how a referendum might be triggered, should a majority in parliament choose to support one. Section 4 examines what options could be put to a referendum, and which of them would satisfy criteria of clarity and feasibility. Section 5 looks at possible question formats, considering the different combinations of options that could be put to voters and what voting system should be used in the event of a multi-option ballot. Section 6 considers what rules would need to be settled before a referendum: what the franchise should be, what improvements or amendments to current referendum regulation might be needed and what non-legislative changes to the campaign might be beneficial. Finally, section 7 ties all the aspects of the report together, identifying five possible scenarios for a second referendum and their associated timetables.

The report draws two principal conclusions. First, a second referendum on Brexit is feasible. It would almost certainly require an extension to the Article 50 period; but that, though not unproblematic, would be possible.

Second, if a decision is taken to hold a further referendum on Brexit, the principle of such a vote is likely to remain controversial – hence is of utmost importance that the process should command the maximum legitimacy. If the result is to be accepted by those on all sides, every effort should be made to ensure that the referendum campaign is fair, the poll is properly conducted, the options put to the referendum are clear, and the question allows voters to express their preferences unambiguously. These considerations guide this report’s discussion of the logistical aspects of holding a second referendum.

# 1. How long would it take to hold a referendum?

If a referendum is to be held in the UK, various processes must be completed, all of which take time. Therefore, the first issue that this report considers is whether there is sufficient time to hold a referendum, given that the UK is due to leave the European Union on 29 March 2019. Some commentators have dismissed the practicality of a second referendum on this basis, citing the 2016 EU referendum's 13-month timetable as evidence of its impossibility (e.g. Green 2017). By contrast, many proponents of a 'People's Vote' have argued that time is not a problem: Vince Cable, for example, has suggested that a referendum could be legislated for 'in a matter of weeks' (Cowburn 2018).

This section examines what processes are necessary to hold a referendum, how long each has taken for past referendums, and whether these could be streamlined. It then goes on to consider the shortest time in which each step could be completed, building a minimum timescale according to which a referendum could be held.

## What is required for a referendum to be held in the UK?

The processes that must be completed before any UK-wide referendum can be held are the following:

- **Legislation** – first, the UK parliament must pass primary legislation. This is needed to provide the legal basis for the referendum and to specify various key details that are not already in the standing legislation on referendums – i.e. the Political Parties, Elections and Referendums Act (PPERA) 2000. These include the referendum question, the franchise, any amendments to the regulatory framework, conduct rules for the poll and the date on which the referendum will be held (as further explored in section 6). The bill often provides for the last two of these to be specified in secondary legislation.
- **Question testing** – during the bill's passage, under the terms of PPERA (section 104), the Electoral Commission must assess the intelligibility of the referendum question. This process usually takes around 12 weeks, and occurs before the bill has completed its Commons stages.
- **Preparation for the poll itself** – there then needs to be sufficient time to prepare for the administration of the poll and regulation of referendum campaigners. For this reason the Electoral Commission (2016: 33) has recommended that referendum legislation should be clear 'at least six months before it is required to be implemented or complied with'. This implies that legislation relating to the campaign should be clear more than six months before polling day.
- **Regulated referendum period** – before the poll, PPERA (section 103) specifies a 10-week campaign period. This comprises:
  - a. four weeks in which registered referendum campaigners may apply to be designated as lead campaigner for one of the referendum outcomes

- b. two weeks in which the Electoral Commission may designate lead campaigners for each outcome, should there be suitable applicants
- c. and four weeks between designation and polling day.

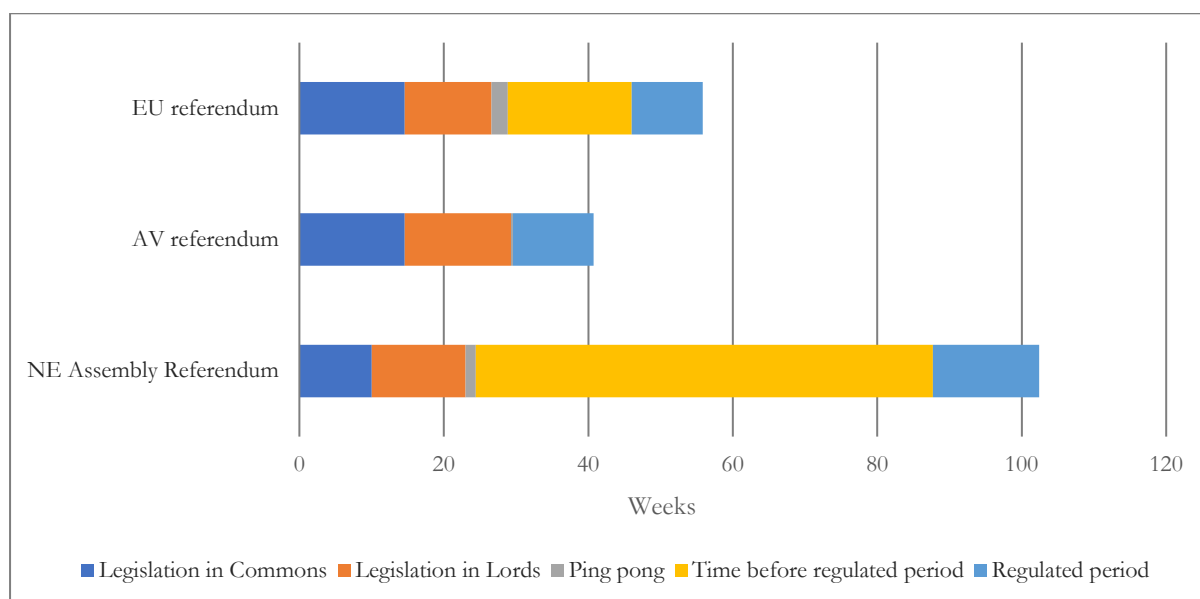
To allow more time for designated lead campaigners to take advantage of their status, the Electoral Commission (2016: 15) has recommended that either designation should take place before the start of the 10-week referendum period or the referendum period should be extended to 16 weeks.

## Would the process take as long as in past referendums?

Since the introduction of PPERA, five referendums have been held under its terms. Of these, three were enabled by UK primary legislation passed for the purposes of the referendum – the 2004 North East Assembly referendum, 2011 Alternative Vote Referendum and 2016 EU referendum<sup>1</sup> – and so provide the most useful basis for comparison.

As shown in Figure 2, the time between the introduction of enabling legislation and polling day has varied significantly, but all past referendums have had fairly long timetables. In total, the AV referendum had the shortest timeline, of nine months; preparation for the EU referendum took a total 13 months; the North East Assembly referendum took the longest, at more than 22 months. In the absence of urgency, however, many of the steps leading to these referendums took longer than is strictly necessary.

**Figure 2. Timeline for previous UK referendums**



Source: Authors' compilation of respective post-referendum Electoral Commission reports and parliamentary data on passage of bills.

<sup>1</sup> In contrast, the 2011 referendum on the powers of the Welsh Assembly was enabled by secondary legislation provided for by the Government of Wales Act 2006; the 2014 Scottish independence referendum was enabled by Scottish Parliament legislation.

Starting with legislation, both the European Union Referendum Act 2015 and the Parliamentary Voting System and Constituencies (PVSC) Act 2011, which enabled the AV referendum, took just under seven months to pass through parliament. However, in both cases the bill was introduced shortly before the long summer recess, during which time no legislative progress could be made. The Regional Assemblies (Preparations) Bill, which enabled the 2004 referendum, received royal assent five months after its introduction. Controversy also played a part in the length of these bills' passage. In particular, the PVSC Bill was complex and faced significant political obstacles. Besides providing for a referendum, it set out the full details of the proposed new voting system, as well as controversial changes to parliamentary constituencies. It faced major delay to its passage through the House of Lords, including 17 days at committee stage (Wintour 2011). A streamlined referendum bill could move more speedily, particularly if there were political will.

The North East poll had by far the longest gap between royal assent and polling day, at one year. In line with the Electoral Commission's preferred timetable, six months elapsed between the passage of the EU Referendum Bill and the date of the 2016 poll. The regulated referendum period was the statutory minimum of 10 weeks, but, on the advice of the Electoral Commission, the six-week designation process took place before the start of this period.

The AV referendum had the shortest time between the passing of legislation and polling day. The date of the poll was specified in the primary legislation itself (which led to concerns that the delay in the Lords would prevent the bill being passed in time to hold the referendum in accordance with PPERA requirements). Eventually, the legislation received royal assent just 11 weeks before polling day, and the regulated referendum period began immediately. Although the tight timescale drew criticism from the Electoral Commission (2011: 28), it demonstrates that holding a referendum on a reduced timescale is achievable.

It is clear that many of the processes in past referendums could have been streamlined and completed in a shorter amount of time had it been necessary. This suggests that a further Brexit referendum could be held on a shorter timetable, should the situation require it. The next sections consider by how much each process could be compressed without harming the integrity of the vote.

## **What is the minimum time in which legislation could be passed?**

Political considerations rather than procedural constraints would dictate the minimum time in which legislation could pass through parliament. The government's narrow majority, dependent on DUP support and subject to internal party divisions, makes the situation highly unpredictable. The key factor would be the extent of cross-party agreement that emerged over the need for a referendum – particularly the government's own position and that of the Labour front bench. Tricky aspects such as the franchise, the referendum question and the regulatory framework would certainly need to be debated and scrutinised (see section 6); but whether they were contested and delayed would depend on the politics of the moment. The EU Referendum Bill, for example, was delayed by 'ping pong' between the Commons and the Lords over whether the franchise should be extended to those aged 16 and 17.

With political will, legislation can be rushed through on significantly reduced timescales. For example, the Prevention of Terrorism Act (PTA) 2005, which introduced a system of 'control

orders' following a court ruling on the illegality of the previous system, received royal assent within just three weeks of its introduction – despite being highly controversial and subject to protracted 'ping pong' between the Commons and the Lords (Russell and Sciara, 2006). If the government and the Labour opposition fell in behind a second referendum it would be relatively easy to pass a programme motion allowing for swift passage through the Commons, so long as this built in a publicly acceptable amount of time for scrutiny of the detail (which would take place on the floor of the House, as a constitutional bill). Nonetheless, if the referendum result is to be seen as legitimate, and to command widespread public acceptance, it could be damaging for an impression to be created that the bill had been rushed through too quickly. The testing of the question, which must be undertaken by the Electoral Commission and normally takes place during the Commons stages of the bill's consideration, could however place a significant constraint on the speed with which legislation could be passed, as discussed below.

In the Lords, mechanisms such as programme motions are not available, but, as was seen with the triggering of Article 50, peers are unlikely to significantly delay an important time-sensitive bill passed by the Commons. The Lords is more pro-EU than the Commons, and a referendum bill might indeed be welcomed by many peers. The biggest potential obstacle could be if the Commons passed a bill that was constitutionally questionable – for example, if the Commons sought to impose an unreasonable timetable on the referendum itself, or to endorse a controversial referendum question. Otherwise, Lords consideration could potentially be swift.

## What is the minimum time for question testing?

Section 104 of PPERA gives the Electoral Commission a statutory duty to assess and publish a statement of its views on the intelligibility of the question set out in the bill. The Commission does so by conducting qualitative research with the public and consultations with prospective referendum campaigners and others to ensure the question is not ambiguous, misleading or biased.

At the end of this process, the Commission either states its approval of the proposed wording or proposes an alternative. Parliament then decides whether to amend the question on the basis of this recommendation. Given this, the norm is for the Commission's recommendation to be made when the bill is still in the Commons and amendable: i.e. by report stage at the latest. As question testing usually takes 12 weeks, this could potentially place a significant time constraint on the speed of its parliamentary passage. A key consideration is therefore whether this process could be streamlined to allow faster reporting.

Given the tight timescale, parliament could decide to pass legislation without waiting for the Commission's opinion. Alternatively, the Commission, which is at liberty to consider the wording 'in such a manner as they may determine' (PPERA 2000, section 104(2)(b)) could simply conduct a very basic assessment in a manner of days: for referendums prior to 2009, the Commission did not conduct research or consult on the question; it simply considered the question internally and made a judgement.

However, in the current polarised political environment over Brexit it is of utmost importance that the result of any referendum should be perceived as legitimate. Integral to this is public confidence in the neutrality and intelligibility of the question. Curtailing or abandoning the normal process could jeopardise this, and risk accusations that the question was misleading or biased. Furthermore, as discussed in detail in section 5, there is a possibility that the referendum question



could take a form not previously used in the UK – with the likeliest innovation being a three-option question. This would necessitate particularly careful testing. Therefore, it is likely that something similar to the usual process, albeit perhaps on a somewhat condensed timetable, will be necessary.

If only a straightforward two-option referendum was under consideration, compressing the question testing process into something like eight weeks might be possible without causing significant problems. In the event that a three-option question were on the table, something closer to the normal 12-week schedule would probably be required (even if, ultimately, a two-option question were chosen). If the proposed question were changed as a result of parliamentary debates, that would also likely cause delays.

## What is the minimum time between legislation and polling day?

The minimum 10-week referendum period is specified in PPERA, and comprises three parts, as outlined above. This could be amended by the legislation enabling a new referendum. However, it is not clear that any of the three stages could or should be shortened:

- Shortening the four-week application period for campaigners would allow campaign groups little time to organise, particularly as the options in the referendum may only become clear late in the legislative process, hindering prior organisation. This would especially disadvantage newly formed groups, which would be problematic if a continuity group from the previous referendum applied for designation for one outcome but no equivalent group could apply for the other. This could occur, for example, if the options were to remain in the EU or accept the negotiated deal.
- If there were more than one suitable applicant to be lead campaigner for one or more outcome, it would be difficult for the Electoral Commission to designate in less than two weeks. This choice is unavoidably controversial, and subject to potential judicial review. It must be made in a demonstrably fair and rigorous manner.
- The final four-week period during which lead campaigners may utilise the benefits of designation – which include a grant of up to £600,000 – is widely seen as too short: to date, it has been extended at nearly every referendum. In the 2011 Welsh referendum (when it was five weeks), the No campaign group opted not to seek designation, in part because it felt there was insufficient time to benefit from doing so. Campaigners need enough time to make their case to voters, and voters need enough time to find sufficient information to make their decision. Shortening the campaign period to below four weeks would be a major departure from past practice. It could undermine the legitimacy of the vote, and would therefore be ill-advised.

As noted above, the Electoral Commission recommends that the period between legislating for a referendum and polling day should be considerably longer than the minimum 10-week regulated period. This reflects the need to complete a range of administrative and regulatory tasks before a referendum can take place. For example, polling stations must be organised, ballot papers printed, guidance for Chief Counting Officers and referendum campaigners produced, and voter information booklets circulated.

However, it is clearly possible to organise a poll without a lengthy period of preparation. The AV referendum was held 11 weeks after the legislation was passed. A general election necessitates most of the same tasks as a referendum, and in 2017 such an election was held just over seven weeks after it was announced. This suggests that, if circumstances required it, a poll could be held as little as 10 weeks after legislation had passed. The Electoral Commission and electoral administrators could begin planning during the passage of legislation, and materials developed for previous referendums could be reused.

But this would only be the case if the rules for the conduct of the poll and the regulation of campaigners were largely the same as in previous referendums. By contrast, if the rules were substantially altered, then more time would be needed to make administrative adjustments. If, for example, the referendum question offered three or more options with a preferential voting system (as explored in section 5), more time would likely be needed to develop and test new guidance to voters and electoral administrators. The amount of time is difficult to judge: government and parliament would need to take guidance from the Electoral Commission. The analysis below assumes that an additional six weeks would be needed. This could begin during the question testing phase if a three-option referendum were on the table, so we assume that six weeks is the total extra time required for a three-option compared to a two-option vote.

## Conclusion

**Table 1. Referendum timescales**

Process	Minimum time to complete	Conditions necessary for minimum timescale	Factors that could increase timescale
Passage of legislation	11 weeks	Cross party agreement to hold a referendum Agreement over key issues such as question/franchise	Slim majority for the principle of a referendum Disagreement over key issues such as the question/franchise
Question testing*	8 weeks	No amendments to the question during the bill's passage Only a two-option referendum under consideration	Amendments to the question during the bill's passage Unfamiliar question format, e.g. multi-option referendum
Period between legislation and campaign	1 week	Same regulatory framework and conduct rules as 2016 referendum	Major changes to the regulatory framework Changes to conduct rules for multi-option referendum
Regulated campaign	10 weeks	No change from previous referendum	More complex designation process
<b>Total</b>	<b>22 weeks</b>		

\* Question testing would take place alongside the passage of legislation so is included in this timescale when calculating the total time. Parliamentary processes after question testing likely require a minimum of three weeks.

There are clearly many uncertainties in the timescales discussed above, the biggest being the timing of the legislation, which is greatly dependent on politics and the circumstances in which the referendum is triggered (as explored in more detail in section 3). Table 1 outlines a minimum timescale according to which each process could be completed and a referendum held, estimating this as 22 weeks. It explains the conditions necessary to meet that minimum timetable, and the factors that could cause more time to be required at each step.

If referendum legislation were introduced on the first day after parliament's conference recess – 9 October, the minimum timescale suggests (allowing for Christmas recess) that the earliest a referendum could be held is 28 March 2019 – the day before the currently scheduled exit day. There is, of course, no chance that legislation would be introduced on this date. It is also unlikely that all the conditions necessary to hold a referendum according to the minimum timescale would be met. And a referendum on the day before exit day is anyway not practicable. Therefore, an extension to the Article 50 period to delay exit day seems necessary to allow a referendum to be held. This is certainly legally possible, but whether it is politically feasible is discussed in the next section.

## 2. Is extending Article 50 feasible?

In the previous section we concluded that, to ensure sufficient time to hold a referendum before the UK leaves the European Union, an extension to the two-year Article 50 window would almost certainly be required. Article 50(3) makes provision for such an extension if agreed unanimously by the departing country and all other EU member states. This section examines whether such agreement is likely, and what obstacles and difficulties might be encountered.

### Would the EU be likely to agree an Article 50 extension?

As an extension to the Article 50 period would require unanimous approval by the EU27, a first question is how likely they would be to grant this. It is not clear that such an agreement would be possible in all circumstances. For example some key figures in the pro-EU movement, such as Nick Clegg (2018), have proposed extending Article 50 to allow more time for negotiations. Sebastian Kurz, Chancellor of Austria – which currently holds the rotating Council Presidency – has suggested that he might support such a request (Rios and Fox 2018). But other EU sources have argued that the Council would be reluctant to prolong the current process unless there was a major shift in the UK's politics (Boffey 2018b).

A referendum, however, would likely be a significant enough development to satisfy this criterion. It is generally thought that the EU would be willing to agree to an Article 50 extension to allow the UK to conduct a democratic process such as a general election or a referendum (e.g. Crisp 2018). If remaining in the EU were an option in the referendum, the EU might well want to afford the UK the opportunity to change its mind on Brexit. Even if remaining in the EU were not an option on the ballot, there is a strong argument that the EU would want to honour the democratic principles on which it was founded and not deny sufficient time to allow the UK electorate the chance to vote – provided it felt that the UK was being sincere rather than simply playing for time.

### Would a UK parliamentary vote be required to extend Article 50?

A question might arise about whether the government would require parliament's consent to request an extension to Article 50. The parliamentary authorisation for the original Article 50 trigger came through the EU (Notification of Withdrawal) Act 2018, which resulted from the ruling in the *Miller* case that parliamentary approval was needed for such a change. Subsequently the EU (Withdrawal) Act 2018 has defined exit day as 29 March 2019.

At the very least, parliament's consent would be required to amend exit day in the EU (Withdrawal) Act. This would almost certainly take place after any such extension had been granted by the EU27. In practice it would be politically prudent for the government to hold a parliamentary vote at an earlier stage, to authorise the request for an extension, whether this is strictly legally required or not. Such a vote could be symbolically important, and help to diminish any questions about the legitimacy of the move. In fact, should there be a majority in parliament for a referendum, approval for an Article 50 extension should be relatively easy to obtain. Doubtless some parliamentarians would seek to oppose this, but the majority would surely support it to facilitate a referendum that parliament itself had expressed a wish to hold.

## Consequences of extending Article 50

Even if the UK asked for an Article 50 extension, and EU leaders were willing to support such a request, various complications would flow from this decision. Since Article 50 was first invoked, the EU27 have been proceeding on the assumption that the UK would leave on 29 March 2019, and some decisions made on this basis would need to be revisited. One major consideration is the European Parliament election due to take place in May 2019, which could cause difficulties both in the UK and for other member states. Implications for the transition period and the EU budget may also raise problems.

### The 2019 European Parliament elections

The European Parliament elections are scheduled to take place in all member states between 23 and 26 May 2019, and the new parliamentary term is due to begin on 2 July. In the context of Brexit, it has been assumed that the UK will not take part. However, the requirement to hold elections to the European Parliament every five years is enshrined in Article 14 of the Treaty of the European Union. If Article 50 were extended, the treaties would still apply, so the UK could find itself legally obliged to participate in the elections. This would cause considerable inconvenience for both the EU and the UK, particularly given that this might only prove a temporary extension.

#### *Difficulties of holding the elections*

On the EU side, it has already been decided what will happen to the UK's 73 seats in the Parliament: 27 of them have been redistributed to other countries, while the remaining 46 will disappear (European Council Decision 2018/937, 28 June 2018). If the UK were to participate in the elections, this redistribution could not take place. In fact, contingency provisions have been made to cover this eventuality. The same European Council decision provides that the redistribution will come into effect only if the UK has officially exited the EU by the first day of the new parliamentary term. If Brexit were delayed beyond 2 July, the UK would retain its seats and, according to this same decision, would later sacrifice them on the day that it finally left the EU. Such an arrangement would clearly cause some inconvenience for those member states that are expecting to receive additional seats, and these states would need to put some arrangement in place potentially to fill them later. The sudden loss of 46 seats and reallocation of 27 others sometime after the elections, almost certainly resulting in a degree of political rebalancing, could also potentially have some destabilising effects in the European Parliament.

The bigger effect is the political impact that holding these elections could have in the UK itself. At the most basic level, elections cost money and take time – for electoral administrators, political parties, candidates, and voters themselves. Holding elections for an institution which the UK may be about to leave would be counterintuitive, difficult, and widely criticised.

Furthermore, if Brexit were delayed tensions would be running high, meaning that the European Parliament elections could become a kind of 'proxy referendum', with voters dividing along Brexit lines – even if an actual referendum on this question were due to follow shortly. Nonetheless there would be two important differences between this and a true referendum.

First, while a referendum would be fought between campaign groups, the competitors in a European Parliament election would be political parties. Such elections might well revive the UKIP vote, as a vehicle for expressing strong pro-Brexit sentiment. In response, some kind of anti-Brexit bloc might form to put the opposite point of view. If the election contest did polarise in this way it could create significant problems for the two main political parties, both of which are very divided on the Brexit issue. With the party system already under strain, such a ‘proxy referendum’ could even prove to be the catalyst for party splits. Notably, the proportional voting system used for the European Parliament would make it relatively easy for new groupings to break through electorally.

Second, the franchise for European Parliament elections, unlike for general elections and the 2016 Brexit referendum, includes EU citizens resident in the UK. If the elections did indeed become a proxy referendum, the inclusion of these voters (potentially as many as 2–3 million, if registration rates were high) could generate additional controversy.

For all these reasons, politicians would want to avoid holding the European Parliament elections during a temporary Article 50 extension period, if at all possible.

### *Could a referendum be held ahead of the European Parliament elections?*

These difficulties would largely be avoided if the Brexit referendum were held before the European Parliament elections. If the result showed a continued commitment to Brexit, the elections would probably then be avoided altogether. If the result supported remaining in the EU, the elections could be held subsequently on a more stable basis.

There is clearly only a narrow window between 29 March and 23 May – the date on which the UK would have held European Parliament elections had the Brexit process not been triggered. According to the UK’s European Parliamentary Elections Regulations 2004 (schedule 1, part 1, paragraph 1), elections to the European Parliament must be announced no less than five weeks before the vote takes place. That is in line with general and local elections; any shorter period would be administratively very problematic and interfere with postal voting. For a post-referendum decision to be possible on whether to participate in the elections on 23 May, the referendum would have to take place on 11 April at the very latest (with the result presumably being announced the following day). According to the timetable set out in section 1 (and allowing for Christmas), this would require legislation for a referendum to be introduced no later than late October, which seems unlikely.

In truth, however, the crucial deadline is not 23 May, but the start of the new parliamentary term on 2 July – at which point newly-elected MEPs must take up their seats. If a referendum could be held by 16 May, with the result announced the following day, a ‘remain’ result would allow the elections to be held, if needed, on 27 June. This timetable would be tight, and might be taxing for election administrators, campaigners, and voters but it would enable UK MEPs to take their seats in time and the UK to fulfil its treaty obligations. It would cause some inconvenience for EU countries that had been allocated extra European Parliament seats. But it would not unduly disrupt the business of the European Parliament itself.

### *Could the European Parliament elections be significantly delayed?*

Matters would become more complex if the referendum timing made it impossible to resolve the issue of the UK's representation in the European Parliament by 2 July.

Were the UK still in the EU at this point, it would clearly retain a legal obligation to hold the elections and participate in the new European Parliament. Any attempt to remove that legal obligation, perhaps through creating some kind of exception, would require treaty change. Given the need for all member states to ratify any such amendment, this seems infeasible within the timescale.

Another option would be for the UK, with the tacit agreement on the EU, simply not to proceed with the elections, on a promise to hold them on some later date if the referendum reversed the decision to leave the EU. Whilst this might be a convenient political compromise, it would be legally problematic. Any EU citizen could launch a case with the European Court of Justice (ECJ), which would likely rule that elections should be held. In practice, by the time any such ruling was made, the UK might already have held the referendum and therefore be ready to take the appropriate action, making this a risk the government was willing to take. Nonetheless, it should be recognised that this approach would put the UK in breach of its formal obligations.

Problems could also be created for the European Parliament in this case. There would be a risk that decisions it took while UK voters were unrepresented could be subject to legal challenge, if the UK were still a member state at that point. The most important such decision is likely to be the election of the next President of the European Commission. At the equivalent point in the last parliament, this election took place on 15 July 2014. However, the new President is not due to take up his or her post until 1 November 2019 – which suggests that the European Parliament could if necessary delay this decision, at least for a short period. Indeed, wrangling about the election process currently looks likely (Herszenhorn and de la Baume 2018), so delay might happen anyway.

While a short delay to the UK's participation in the election of MEPs might be possible without causing huge problems, a lengthy delay would be more problematic. As the European Parliament does not sit in August, muddling through without UK representatives in July might be possible. A delay extending into the autumn would be more difficult to accommodate, and legal and political difficulties would mount.

### **Implications for the EU budget, and for trade negotiations**

It has already been agreed as part of the Brexit negotiations that the UK will continue to pay into the EU budget in 2019 and 2020, although this settlement will not be legally binding until the withdrawal agreement is ratified (Keep 2018: 14). Therefore, extending Article 50 would have no immediate implications for EU budgets. However, the EU27 have already begun the process of negotiating the budget for the period after 2020, and continued uncertainty about the UK's status could disrupt and delay those negotiations.

In addition, a significant delay to exit day would be likely to delay progress on negotiations on the UK's future relationship with the EU, most importantly on any trade deal. It is intended that negotiations will be concluded within the transition period, which is due to end on the last day of the EU's seven-year budget period, 31 December 2020.

The 21-month transition period between March 2019 and December 2020 has already been widely criticised as too short to negotiate a trade deal (e.g. Cîrlig, Tilindyte, and Mazur 2018: 17). Any extension to Article 50 would shorten this period further and increase the likelihood that transition would need to be extended. This too would have implications for the future EU budget.

## Conclusion

An extension to the Article 50 period would almost certainly be required to allow enough time to hold a further referendum on Brexit. Should the UK parliament decide to support such a referendum, it would be very unlikely to oppose a delay to exit day. The EU27 also look likely to agree to this to facilitate the UK holding a referendum.

Should the period be extended, however, the UK would still be subject to the treaties, and thus could be formally required to participate in the elections to the new European Parliament, which will sit from 2 July 2019. Going ahead with these elections before a referendum would be problematic: the effort and expense of holding elections for positions that UK representatives might never take up (depending on the result of the actual referendum) seems very undesirable. In addition, the elections would risk becoming a ‘proxy referendum’, with destabilising effects on the UK party system. There would also be some disruption at EU level.

Most of these problems could be avoided if the referendum were held by mid-May 2019, allowing the European Parliament elections in the UK to take place, if needed, by the end of June.

If a referendum were scheduled for later than that, the difficulties would increase. There would be no easy legal route out of the obligation on the UK to elect MEPs. Potentially the UK and EU could tacitly agree that elections in the UK should be delayed – but this would place the UK in breach of treaty obligations and could be open to legal challenge. These are clearly delicate matters that the UK government and EU partners would need to consider in the event of an Article 50 extension.

The longer the Article 50 period is drawn out, and the uncertainty about the UK’s status remains, the greater the knock-on effect on other EU processes. The difficulty in negotiating a trade deal might require the transition period to be extended, while EU budget negotiations could be disrupted. There are good reasons why a longer transition period might be desirable even in the absence of a referendum. Nonetheless, this further adds to the argument that an extension to Article 50 should be kept to a minimum. We return to these questions when considering the overall possible timetable for a referendum in section 7 of the report.



# 3. How could a referendum be triggered?

In order for a referendum to be triggered, there would need to be a majority in parliament in favour of holding such a poll. How likely this becomes would depend on a number of factors – including whether a deal is reached, the nature of that deal, the position of the opposition parties, and how public opinion develops regarding both a second referendum and the UK’s relationship with the EU. Much of this remains unknown, but we can identify several distinct points in the process at which a referendum could be triggered, should there be sufficient parliamentary will. These circumstances might influence the options on the ballot paper, and would also affect the timeline for the poll.

## What steps must take place before the UK leaves the EU?

### Negotiations with the EU

Article 50 negotiations between the UK and the EU remain ongoing. There are expected to be two outputs upon the conclusion of the negotiations (which are discussed in greater detail in section 4):

- a legally binding withdrawal agreement
- a non-binding political declaration setting out the framework for the future relationship between the UK and the EU.

If no withdrawal agreement is reached before 29 March, the UK will leave with no deal, unless Article 50 is extended (see previous section).

Speaking at the end of the ‘informal’ meeting of EU leaders in Salzburg in September, European Council President Donald Tusk said: ‘The moment of truth for Brexit negotiations will be the October European Council. In October we expect maximum progress and results in the Brexit talks. Then we will decide whether conditions are there to call an extraordinary summit in November to finalise and formalise the deal’ (Tusk 2018). Nevertheless, it remains entirely possible that the negotiations will go on beyond that.

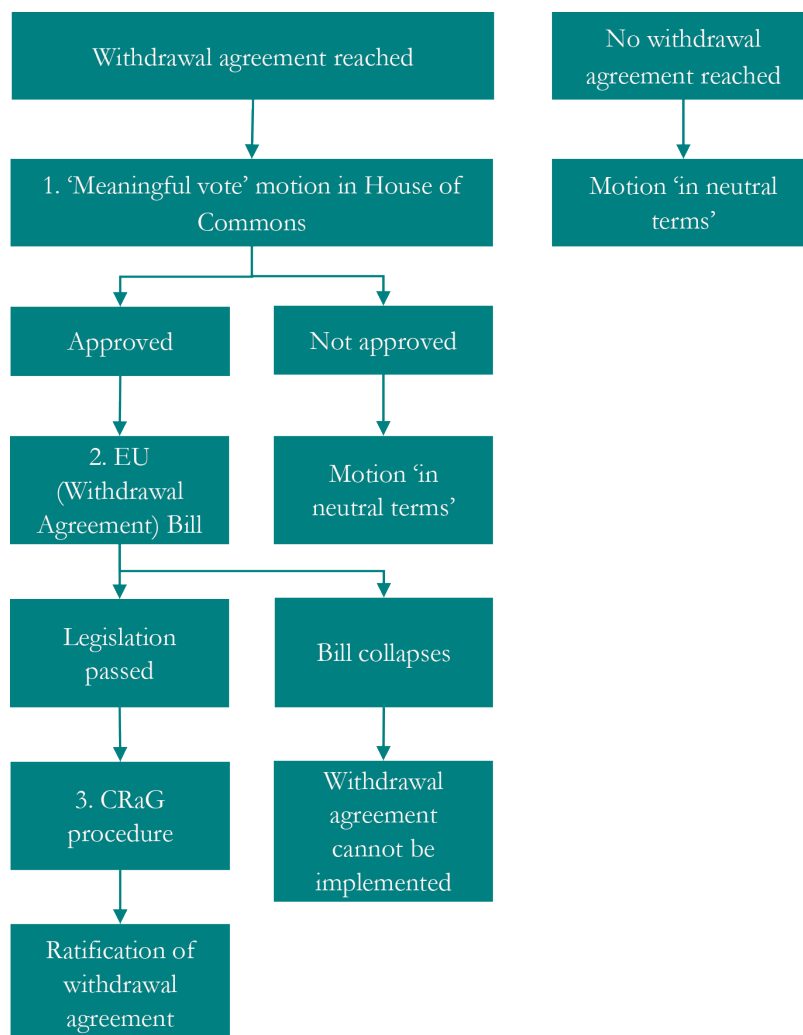
According to Article 50(2), if an agreement is reached it ‘shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament’. But in terms of a possible referendum, it is the UK parliamentary processes of approval and ratification that are of most interest.

### UK parliamentary processes

Parliament’s role in the Brexit process has been the subject of considerable controversy since the 2016 referendum. A major flashpoint was the passage of the EU (Withdrawal) Bill 2017–18, when

Conservative MPs rebelled over the need for a ‘meaningful vote’ in parliament on the final deal. This led to the inclusion of section 13 in the Act, which sets out mechanisms for parliamentary input at certain points in the Brexit process. These processes, along with the other parliamentary steps required to ratify the deal, are set out in Figure 3.

**Figure 3. UK Parliamentary processes for UK to leave the European Union**



Note: CRaG refers to the Constitutional Reform and Governance Act 2010, explained below.

## If a withdrawal agreement is reached

If a withdrawal agreement is reached, three subsequent steps must be taken before it can be ratified.

### *1. Parliament must pass a motion approving the deal*

Section 13(1b) of the EU (Withdrawal) Act 2018 requires parliamentary approval of the final deal. The minister must lay a statement that the political agreement has been reached, a copy of the withdrawal agreement, and a copy of the framework for the future relationship before parliament. The House of Commons must then pass a motion approving the deal and the future framework, in what has been referred to as the ‘meaningful vote’ motion. The presumption is that this motion will be amendable. The House of Lords in turn must debate a non-amendable motion simply to ‘take note’ of the agreements, with its debate time limited to five sitting days. The EU (Withdrawal)

Act 2018 obliges the government to table the Commons motion before the deal is put before the European Parliament.

If the Commons approves the deal, the government may proceed to the next step. Alternatively, if the Commons does not approve the deal, the government then has 21 days to make a written statement setting out how it intends to proceed. The Commons must then consider a motion on the statement within seven days. The legislation states that this will be a motion ‘in neutral terms’ – leading to disputes (as discussed below) as to whether it will be amendable. Again, the Lords must simply ‘take note’.

## ***2. European Union (Withdrawal Agreement) Bill***

In order to give the withdrawal agreement domestic effect, primary legislation is required. The White Paper *Legislating for the Withdrawal Agreement between the United Kingdom and the European Union* (Department for Exiting the European Union 2018) set out the government’s plans to introduce the European Union (Withdrawal Agreement) Bill, which would make provision for citizens’ rights, the implementation (or ‘transition’) period, and the negotiated financial settlement. Section 13 of the EU (Withdrawal) Act 2018 requires this legislation to pass before the deal can be ratified.

## ***3. Constitutional Reform and Governance Act 2010***

As well as being subject to the requirements set out in the EU (Withdrawal) Act, the withdrawal agreement is also subject to the usual procedures for treaty ratification. The Constitutional Reform and Governance Act (CRaG) 2010, which put the long-existing ‘Ponsonby Rule’ on a statutory footing, requires treaties to be laid before both chambers of parliament for 21 sitting days before ratification. In the case of Brexit, this period may run concurrently with the passage of the EU (Withdrawal Agreement) Bill. During the 21 days either chamber may resolve against ratification; if neither does so the government can proceed to ratification. If the Commons objects, ratification can in effect be delayed indefinitely.

## **If no withdrawal agreement is reached**

The EU (Withdrawal) Act also outlines a procedure to be followed in the event that no deal is reached by 21 January 2019. In this case, the government must make a statement within five days setting out how it intends to proceed. Like the processes laid out in the event that the Commons rejects the deal, the Commons must then consider a motion ‘in neutral terms’ on the statement and the Lords must consider a motion to ‘take note’. The deadline for the tabling of the motion is five days after the government makes its statement.

## **What are the possible routes to a second referendum?**

As discussed in section 1, primary legislation is required to provide the legal basis for a referendum. One route to this is clearly a spontaneous government change of mind. With the exception of the 1979 devolution referendums, all UK referendums have been initiated by the government. It is conceivable that the government could change its position to one in favour of a second referendum, perhaps as a result of a large swing in public opinion. Should this occur, ministers could bring forward enabling legislation for consideration by parliament. This would be the smoothest route to a second referendum, but perhaps the most unlikely. In July Theresa May ruled

a referendum out under ‘any circumstances’ (Pickard 2018); she repeated this at the start of September (May 2018).

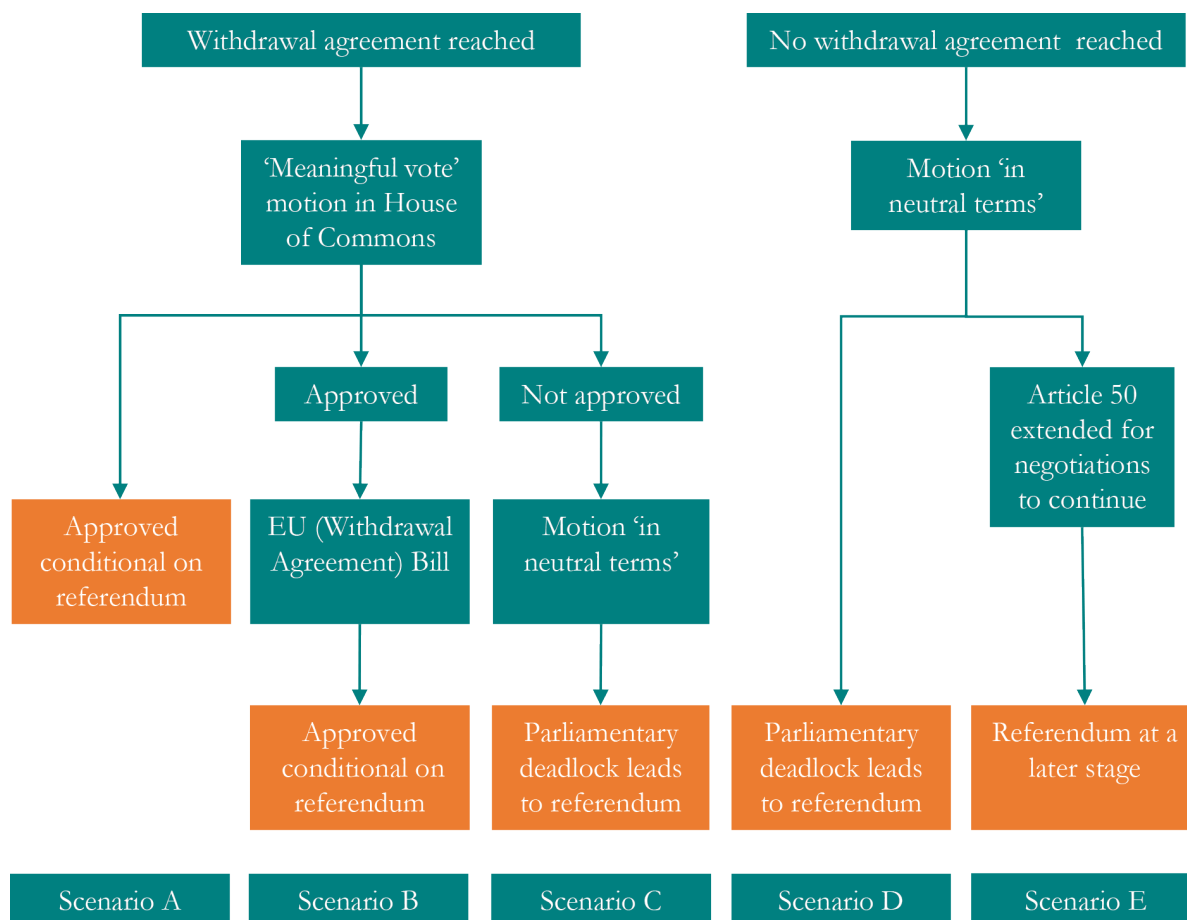
More likely, a cross-party majority in parliament in favour of a second referendum could force the government’s hand. Historically, there is precedent for parliamentarians to impose a referendum as a condition for passing a government bill. The Labour government was initially opposed to the two referendums held in 1979 on devolution, but was forced to concede them in order to prevent its legislation on devolution from entirely collapsing. Ultimately it was the result of the referendum that blocked the policy. Like now, the Callaghan government at the time had a very narrow Commons majority which made it vulnerable to backbench pressure.

As outlined above, parliament will have a number of opportunities to vote on the withdrawal agreement. If there is a parliamentary majority in favour of a referendum, it would be possible to use these to require a referendum, either by defeating the government directly, or by extracting concessions. There are hence a number of points at which a referendum could be triggered by parliamentary pressure.

At least in theory, a referendum could be mandated by a private member’s bill. There is currently a Ten Minute Rule Bill – the European Union Withdrawal Agreement (Public Vote) Bill – due its Commons second reading in October, which aims to legislate for a referendum on the final deal. However, private members’ bills are easily obstructed, and the strong opposition such a proposal would make it extremely unlikely that this bill or any other would succeed. Although such a bill could facilitate proponents of a referendum making their voices heard in parliament, and attracting media and public attention, we do not consider this route further as a direct means to force a referendum on the government.

Figure 4 sets out five plausible scenarios through which a referendum might come about. The first three could emerge following a deal between the UK government and the EU. The House of Commons could approve the motion on this deal subject to a referendum (scenario A). Or it could approve that motion, but then a referendum requirement could be inserted (by either the Commons or the Lords) into the EU (Withdrawal Agreement) Bill (scenario B). Or the Commons could reject the motion on the deal outright, and the ensuing discussions could lead to a decision to hold a referendum (scenario C). The remaining two scenarios arise if the UK government and the EU fail to reach a deal. The parliamentary debates following this could generate a decision to hold a referendum (scenario D). Alternatively, the UK and the EU could decide to prolong the negotiations beyond the current exit day, in which case a referendum could be triggered by any of the preceding routes at a later date (scenario E). The following paragraphs explore these possibilities.

**Figure 4. Possible routes to a second referendum**



### Scenario A: Conditional approval of the ‘meaningful vote’ motion

If a deal is reached, the ‘meaningful vote’ motion will be parliament’s first opportunity to vote on it. The government needs the Commons to approve the deal in order to progress onto the next step – which clearly gives MPs important leverage. For example, if the deal is opposed by Eurosceptic Conservative MPs, the government may need the votes of a substantial number of Labour MPs in order to pass the motion. Pro-Remain Conservative MPs could likewise refuse to support the motion unless a referendum is promised. This means that there are various political scenarios by which the Commons could make its approval of the deal conditional on a referendum.

There are two ways in which such a conflict might play out. The most obvious is that proponents of a second referendum successfully amend the wording of the motion to state that the House approves the withdrawal agreement and future relationship subject to approval by the public in a referendum. Regardless of whether such a motion was judged to be legally binding, it would in practice be politically binding: if the government was defeated on such an amendment, this requirement could not in practice be ignored. Alternatively, in order to avoid such a defeat, dissenters might be persuaded to support the government’s motion approving the deal in exchange for the government publicly changing its position and committing to a referendum.

Procedural considerations could provide an incentive for ministers to propose a conditional referendum of this kind as a compromise in the event that the ‘meaningful vote’ motion is initially rejected. Parliamentary procedure prevents a motion on a question that has already been decided

from being brought forward in the same parliamentary session. Hence if the government wanted to make a second attempt following an initial rejection, a subsequent motion would need to be substantively different (Simson Caird, Wager and Bevington, 2018: 14). Making the deal subject to approval in a referendum could be one way to fulfil this requirement.

In any of these cases, the referendum would then need to be enabled by primary legislation (see section 1).

A decision at this stage would be the earliest means of triggering a referendum on the deal, so would potentially facilitate an earlier referendum than a similar decision taken subsequently.

## **Scenario B: Conditional approval of the EU (Withdrawal Agreement) Bill**

Even if the House of Commons approves the exit deal in principle without a referendum condition, the subsequent EU (Withdrawal Agreement) Bill could potentially be used to require a referendum before the legislation comes into force.

One possibility is that, if the EU (Withdrawal Agreement) Bill did not follow immediately from the motion, the intervening time could allow momentum behind a second referendum to grow. Alternatively, if the government bought off dissent on the motion with promises of future action that it has not delivered upon (including, conceivably, a promise of a referendum itself), parliamentarians could use this vehicle to insert the requirement. In this case the trigger would obviously occur later than above, so might result in a later referendum. Just how much later would depend on where in the legislative process the decision was reached.

A ‘reasoned amendment’ at the bill’s Commons second reading could make the continued survival of the bill dependent on a referendum requirement. Likewise, the threat of a second reading defeat could be used to force the government to volunteer such a commitment. If the bill survived second reading, rebels could attempt to insert amendments at Commons committee stage (which will be taken on the floor of the House), or potentially at report stage.

There would then be further chances to amend the bill during its passage through the Lords. Notably, that chamber would not previously have had the opportunity to vote on the deal, given that the EU (Withdrawal) Act only requires it to debate an unamendable ‘take note’ motion. An attempt to make parliamentary approval of the deal conditional on a referendum during the Lords stages could be the key opportunity for that chamber to affect the process. Usually peers are very respectful of the Commons’ view, so if a referendum amendment had been decisively rejected in the first chamber further significant pressure from the Lords seems unlikely. But if it was clear that uncertainty remained in the Commons, or if evidence emerged during the Lords stages of further shifts in public opinion, such pressure could occur. As the bill would require the support of both chambers, the tight timetable in effect gives the Lords a veto: the Commons has the power to override such a veto only after a year’s delay. However, if it was clear that the effect of a Lords veto would be a ‘no deal’ Brexit, peers would be unlikely to take such a step.

The EU (Withdrawal Agreement) Bill could itself provide the legal basis for the referendum, if the principle of holding one was agreed – meaning separate primary legislation was not required. However, given that there would be a lot of technical issues to consider, this would in practice require the government to bring forward amendments. As this would delay the bill, and potentially

disrupt it given the controversial nature of some of these issues – such as the referendum question and the franchise – the government would probably prefer to bring forward separate legislation.

### **Scenario C: Rejection of the deal**

In the third scenario, the House of Commons rejects the ‘meaningful vote’ motion on the withdrawal agreement outright. Parliamentary pressure for either a general election or a referendum would build at this point. It is easier to see how a majority could be constructed for the latter than for the former.

If the motion on the deal is rejected, there might be immediate calls for a referendum – which the government could concede. Otherwise, in this situation the Commons is due to consider a motion in ‘neutral terms’ within a maximum of 3–4 weeks. The wording ‘in neutral terms’ was deliberately used in section 13 of the EU (Withdrawal) Act 2018 in an attempt by the government to ensure that these motions would be unamendable. Constitutional experts have nonetheless argued that, as a matter of parliamentary procedure, this is not a requirement that can be legislated for (Simson Caird, Wager and Bevington, 2018: 8–9). As the government was forced to accept at the time, ‘it will be for the Speaker to determine whether a motion when it is introduced by the Government under the European Union (Withdrawal) Bill is or is not in fact cast in neutral terms and hence whether the motion is or is not amendable’ (Davis 2018).

It is hence a matter of conjecture whether amendments will be possible at this point. At one level, since there is no legal requirement for these motions to pass, they may be a poor vehicle for extracting concessions via amendment. But it is important to consider the political environment that would exist at this point. Parliament’s refusal to agree a deal would leave the UK facing a ‘no deal’ Brexit unless some compromise could be reached. This is not a situation that the government, or the great majority of parliamentarians, wants. Hence an agreement to proceed with a referendum seems quite possible.

### **Scenario D: No deal**

Under scenario D, the negotiations between the UK government and the EU fail to reach a deal on a withdrawal agreement. The parliamentary process here is very similar to what would follow the rejection of a deal, as set out in scenario C – subject to a ‘neutral terms’ motion.

This is probably the most difficult set of political circumstances of all, and could cause the government to reach for a referendum in the hope of avoiding what it considers a highly undesirable outcome. If this didn’t happen, the Commons could well force a vote on the matter. Even if the neutral terms motion did not provide the opportunity, this could occur through other mechanisms such as an opposition day or a backbench debate. None of these would have legal force, but a clear parliamentary vote in favour of a referendum, rather than the UK heading for an automatic ‘no deal’ outcome, would in practice be politically binding on the government.

As discussed in section 2 the proposal to hold a referendum would likely prove persuasive with other EU member states in extracting an extension to the Article 50 period, whereas a simple desire for more negotiating time might not. To avoid ‘crashing out’ on 29 March 2019, a referendum could ultimately prove the government’s only solution.

## Scenario E: Negotiations are extended

Finally, it is also possible that, in the event of no deal being reached, the UK government and the EU might collectively agree to extend the Article 50 window in order to allow the negotiations to continue. As noted above, while there is little enthusiasm for this on either side, some – notably Austrian Chancellor Sebastian Kurz – have raised it as a possibility (Rios and Fox 2018). Even if a deal on the withdrawal agreement is essentially done, the negotiations might be extended to allow the declaration of future relations to be fleshed out in more detail. In such a circumstance, the steps above would presumably be followed through at a future time. Hence a referendum could still come about through any of the mechanisms set out above, with the processes simply triggered at a later date.

## Would a government defeat lead to a general election?

It might be thought that if the government were defeated on the Brexit deal, or forced to concede a second referendum, this would amount to the loss of a confidence vote, leading to a general election. But under the Fixed-term Parliaments Act (FTPA) 2011 this need not be the case. The Act outlines two specific procedures for calling an early general election: either the House of Commons must pass a separate motion of no confidence, or two-thirds of MPs must vote for a general election. Neither of these processes would follow automatically from a second referendum being triggered, even if this was against the government's will. The Prime Minister could, of course, seek to repeat the events of 2017 in asking MPs to vote for an election; but the lessons from that occasion, and the very uncertain political situation now, make that seem a rather unlikely course.

In reverse, the House of Commons could always ultimately threaten the government with a general election through a vote of no confidence if it flagrantly defied the wishes of MPs. Hence if support grew for a referendum in the House of Commons – including in the event that the UK was faced with 'no deal' – but the government refused to concede this, the issue could be forced. Alternatively, the opposition could propose a no confidence motion in response to a 'no deal' scenario, seeking the support of disillusioned Conservative MPs. The government would almost certainly offer concessions if it could, rather than allow relations with parliament to descend to this point – and one obvious concession would be a referendum.

## Conclusion

This section identifies five scenarios in which a referendum could be triggered, either on the government's initiative, or against its wishes. All require a parliamentary majority in favour of a second referendum. At present, campaigners for a 'people's vote' may not have sufficient Commons support to force such a change, but there is much that remains unknown. Notwithstanding Theresa May's current firm stance against a further referendum, the path to Brexit is highly unpredictable, and another public vote remains possible. Indeed, in a crisis scenario it may prove the government's only way out.

Section 7 picks up these scenarios and sets out the referendum timetables that they might lead to. But specifying such timetables requires further information on the nature of the referendum. This is examined in sections 4–6, starting with the issue of what options might appear on the ballot paper.



## 4. What might the options be?

Having considered the circumstances in which a further referendum on Brexit might be called, this section reviews the options that could be placed on the ballot paper. The set of possible options would depend in part on the circumstances existing at the time such a vote was called: for example, the Brexit deal between the UK and the EU could be put to voters only if such a deal had in fact been signed. At present, however, it appears that there are four main options that could be considered for inclusion in any further referendum:

- leave the EU on the terms the government has negotiated
- leave the EU without a deal
- remain in the EU
- reopen negotiations.

We can assess these possible options in terms of two principal criteria.

First, are they feasible? That is to say, if voters chose any given option, is it likely that this choice could in fact subsequently be delivered? If an option is unlikely to meet this requirement, it makes no sense to offer it to voters.

Second, is each option clear? A central point made by the Independent Commission on Referendums (2018) in its comprehensive review of the role and conduct of referendums was the need for clarity in the options that are put to voters. The Commission gave two primary reasons for this: first, clarity is required to allow voters to make an informed decision on which option they prefer; second, to be able to implement the result of a referendum effectively, parliament needs a clear instruction. A failure to satisfy this condition risks undermining the legitimacy of the result and of any change that it mandates. Prior to the 2016 EU referendum, there was a lack of clarity on what the UK's future outside the EU would look like should the electorate vote to leave. Consequently, there have been competing interpretations of the result and how it should be honoured, which have generated significant political difficulties and delays. If a further referendum on Brexit is to settle the issue effectively, maximum clarity on the options is required.

This section considers each of the four options above in turn and assesses how they measure up against these two criteria of feasibility and clarity.

### **Leave the EU on the terms the government has negotiated**

The first possible option is that Brexit should take place on the terms agreed in the negotiations between the UK government and the EU. As already indicated in section 3, any such deal would consist of two parts:

1. the withdrawal agreement, which would set out the terms of the UK's exit
2. the framework for the UK's future relationship with the EU.

The feasibility criterion in respect of this option is straightforward: a deal could be put on the ballot paper if a deal had been done, but not if no deal had been done. Since any deal must also be

endorsed by the European Parliament and the European Council, a referendum held before this agreement was forthcoming would, of course, remain subject to the deal's endorsement at EU level – but this is almost certain to occur.

The clarity criterion is, however, harder. The withdrawal agreement, if reached, will take the form of an exact legal text to be ratified, and therefore there will be clarity on this aspect of the deal. But the framework for the UK's future relationship with the EU will be set out in a 'political declaration'; this will be legally non-binding and is likely to be lacking in detail.

Some reports have suggested that the EU is reluctant to expend its efforts seriously negotiating the future relationship until there is certainty that the UK will leave (Boffey 2018a). By contrast, Scottish First Minister Nicola Sturgeon (2018) has warned that, if progress on this area of the deal is not made, there is a risk of a 'blind Brexit' – meaning that the UK leaves the EU, but significant uncertainty remains over what the post-Brexit arrangements will be.

It is in fact upon the future relationship, not the withdrawal deal, that most of the debates in the UK relating to Brexit have focused. For example, except in respect of measures to avoid a hard border on the island of Ireland, the withdrawal agreement will not address how the UK will trade with the EU – how it will relate to the Single Market and Customs Union – after the transition period. There is hence a risk that a referendum held on this option could suffer from some clarity problems similar to those evident in 2016.

This risk would be minimised – though not entirely removed – if the UK government and its EU counterparts sought to provide maximum detail in the declaration on the future relationship. German Chancellor Angela Merkel has said that the declaration on the future relationship should be 'as detailed as possible', to ensure that there is time to negotiate a full agreement by the end of 2020 (Martin 2018).

Even if the agreed UK–EU declaration does not contain such detail, the risk could still be mitigated somewhat if the UK government set out in precise terms the future relationship that it would seek. The Independent Commission on Referendums (2018: 86) recommended that, where it is not possible to legislate for a change in advance, a detailed prospectus for what that change means should be developed. It said:

*'a prospectus would provide details of how the government proposing the referendum intended to proceed, and what it hoped to achieve, alongside impact assessments and an examination of any problems that might be encountered. Such information would need to be presented in a White Paper, or equivalent document, published sufficiently far in advance to allow meaningful parliamentary scrutiny and wider public debate.'*

Assuming that the government which had negotiated the deal remained in place at the time of the referendum, it should be capable of offering a credible prospectus for carrying the deal forward, and it would be important to do so.

## Leave the EU with no deal

The second possible option is that of leaving the EU without a deal. This is a feasible option, in the sense that it could happen if the UK chose it, irrespective of what the EU might do. It could also occur by default if no deal were reached, or if the deal agreed was not accepted by parliament.

But it again struggles to meet the criterion of clarity. Indeed, it would almost certainly be harder to provide clear details of the long-term and short-term implications of this option than of the option to accept a deal. This is so for two reasons.

First, if ‘no deal’ were chosen, in contrast to a negotiated deal, not even the framework of a future relationship would then have been agreed. Those who are willing to countenance this option are almost unanimous in agreeing that they would like a future trading relationship with the EU that goes beyond WTO terms. But what might be possible, particularly if the Brexit talks had broken down in acrimony, could be very unclear.

Second, given most MPs’ antipathy to the ‘no deal’ option, it appears unlikely that any government would argue for it in a referendum. In that case, the government would struggle to offer a credible prospectus for what it would do in the event that voters chose this option. And, while campaigners could offer such a prospectus, they would not have the power to deliver it after the vote.

## Remain in the EU

The third possible option is that the UK should remain in the EU. The feasibility and clarity of this depend on whether the UK can withdraw its declaration under Article 50 of its intention to leave the EU. Article 50 does not address this, so it is a matter of legal interpretation. There are three possible readings: that revocation of an Article 50 notification is not possible; that it is possible, but only with member states’ unanimous consent; and that it is possible and could be done unilaterally by the UK.

Legal opinions on this vary. Lord Kerr of Kinlochard – the British diplomat responsible for drafting Article 50 – has argued that the UK could revoke its notification of intent to leave unilaterally (Campbell 2016). Shortly before the 2016 referendum two experts on EU law, giving evidence to the House of Lords EU Committee, expressed the same view (House of Lords European Union Committee 2016: 4–5). By contrast, both sides in the 2016–17 *Miller* legal case (*R v. Secretary of State for Exiting the European Union*), which determined that a parliamentary vote was needed before Article 50 could be triggered, contended (for their own purposes) that notification of withdrawal should be viewed as irrevocable. The Supreme Court did not challenge this but, equally, did not express its own view. Debate among lawyers continues. Earlier this year, a paper from the European Parliament’s research service surveyed the arguments (Papageorgiou 2018), and two senior legal academics set out their contrasting views (Weatherill and Peers 2018). The only way in which a definitive judgement can be made on the matter is by reference to the European Court of Justice (ECJ). The Scottish Court of Session has recently made such a reference (*Wightman and others v. Secretary of State for Exiting the European Union*); provided there is no successful appeal against this and that the ECJ accepts the request, a conclusive answer will therefore be forthcoming.

Even if the ECJ concludes that Article 50 does not permit revocation, the treaty could be amended to overcome this. The message that consistently comes from the European Commission and member state governments is that they would like the UK to change its mind over Brexit (e.g. BBC 2018a). Thus, if the UK were to decide to reverse the outcome of the 2016 referendum – so long as it did so while still formally an EU member – a way would be found to allow it to stay.

Whether this move could be decided by the UK unilaterally, or only with EU consent, might be thought to have implications for clarity in a referendum. Unilateral revocation would leave no

doubt that the UK could retain its current EU membership terms, including such favourable features as the budget rebate and euro opt-out, whereas a need for consent might allow member states to seek concessions from the UK in return. But those who track the mood in Brussels closely think such demands highly unlikely.

All of this presumes that any decision to reverse the UK's decision to leave the EU would come before the UK had in fact formally left. If, by contrast, a decision to reverse course came after Brexit – even if this was during a transitional phase in which most arrangements continued as before – the UK would have to reapply for membership as an external state. In that case, regaining all aspects of the current membership terms would be very unlikely.

## Reopen negotiations

The final possible option for a further referendum is for the electorate to be given the opportunity to indicate a preference for re-opening negotiations. This could be accompanied by detailed proposals for an alternative negotiating position: for example, a 'soft Brexit' option that includes Single Market membership, or a 'Canada-style' deal.

This option would, however, face severe difficulties in terms of both the feasibility and clarity criteria.

As regards feasibility, there is no evidence as yet to suggest that EU member states would be prepared to reopen negotiations after striking a deal. Instead they have indicated a clear preference for resolving the Brexit issue one way or the other and then moving on.

In terms of clarity, meanwhile, it would not be possible to provide any certainty as to what the UK might secure from further negotiations. Indeed, this option would be even less clear than the 'no deal' option, where at least the broad direction of travel would be evident.

A referendum of this kind would by its nature be unable to 'settle' the issue of the UK's relationship with the EU: it would simply prolong the current uncertainty. Hence re-opening negotiations should not be considered a viable option in a further referendum.

## Conclusion

If this final option is ruled out, three possible options are left that could be considered for inclusion on the ballot paper at a referendum. Each of them carries significant support among MPs, and polling evidence also suggests substantial support for each among voters (Colson 2018). The extent of clarity does vary significantly between these options: if a deal is reached, uncertainty may well remain about the terms of the future relationship, which should be spelt out in as much detail as possible before a referendum; with respect to a 'no deal' option, the long-term implications of support would inevitably be even less clear; if there is a 'remain' option clarity is possible, since it seems very likely that the UK would keep its existing membership terms. The next section examines ways in which these options might be combined in terms of a referendum question (or questions) and what kinds of choice voters could be offered among them.

## 5. What form might the question take?

The previous section reviewed what options might be considered suitable for putting to a referendum, looking particularly at whether these options would be feasible and clear. It concluded that three options might be considered: leaving the EU on the negotiated terms; leaving without a deal; and remaining in the EU. This section discusses how choices among these options may be presented to voters.

The most basic issue here concerns how many of the options appear on the ballot paper. Voters could be presented with one of the options and asked whether they accept or reject it. Or they could be offered two of the options and asked to choose between them. Or all three options could be included. The first two cases obviously raise the issue of which options are offered. The third case raises the issue of how voters are asked to make their choice – through either one multi-option question or several separate questions.

The referendum proposals that have been made to date encompass many of these possibilities. Table 2 outlines the forms of referendum that have received at least some attention. We explore each of these in depth below.

**Table 2. Possible form and combination of options for the referendum question**

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

The remainder of this section evaluates possible kinds of referendum question according to two criteria.

First, the question must allow voters to express their opinion on the subject matter clearly and easily, and to influence the result in the direction they intend. An unclear question, or one that excludes an option that large numbers of voters prefer, could fail this test. So could one that forces voters into difficult tactical voting decisions.

Second, a referendum should, so far as possible, lead to victory for the option with the most public support. That sounds straightforward but in practice isn't – indeed, even what it means is open to dispute.

Fundamentally, in the current circumstances, it is vitally important that the result of any further referendum on Brexit commands widespread respect. Given that many people feel very strongly that the 2016 referendum result should be respected at all costs, any future decision that overturned it, or that sought to place a particular interpretation upon it, would have to reach a particularly high bar of legitimacy. This makes the choice of question hugely important.

As indicated in section 1, the Political Parties, Elections and Referendums Act 2000 (PPERA) requires the Electoral Commission to conduct a question testing process for any referendum. This addresses the issues above to some degree. Specifically, it provides a safeguard against a question that is leading, ambiguous or difficult to understand. But the Commission is mostly limited to advising on the intelligibility of the wording. While it may comment on the options or the form of the question should its research uncover problems, these remain fundamentally political decisions to be made by parliament. Politicians must therefore think carefully about how they are addressed.

## Single yes/no question

The first possibility is to present voters with one option and ask whether they support or oppose it. While in principle this could be done with any of the three options, the case for such a vote has in practice been made only in relation to leaving the EU on the terms of a negotiated deal. The government might propose such a referendum in order to seek a mandate directly from the people, particularly if its deal were not approved by parliament.

Such a question format would be familiar to voters, campaigners, and electoral administrators. It would mirror most past referendums, both in the UK and around the world, where a proposal is formulated and voters are invited to accept it or reject it.

But this kind of referendum is not tenable in the current situation. A 'yes/no' referendum is in practice a choice between the option on the ballot paper and the status quo. For example in the UK's 2011 referendum on the voting system it was clear that rejection of the Alternative Vote system implied maintenance of the existing system of First Past the Post. But in the case of a vote on Brexit, there would be no clear status quo to serve as the fall-back if the deal were rejected, making it hard for voters to make their decision. Rejection could be interpreted as support for the UK remaining in the EU, or as support for leaving without a deal, or indeed under some alternative deal. To allow voters to express their preferences clearly, and to avoid a situation where those voting 'no' did so for completely different reasons, the alternative (or alternatives) should be made explicit. Otherwise parliament could be left in an impossible position of having to interpret and act upon a 'no' victory.

Given these factors such a referendum would be unadvisable, and it seems unlikely that it would command a majority in parliament.

## Single two-option question

The second approach would be to ask a single two-option question, as in the 2016 EU referendum. Like the 'yes/no' format, this form would be familiar to voters, campaigners, and electoral

administrators, so implementing it to a tight timetable should be relatively straightforward. This approach would provide more clarity for voters than the previous one, with the meaning of each option spelt out on the ballot paper.

But there are also significant potential problems with referendums of this kind in the current context given that, as explored in the previous section, three viable options for the UK's future have clearly emerged. Excluding any currently live option could prevent some voters from expressing their preference, which could undermine the legitimacy of the referendum as a whole. The depth of this problem varies between the possible combinations of options.

### **Negotiated deal vs. remain**

This option is favoured by many proponents of a second referendum, and therefore might have the best chance of all the two-option formulations of commanding a majority in the House of Commons (although such a majority is far from guaranteed).

This combination would clearly only come into play if a deal had been agreed between the UK government and the EU. Some MPs might hope to make a referendum along these lines a condition for supporting the Commons motion setting out the deal, or for approval of the EU (Withdrawal Agreement) Bill, as discussed in section 3. However, it would clearly exclude the 'no deal' option. Proponents might argue that this was the right decision, because of the undesirable consequences of a 'no deal' Brexit. They might even suggest that it would be irresponsible to put such an option to the public, given that many parliamentarians themselves consider it dangerously undesirable.

But this route would dissatisfy many voters. Those who perceive 'no deal' as the option that best honours the result of the 2016 EU referendum could present a new referendum excluding this option as a deliberate attempt by politicians to overturn the previous result. This could cause an angry public backlash, and risk undermining democratic trust. Some 'no deal' supporters might boycott the poll, reducing turnout and harming legitimacy.

The extent of backlash would likely be contingent on the deal that the government delivered. It would be greatest if the deal was considered 'too soft', but minimised if the deal were acceptable to pro-Brexit opinion leaders.

### **Negotiated deal vs. no deal**

Almost the mirror image of the previous option is to offer voters a two-way choice between the deal and 'no deal'. Under this arrangement, voters whose preferred choice was to remain in the EU, but who wanted at all costs to avoid leaving without a deal, would be forced to vote for the deal. This would clearly increase the likelihood of its approval.

As in the previous case, however, a referendum on this model would likely provoke a backlash amongst those denied the opportunity to vote for their first preference – in this case, 'remain' supporters. Indeed, that is exactly what happened when some senior Labour figures mooted it during the party's conference in September. A damaging boycott among supporters of the excluded option might again occur.

This referendum format is also unlikely to command a parliamentary majority. While some parliamentarians would be uneasy at backing a referendum which put ‘no deal’ on the ballot paper, many others who support a second referendum would likely refuse to accept a question that excluded the option to remain in the EU. Even if the government proposed such a format and it could command a majority in the House of Commons (which seems unlikely), it would surely not get through the House of Lords. It is hence difficult to see circumstances in which this question structure would be used.

## No deal vs. remain

If the government and the EU fail to agree a deal, leaving with no deal or remaining would clearly become the only viable options. In these circumstances, a single two-option question would be logical. Although some voters might be dissatisfied, no viable option would have been excluded from the ballot paper. While some parliamentarians might be nervous of offering the public a ‘no deal’ option, they would probably feel that they had no alternative in these circumstances. In terms of the referendum triggers set out in section 3, this kind of referendum could be reached for at a relatively late stage, when it became clear that negotiations had irrevocably broken down.

Another potential way of arriving at this outcome would be if a deal was negotiated, put to parliament, and rejected by MPs. This seems a less likely route to such a referendum, but given the seeming lack of Commons majority for any specific form of deal, it could potentially occur – again at a relatively late stage in the process. It could well cause some public frustration among those who would have preferred to support the deal, but at least voters would face a relatively clear and straightforward choice. Nonetheless the government would be likely in this scenario to argue strongly for the deal to be on the ballot paper in any referendum and, given parliamentary unease with the ‘no deal’ option, a parliamentary compromise to facilitate this seems more likely.

## Single multi-option question

Some of the above reasoning points towards the possibility of a three-option referendum – where leaving the EU on the negotiated terms, leaving without a deal, or remaining in the EU would all be on the ballot. This format has been proposed by high-profile supporters of a second referendum, including Justine Greening (2018) and Tony Blair (2018).

Multi-option referendum questions are rare internationally, and unprecedented in the UK. For the 2014 Scottish independence referendum, however, the possibility of including a third option of ‘devo-max’ was discussed (Scottish Affairs Committee 2012). The Independent Commission on Referendums (2018: 109) recommended that multi-option questions should be seriously considered for future referendums where more than two options have significant public support:

*‘Although they are not appropriate in all circumstances, referendums where voters can choose among multiple options may sometimes be preferable to those which offer a binary choice. Allowing voters to choose between a number of different options can indicate where the broadest possible agreement on change lies and thereby help to promote unity rather than polarisation.’*

A three-option referendum might avoid some of the polarising effects seen as a result of the 2016 referendum, particularly if campaigners had reason to court voters’ second preferences. However, given the lack of international experience to draw from, solid evidence on this effect is limited.



The obvious advantage of this approach is that no prominent option is excluded, allowing voters to support their most preferred of the three options. This could help command public legitimacy and perhaps more easily win majority backing in the Commons. Nonetheless there are also potential challenges.

One concern is that, as noted in section 1, a multi-option referendum would be harder to conduct within a tight timeframe than a conventional binary vote – it is difficult to estimate the time differential, but it might require around an additional six weeks. New guidance for campaigners, electoral administrators and voters would need to be developed, and time provided for training and public information to ensure a free and fair poll. An innovative question format would reduce the scope for speeding up the Electoral Commission’s question testing work. None of these issues are insurmountable, but they must be considered given the time constraints on holding a referendum. Additionally, campaign regulation might need to be modified to take account of the three, rather than the usual two, possible options. This would raise important questions about how the campaign should be conducted – as discussed further in section 6.

Particularly big questions arise when considering what voting system should be used. This matters because different voting methods could actually lead to different outcomes. These are modelled, based on wholly notional levels of support for the three options, in Table 3. The columns headed ‘Preferences’ suggest that there might be four main blocks of voters in a three-option contest. We suppose for the sake of illustration that the largest group – 45% of voters – prefer the option of remaining in the EU, followed by the Brexit deal, followed by leaving the EU without a deal. Another block of 35% put the no deal option first, followed by the deal, followed by remaining in the EU. Smaller groups favour the deal, some of whom then favour leaving without a deal and others of whom support remaining. The further columns in the table then show how different possible voting systems translate these preferences into results.

**Table 3. Simulating different voting systems for multi-option referendums**

Options	Preferences				First Past the Post	Alternative Vote		Condorcet		
						Round 1	Round 2	A v. B	B v. C	A v. C
<b>A: Remain</b>	1	3	3	2	45%	45%	48%	45%		48%
<b>B: Deal</b>	2	2	1	1	20%	20%		55%	65%	
<b>C: No Deal</b>	3	1	2	3	35%	35%	52%		35%	52%
	45%	35%	17%	3%	<b>Remain wins</b>	<b>No deal wins</b>		<b>Deal wins</b>		

Note: The figures in this table are for illustrative purposes only and are not based on actual polling data.

### First Past the Post

First Past the Post, where voters state a single preference and the option receiving the highest vote share wins, is the most familiar system for UK voters – given its use for elections to the House of Commons. It has been used in multi-option referendums in Sweden (1980) and Slovenia (1998). But has a fatal flaw in the referendum context, as it can lead to inconclusive results. In the Swedish multi-option referendum, which was on nuclear power, the three options received, respectively,

18.9%, 39.1% and 38.7% of votes. The second option therefore won. But it fell well short of majority support, and it is entirely possible that a majority of voters may in fact have preferred the third option.

In the current context, there would be two 'leave' options, and only one 'remain', so the votes of those who wanted to leave the EU would be split. As Table 3 shows, this could allow the single 'remain' option to gather the highest percentage of votes, even if a clear majority of voters preferred one of the 'leave' options over 'remain'. With a different pattern of preferences, the same could occur in reverse – allowing one of the 'leave' options to win despite not having majority support. Either way, the legitimacy of the outcome could be compromised.

Given this, the use of First Past the Post in a multi-option referendum is strongly ill-advised.

## Alternative Vote

Under the Alternative Vote (AV) system, participants rank the options in order of preference. First preference votes are counted, and if one option receives over 50% of the vote, it wins. If not, the option with fewest votes is eliminated and the second preferences of that option's supporters are counted. In a three-option contest the process ends here, though it can also run on if there is a greater number of options.

Such a system has clear benefits. It would allow voters to express not just their first choice, but also their second choice. It would avoid the vote splitting problem of First Past the Post, and make it far more likely that the winning option could command majority support.

Some might object to AV on the basis that it was rejected by voters as a replacement parliamentary electoral system in a referendum in 2011. But this was a different case. There are good arguments against AV for parliamentary elections – notably, that the aggregation of local results can exaggerate landslide victories – that simply do not apply to a national referendum.

But there is a further objection, that AV can be subject to the so-called 'Condorcet problem'. If an option exists that could defeat any of the other options in a pairwise contest, this is known as the 'Condorcet winner'. Many would argue that such an option ought to win. But under AV, if this option is a compromise outcome, it could be eliminated in the first round.

This is illustrated by the theoretical example in Table 3. Again using notional figures, if voters are asked to choose between the deal and 'no deal', a majority back the deal. Similarly, if faced by a choice between the deal and remaining in the EU, the deal wins majority support. But, as relatively few people's first choice, the deal is eliminated in an AV ballot before it can be pitted against either of the other options. The result illustrated is a narrow victory for the 'no deal' option, although 65% of voters would have preferred the deal instead. The same effect could also produce a narrow victory for remain.

The fundamental question here is how to define which is the 'most supported' option. AV prioritises leaving options in the race that have a high proportion of first preferences, rather than necessarily seeking compromise. Whether you view the system as appropriate in this case depends on whether you think it correct that the ultimate winner could be something that is few people's first choice, but attracts virtually everyone's second preference, or whether it is better to eliminate this option and decide between the two 'first choice' options.

To an extent, this quandary might be resolved by voters' tactical voting decisions. If, for example, opinion polls suggested that 'no deal' would defeat 'remain' in the second round of counting, supporters of remaining who saw the negotiated deal as an acceptable compromise might opt to give it their first preference in order to keep it in the race. Likewise, 'no deal' supporters who were willing to accept the deal might do the same if polling made it appear that 'remain' would win the second round. But forcing voters into such tactical calculations is regrettable, and of course polling may prove a poor indicator of the actual result.

It has been proved mathematically that it is impossible to devise a voting system that eliminates the danger of any paradox such as the Condorcet problem in a multi-option contest. Thus, while it is not without its problems, AV does remain clearly preferable in a referendum context to First Past the Post.

## Other voting systems

Given AV's imperfections, some have suggested voting system innovation in the Brexit context. Peter Kellner (2018) raised the prospect of a referendum offering a series of pairwise comparisons to reveal the Condorcet winner. In the example in Table 3, this would produce victory for the deal. Another alternative is the 'Borda Count', under which voters rank their preferences and points are awarded according to preference order (in a three-option vote, two points for a first preference and one for a second preference). Using the preference figures on the left of Table 3, with a notional 100 voters, 'remain' would win 93 points, 'deal' 120 points, and 'no deal' 87 points. Again, the deal – in this illustrative example – would win. Peter Emerson (2018) of the De Borda Institute has proposed a modified version of this system for a further Brexit referendum.

Compared to other voting rules, both of these systems favour the 'compromise' choice. Whether that is to be welcomed depends again on how the 'most supported' option is defined. But there is a further objection to these systems, which is that they have never been used for any prominent political vote in the UK. Innovation in a major referendum that demands high clarity and legitimacy seems both risky and unlikely.

The difficulties of choosing among multiple options in a single vote have led some to suggest a two-question referendum format, which is considered next.

## Two-part referendum

The questions in a two-part referendum could either be asked simultaneously on the same ballot or sequentially in separate ballots. An example of the first structure is the 1997 Scottish devolution referendum, which asked voters first whether there should be a Scottish Parliament and second whether it should have tax-varying powers. There have been referendums of the second type in New Zealand on electoral reform (1992/3 and 2011) and the choice of national flag (2015/16).

Two proposals, both involving sequential ballots, have been made for a further referendum on Brexit:

- Dominic Grieve (2018) suggested that, if the deal cannot command a majority in parliament, the public should be asked first whether they approve the deal. If they reject the deal, voters should subsequently be asked whether they wish to leave the EU with no deal, or remain in the EU.

- Constitutional expert Professor Vernon Bogdanor (2018) has proposed a first stage question asking voters whether they still wish to leave the European Union. If they do, a second ballot would give them the choice between the government’s deal, and an alternative deal.

A two-part approach would allow all three options to be kept on the table, whilst maintaining the familiar binary format of previous referendums. However, unless the options in the second question were close variants of the same basic proposal (as in Scotland in 1997), such arrangements would create very difficult tactical voting decisions for some voters, making it hard for them to express their preferences clearly. This in turn could lead to major legitimacy problems.

Under the Grieve proposal, many voters’ decisions on whether they approved the deal would depend on what they would get if the deal was rejected – but they couldn’t know this at the time of the first ballot. As in the other binary referendum options discussed above, voters would doubtless protest that they couldn’t express their true choice on the first ballot. Similarly, on the Bogdanor proposal, some voters’ preferences on whether to support leaving the EU would depend on whether this would take place on the basis of an agreed deal or not. In both cases, voters would have to make very difficult calculations about what was likely to happen in the second ballot in order to decide how to vote in the first.

Another concern with any two-ballot system is that the ordering of the questions could significantly affect the outcome. Table 4 demonstrates how – in the same theoretical scenario as above, and assuming voters followed their first preferences – the government’s deal could be rejected by as many as 80% of voters if a two-question referendum were held on Grieve’s model, but chosen by 65% of voters using Bogdanor’s model.

**Table 4. Simulating two-part referendums**

Grieve model				Bogdanor model			
Q1		Q2		Q1		Q2	
Accept deal	20%	Remain	48%	Remain	45%	Deal	65%
Reject deal	80%	No deal	52%	Leave	55%	No deal	35%
No deal wins				Deal wins			

Note: These calculations are made on the assumption that voters vote strictly in accordance with the same (wholly notional) preferences simulated in Table 3. As the option to reopen negotiations was ruled out in section 4, ‘no deal’ has been substituted for ‘alternative deal’ in Bogdanor’s model.

The Bogdanor proposal suffers from the more political problem that the first round of the vote would essentially rerun the 2016 referendum. Many people would consider that unacceptable. If the argument for another referendum is that now there is a clearer Brexit package to vote on, it would be odd to exclude this from the first ballot.

Finally, a two-round referendum would inevitably take longer than a single contest. Bogdanor suggests that the second round could take place a week after the first. But that would be extremely difficult. This is not like a French presidential election, in which the candidates remain essentially the same from the first round to the second: following a ‘remain’/’leave’ contest in the first round, a ‘deal’/’no deal’ choice at the second round would involve quite different arguments. Campaigners would need time to convey their messages and voters to reach their decisions.

For all of these reasons, a two-round referendum format would be undesirable.

## Conclusion

This section demonstrates that there is no single, simple way to make a collective choice when there are more than two serious options on the table. If a deal is reached between the government and the EU, a straightforward ‘yes/no’ vote on the deal would be very ill-advised – as the meaning of a ‘no’ vote would be unclear. Binary votes between two of the three available options could also be problematic, as they risk alienating a significant part of the electorate who would have supported the excluded option.

If three options are on the ballot paper, a First Past the Post contest would be very unwise, as the ‘winning’ option might well not command a majority of votes. The Alternative Vote (AV) would avoid this problem, but could end up polarising opinion around ‘remain’ and ‘no deal’, with the compromise of supporting the deal being forced out in the first round of voting. Innovations such as Condorcet voting or Borda Count could deliver a compromise, but many would see this as a messy fudge. Anyway, these are probably too unfamiliar to be serious contenders. Referendums based on a two-stage process do not offer an attractive alternative, primarily as they create very difficult tactical voting dilemmas. With three options still in play, voters are likely to demand that all three are reflected on the ballot paper.

If proceeding with a further Brexit referendum, clarity for voters and legitimacy of the result are both crucially important. On this basis there are three viable question formats. If the government’s attempts to agree a deal collapse, a two-option ballot between ‘remain’ and a ‘no deal’ Brexit is the straightforward choice. If a deal is reached, a two-option choice between ‘deal’ and ‘remain’, already favoured by many proponents of a second referendum, might command parliamentary support; but this could cause protests, the extent of which might depend on the content of the deal itself. If there were concern that excluding a viable option would be too controversial, a single three-option referendum, including the ‘deal’, ‘no deal’ and ‘remain’, may be advisable. If all three options are offered, AV is probably the best system to use.

## 6. Setting the rules for the referendum

Any further referendum would need to be conducted within a framework of rules. The UK has some standing legislation on the conduct of referendums – as already indicated in section 1, these are contained in Part VII of the Political Parties, Elections and Referendums Act (PPERA) 2000. But this leaves out some key issues – most notably, the referendum question and the franchise. And, as in all previous referendums, it would be necessary to deviate from some of its provisions to ensure a fair poll. The legislation underpinning the 2016 referendum (the European Union Referendum Act 2015) would be the obvious starting point for doing this.

This section examines what rule-making would need to take place before a referendum. It looks first at the contentious issue of the franchise. Then it considers key deviations from the PERA framework, some of which have been applied in past referendums while others are widely recognised as necessary in light of recent experiences and the rapid rise of digital campaigning. Third, the section examines what further adjustments would be needed in the event that a three-option referendum were called. All three of these sets of issues would need to be resolved in the legislation enabling a referendum. Finally, the section moves beyond legal rules to consider the approach that broadcasters and others might take to the vote.

### The franchise

The franchise for UK referendums is not specified in standing legislation. It must therefore be set out in each individual referendum’s enabling legislation, and so would need to be decided for a further referendum on Brexit.

The franchise for the 2016 EU referendum included all those eligible to vote in UK parliamentary elections, plus those members of the House of Lords and Gibraltar residents who are eligible to vote in European Parliament elections. Some proponents of a second referendum have argued that the franchise should be extended also to 16- and 17-year-olds (e.g. Brake 2018) and to EU citizens resident in the UK.

There are a number of valid arguments why such groups should be enfranchised, and there is also precedent for doing so: 16- and 17-year-olds and EU citizens resident in Scotland were eligible to vote in the 2014 Scottish independence referendum. Nonetheless, the issue was debated during parliamentary scrutiny of the European Union Referendum Bill, but amendments to extend the franchise to these groups were not successful. If it appeared that the result of the 2016 referendum had been overturned because the franchise had been changed, many Brexit supporters would likely view this outcome as illegitimate. More broadly, the best international guidelines recommend that the franchise for referendums should be set well in advance, not adjusted for any particular vote, in order to minimise the danger of manipulation (Venice Commission 2007: II.2.b–c). Furthermore, although the rules are not fixed, the practice is well established in the UK of basing the referendum franchise on the corresponding parliamentary franchise.

The franchise for any further referendum should therefore be the same as for the 2016 vote.

## Improvements to referendum regulation

The key elements of referendum regulation set out in PPERA have not been amended since the Act was first introduced in 2000. Since then five referendums have been held under its terms, and the nature of communication and campaigning has changed significantly. Successive reports from bodies such as the Electoral Commission (2016, 2017, 2018a), the Public Administration and Constitutional Affairs Committee (PACAC) (2017) and, most recently, the Independent Commission on Referendums (2018) have identified a number of improvements to referendum regulation that should be made to ensure campaigns are as fair and transparent as possible. Some of these were included in the legislation enabling the 2016 referendum, but others were not. Legislating for various further deviations from the PPERA framework that were not included in 2016 would be highly desirable.

However, given that a second referendum on Brexit is likely to be conducted on a short timescale, there will be little time for developing policy or perfecting legislation. And some proposals may be too contentious to be applied in the current context. Table 5 outlines proposals for improvements to referendum regulation that have been made, and indicates whether they might be applied to a further Brexit referendum. Green indicates that such a modification would be desirable and could be applied with little difficulty. Amber suggests that such a proposal might be politically difficult, or impractical in the timescale. Red indicates change that it would not be possible to apply.

**Table 5. Proposed improvements to referendum regulation**

Option	Apply?
<b>Restrictions on government</b>	
Extend section 125 restrictions to cover the whole campaign period	Green
Revise section 125 restrictions to apply to ‘campaigning’ only	Green
Empower the Electoral Commission to seek an injunction for breaches of section 125	Amber
<b>Designation of lead campaigners</b>	
Introduce a ‘fit and proper person’ test as part of the designation process	Amber
Earlier designation	Red
<b>Financial regulation</b>	
Introduce improved joint spending rules	Green
Require earlier spending returns for large campaign groups	Green
<b>Digital campaigning</b>	
Extend imprints to online campaign materials	Green
Require spending returns to disaggregate digital spending transparently	Green
<b>Information</b>	
Clearly labelled referendum addresses	Green
Citizens’ assemblies to produce public information	Amber

## Restrictions on government

Less than three months prior to the 2016 EU referendum, the government spent £9.3 million of public funds producing and distributing a leaflet advocating for remaining in the EU. This drew strong criticism from PACAC (2017: 46), whose members span both sides of the Brexit divide. A common complaint was that the sum spent by government exceeded the spending limit of lead campaigners, giving the Remain campaign a significant advantage that the Leave campaign could not match (Mosbacher, 2018). Section 125 of PPERA prohibits the government and other public bodies from publishing material relating to the referendum or its subject matter. But these restrictions apply only in the final 28 days of the campaign, whereas the official campaign period lasts for 10 weeks.

PACAC (2017: 24), the Electoral Commission (2016: 124) and the Independent Commission on Referendums (2018: 131) have all recommended that the period covered by section 125 should be extended to cover the whole regulated referendum period. Even that might not ensure a level playing field in all cases: the 2016 government leaflet was distributed just before the 10-week regulated period began, suggesting that lengthier restrictions might sometimes be needed. Given that a further Brexit referendum would be held on a tighter timetable, however, a simple extension to 10 weeks would in this case seem to be adequate.

There have been concerns that extending the section 125 period could inhibit the normal working of government: during the debates on the legislation for the 2016 referendum, for example, then Minister for Europe David Lidington (2015: col. 233) said even the existing rules would disrupt the government's ability to conduct 'ordinary day-to-day EU business'. Whether that is a real problem is disputed. Nevertheless, one solution would be to apply a modified section 125 that restricted only activity considered 'campaigning'. This has been recommended by the Electoral Commission (2016: 124) and the Independent Commission on Referendums (2018: 131). Drafting such restrictions could pose challenges, but the Electoral Commission (2016: 124) has proposed how it could be done. Although the government might want to resist attempts to place additional restrictions on its activities, these two proposals are likely to find support on all sides of the referendum debate; including them in the legislation would therefore be advisable to ensure a smooth passage through parliament.

A further proposal in this area is to give the Electoral Commission the power to seek an injunction for breaches of section 125 (Independent Commission on Referendums, 2018: 131). At present, as the Electoral Commission (2016: 100–1) has highlighted, there is no mechanism for enforcing this part of PPERA. But this would impose a further constraint on government, so might be politically infeasible under pressure of time. Government would in any case likely be widely criticised if it broke the rules, so introducing legal sanctions may be a low priority.

## Designation of lead campaigners

With regard to the designation of lead campaigners, the enabling legislation for both the last two referendums has already included one significant deviation from the PPERA framework. PPERA states that the Electoral Commission must designate for all outcomes in a referendum, or none at all. Following concerns in the 2011 Welsh referendum on further devolution, when the absence of a suitable applicant for the 'No' designation meant no group could be designated for 'Yes' either,



the legislation for the 2014 and 2016 referendums allowed the Commission to designate for one side only. Similar provisions should be replicated again.

The Independent Commission on Referendums made two further recommendations on the designation process:

- designation should take place as soon as possible after the legislation is passed, which should ideally – in line with previous Electoral Commission recommendations (2016: 15) – be six months before it is due to be complied with (Independent Commission on Referendums 2018: 142)
- key individuals associated with groups applying for lead campaigner status should be subject to a ‘fit and proper person’ test (ibid: 144).

Given the short timescale envisaged for a further Brexit referendum, early designation is likely to be impossible, making the first of these recommendations impractical in the current case. The second proposal may be controversial, as any ‘fit and proper person’ test would presumably take into account compliance with electoral law at previous referendums. Such a test would need to be carefully designed and command the confidence and support of all possible referendum participants. Attempting to introduce such a requirement in a heated and rushed atmosphere for this referendum may hence be unwise.

## Financial regulation

Joint spending rules aim to prevent campaign groups from circumventing spending limits by working with other groups. They are not part of the PPERA framework, but have applied through provisions in the enabling legislation for every referendum since 2011.

At a minimum, the same requirements as in 2016 should be reapplied. However, the rules have been subject to some controversy since 2016. A lack of clarity over what exactly constitutes ‘working together’ has caused confusion and other difficulties amongst campaigners: an Electoral Commission survey suggested that most campaigners ‘found the joint spending rules difficult to understand’ (Electoral Commission 2017: 36–7). Vote Leave was fined, and its ‘responsible person’ referred to the police, after the Electoral Commission found that the approximately £600,000 it had donated to BeLeave had been spent with a common plan (Electoral Commission 2018b). The lead Remain campaign, Britain Stronger in Europe, was also accused of a similar violation, but following investigation this claim was dismissed by the Electoral Commission (Johnston 2018).

Recently, the High Court has ruled that, if a registered campaign group donates to another group intending that the money will be used in a specified way, this counts as a campaign expense (*The Good Law Project v. Electoral Commission*). This clarifies the matter somewhat. However, further clarification would be beneficial before the rules are reapplied; the Electoral Commission (2017: 38–40) has proposed how this should be done.

A further improvement that could enhance the accountability of campaigners would be to reduce the time that large campaign groups have after a referendum to submit audited accounts. Currently this is set at six months, meaning that many Electoral Commission investigations cannot begin until well after the referendum result has been announced. The Electoral Commission has highlighted this as needing attention (2017: 51) The Independent Commission on Referendums

(2018: 157) recommended that the time limit could be reduced to three months with little disruption or inconvenience.

## Digital campaigning

There have been widespread concerns in the last two years about digital campaigning in both elections and referendums, relating to potential foreign interference, ‘microtargeting’ and ‘dark ads’, and inappropriate or illegal use of personal data. Such worries have been expressed in the UK by the Prime Minister and other ministers (May 2017; BBC 2018b) and in a range of reports (e.g. Electoral Commission 2018a; DCMS Committee 2018; Hankey et al. 2018). They have also been prominent in, for example, the US (Vogel and Kang 2017) and Ireland (Rogan 2018). This has undermined confidence in the integrity of democracy. Such problems require further investigation and inquiry to develop long-term solutions. Nonetheless there are a number of gaps in electoral regulations that could be addressed in the short term, in time for a further referendum on Brexit.

First, imprint rules, which require printed campaign materials to include the details of their publisher and promoter, do not currently apply to online materials. The Electoral Commission (2018a: 9), the Committee on Standards in Public Life (2017: 61) and the Independent Commission on Referendums (2018: 190) have all recommended that imprint rules should be extended to cover digital campaign materials, and the government is now consulting on this (Cabinet Office 2018). It is therefore likely that such a modification could be applied with little resistance. Indeed this requirement was previously applied in the 2014 Scottish independence referendum, so there is already legislative text that could be replicated, with some modification.

Second, rules for spending returns by campaigners at present require little transparency of online spending, making it difficult to scrutinise. The Electoral Commission (2018a: 11–12) and the Independent Commission on Referendums (2018: 189) have both recommended that campaigns should be required to provide more information in spending returns, and these should in particular ensure clarity as to how much has been spent in what ways on digital campaigning; the Electoral Commission (2018a: 11–12) has provided guidance on how this might be done. It may take time to design a system which provides the most transparency whilst not placing undue burdens on campaigners. Nonetheless, a further referendum on Brexit would present an opportunity to trial new categories that better reflect actual campaign spending.

A further important step towards greater transparency of digital campaigning involves the creation of searchable repositories of online political advertising. It may be too early, however, to legislate on this, so the matter is one of several non-legislative changes discussed below.

## Public information

Designated lead campaigners are entitled to free postage on one referendum address, sent to all households or voters. Such materials receive public funding but serve a campaign purpose. At the 2016 referendum, both mailings were criticised because they were clearly designed to look like official government communications (Independent Commission on Referendums 2018: 171). Therefore, future addresses should be required to have a clear, bold heading stating, ‘This is a communication from the X campaign’.

The quality of information during the 2016 referendum was subject to significant criticism. Post-referendum polling by the Electoral Commission (2016: 47) found that over half of respondents disagreed with the statement that ‘the conduct of campaigns was fair and balanced’; 31% said it was ‘one-sided/unbalanced/biased/partial’; likewise 31% felt that information was ‘inaccurate and misleading’. The Independent Commission on Referendums examined a number of ways in which the quality of discourse could be improved for future referendums. Its recommendations mostly related to changes that would not involve legislation, and these are therefore discussed below.

## Campaign regulation for a multi-option referendum

So far, the UK has only held binary referendums. If a multi-option referendum were to be held, thought would need to be given to how the regulatory framework would or should apply. PPERA does provide for this possibility. Section 108(3) states:

*Where there are more than two possible outcomes in the case of a referendum to which this Part applies, the Secretary of State may, after consulting the Commission, by order specify the possible outcomes in relation to which permitted participants may be designated’.*

This suggests that, for a three-option referendum, the Electoral Commission would be able to designate a lead campaign for each of the three options. Each would be entitled to the same public benefits, including public funding, a freepost referendum address and referendum campaign broadcasts. Broadcasters would also need to maintain ‘due impartiality’ among the three options.

This could prove controversial: supporters of remaining in the EU might complain that they were competing against two ‘leave’ campaigns (supporters of ‘no deal’ and of the deal combined); advocates of a clean break might meanwhile complain that they were competing against two campaigns for maintaining close EU alignment. However, there is no fairer way of distributing benefits. For example, if the two ‘leave’ options were subject to lower spending limits on the basis that they were more similar than the ‘remain’ option, they would have clear cause to complain of being unfairly disadvantaged. The three options in the referendum are surely entitled to equal opportunities to make their case.

The more options there are in a referendum, the more likely it may become that no suitable group applies for designation for one of them. This highlights the importance of allowing designation for other options in this circumstance.

If a preferential voting system were used, campaigners might wish to encourage supporters to give their second preference to another option. Therefore, groups campaigning for different outcomes could engage in activity that counts as ‘working together’. The joint spending rules would need to be worded to take account of this possibility.

Further significant complications could emerge if a two-round system were used. It could prove impossible to designate lead campaigners for the second round in advance of the first. Some campaigners might be reluctant to express a second-round position in advance; campaigners on opposite sides in the first round who might go on to join the same side later would in practice find it hard to cooperate before the first round was over. These difficulties offer a further reason for not using a two-round referendum format.

## Beyond legislation

Most of this section has focused on the content of the legislation authorising a referendum. But there are other lessons from past referendums that ought to be learnt – by government, but also by others involved in the referendum process, including broadcasters, internet companies, and researchers.

As noted above, recent attention has focused on the need to enhance the transparency of online advertising. As a result, Facebook and other large internet companies have begun to develop searchable repositories of online political advertising on their sites: Facebook launched its first such repository for the 2018 US midterm elections (Leathern 2018). It would be desirable ultimately to create a single, regulated repository that maximises transparency and democratic control (Independent Commission on Referendums 2018: 188). In the short term, government should liaise with internet companies to encourage each to provide a comprehensive, useable facility that provided information alongside each advertisement – including who sponsored it, how much was spent on it, and at whom it was targeted (DCMS Committee 2018: 37–8).

The second major area of recent concern relates to the information available to voters: as the Independent Commission on Referendums put it, ‘voters should be able to access the information that they themselves want, from sources they trust, so that they can feel confident in their own decision’ (2018: 159). In the event of a further referendum, it would be for broadcasters, fact-checkers, specialist researchers, and others to consider how they could most effectively develop reliable information tools that would engage as many voters as possible. Many approaches are possible. For example:

- Since 2016, broadcasters have recognised the need to enhance the role of fact-checking, so that viewers and listeners are not left to work out on their own where the truth lies among campaigners’ claims and counter-claims. Such change might be taken further.
- In 2016, projects such as the UK in a Changing Europe programme delivered quality, impartial analysis to many voters through online resources, media engagement, and public meetings. Lessons can be learnt from what worked better or worse, and broadcasters can examine how to build such analysis into their coverage from the start.
- The Independent Commission on Referendums (2018: 177) recommended that citizens’ assemblies should be piloted in future referendums. These could foster considered debate and deliberation of the issues either before a referendum is called (as has happened several times recently in Ireland) or during the campaign (as happens in Oregon). This would be difficult to implement given the tight timescale of a second Brexit referendum, but not necessarily impossible.

## Conclusion

Calling a further referendum on Brexit would require legislation. The first three parts of this section set out what – besides the question itself – this legislation would need to contain. It could build on the European Union Referendum Act 2015, which paved the way for the 2016 vote. Notwithstanding pressures to the contrary, the 2016 franchise should be retained unaltered. But the 2016 rules should be changed in the ways set out above to ensure a level playing field in the campaign, enhance transparency, and reflect the realities of digital campaigning. Further

consideration would need to be given to aspects of the rules in the event of a multi-option referendum.

The more the legislative framework were to deviate from that applied in 2016, the longer parliament would likely take to scrutinise the bill and the more time the Electoral Commission would need to develop new guidance for administrators and campaigners. The preceding section has indicated which changes would be both desirable and feasible within a constrained timetable and which would better be set aside on this occasion.

Important non-legislative improvements could also be made, particularly relating to the transparency of digital campaigning and the quality of information available to voters. Achieving these would depend on action by government, internet companies, broadcasters, research specialists, and others.

## 7. Fitting it all together: how and when might a second referendum occur?

The preceding sections have yielded the following conclusions:

- Section 1 established that the minimum time necessary to complete the processes required to hold a referendum – from the introduction of legislation to polling day – is probably around 22 weeks. Several factors could extend that timescale. For example, disagreement over key issues like the question and franchise could mean that parliamentary scrutiny or the Electoral Commission’s question testing need more time. A multi-option referendum would require longer – perhaps around six weeks longer – for question testing and additional preparation. Even under the fastest possible timetable, and if planning for a referendum began in early October, an extension to the Article 50 period would almost certainly be required.
- Section 2 concluded that such an extension would likely be agreed by the EU to enable a referendum to be held. But with the new European Parliament due to sit from 2 July, and elections for MEPs happening in late May, this could create difficulties unless the Article 50 extension were very short. A referendum by mid-May would be relatively unproblematic. Thereafter difficulties would start to mount, though political solutions might nonetheless be found.
- Section 3 identified five scenarios in which a referendum might be triggered. It explored the parliamentary procedures associated with these and how the politics might unfold in practice.
- Section 4 established that leaving the EU on the terms of a negotiated deal, leaving the EU without a deal, and remaining in the EU are the only options that it would be appropriate to put to a referendum.
- Section 5 concluded that only three possible question formats would allow voters to express their preferences clearly and would have a chance of commanding a parliamentary majority: these are a choice between ‘no deal’ and ‘remain’, a choice between ‘deal’ and ‘remain’, or a three-option question using preferential voting. Although other possibilities exist, including a ‘yes/no’ vote on the deal, or a two-stage referendum, these formats are problematic and unlikely to find parliamentary support. Hence we do not consider them further here.
- Finally, section 6 argued that, to ensure that any further referendum on Brexit would command the greatest possible legitimacy, the franchise should be the same as at the 2016 EU referendum, and a series of improvements to referendum regulation and practice should be made.

Having considered the various aspects of holding a second referendum individually, the final question is how they all fit together, and what the consequences for the timetable might be. Figure 5 builds upon the five scenarios that were set out in section 3. It draws on the analysis in other sections to include the different possible referendum questions at alternative trigger points, and the knock-on effects for the timetable and hence when polling day for a referendum might be held.

The remainder of this section discusses each of these scenarios in turn, before considering the overall effects on the timetable, particularly with respect to the timetable for an extension of Article 50, and the consequences for the European Parliament elections. We end with a conclusion about which scenarios seem most viable, and why.

## The five referendum scenarios

We take as a starting point the European Council meeting pencilled in for 17–18 November 2018, which appears to be the current target date for reaching a deal between the UK government and the EU (Tusk 2018; Reuters 2018). If a deal is agreed, parliament will be asked to vote on it around late November. At this stage there are three possible outcomes: the withdrawal agreement either could be approved, or rejected, or (scenario A) approval could be made conditional on a referendum. If the agreement is approved, the EU (Withdrawal Agreement) Bill will be introduced, which provides further opportunities for a referendum to be triggered (scenario B). If the agreement is rejected, this could trigger a referendum (scenario C), or could result in the government seeking to return to the negotiations. If, one way or another, negotiations continue without a deal being reached before 21 January 2019 the government must make a statement to parliament and a motion must be debated. At this stage a referendum could be triggered (scenario D), or potentially the government could seek to return to negotiations – which at this point would almost certainly require an extension to Article 50 – and, depending on the outcome of these, a referendum might be triggered at some later point (scenario E).

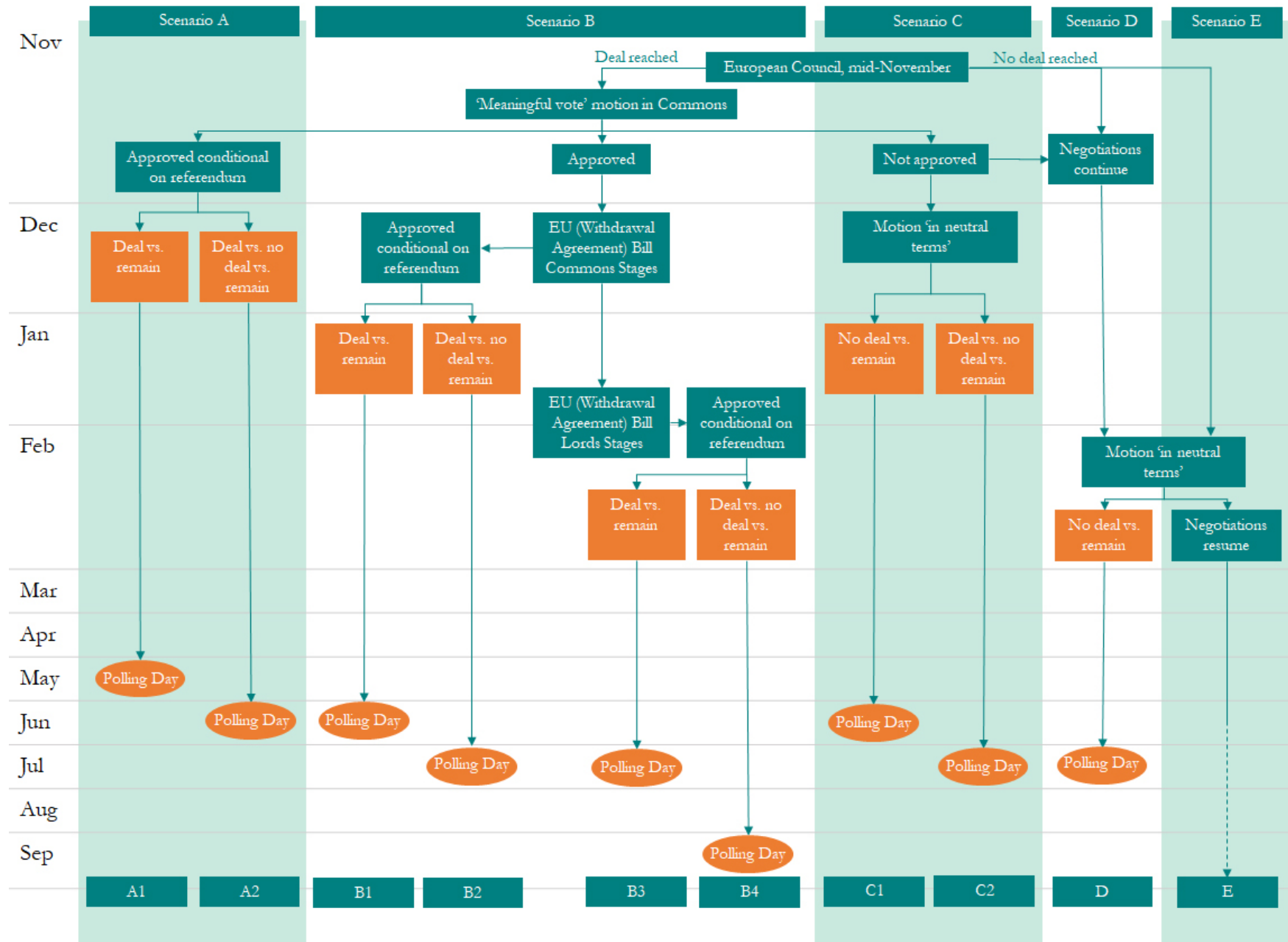
### Scenario A: Parliamentary approval of withdrawal agreement made conditional on a referendum

The earliest possible trigger occurs if the motion on the withdrawal agreement is put to the House of Commons and MPs make its approval conditional on holding a referendum. If negotiations conclude at the November Council, the ‘meaningful vote’ motion is tabled in the following week and this is then considered for five sitting days – as is the precedent set by the 1971 motion on joining the European Community – the Commons could vote at the end of November 2018. This would potentially allow a bill to facilitate a referendum to be introduced in early December.

Under this scenario there are two possible routes, based on the choice of referendum question:

- If parliament adopts a simple two-option question, where the choices offered to voters are accepting the negotiated deal or remaining in the EU, the minimum timetable to polling day (as discussed in section 1) would be around 24 weeks, including two weeks for the parliamentary Christmas recess. The first available polling day would hence be in mid-May 2019. We label this scenario A1.
- If parliament, alternatively, adopted a three-option format, adding the choice of a ‘no deal’ Brexit, the timetable for legislation, question testing and preparation for the poll would be extended by roughly six weeks (as discussed in section 1). Hence the earliest possible polling day would be in late June 2019 (scenario A2).

Figure 5. Five referendum scenarios





There is clearly great uncertainty in these timetables. First, negotiations might not be concluded at the November Council. Second, if parliament makes approval of the withdrawal agreement conditional on a referendum, there could well be delay to the introduction of legislation – particularly if government is resistant. Third, if the referendum legislation itself proved highly controversial in parliament (e.g. due to disagreements about the franchise or the referendum question), parliamentary passage might extend beyond the minimum timetable. But at least in theory both versions of this scenario could allow a referendum before the first sitting of the new European Parliament on 2 July (as further discussed below).

## **Scenario B: Parliamentary approval of the EU (Withdrawal Agreement) Bill made conditional on a referendum**

As discussed in section 3, an alternative is for the motion on the withdrawal agreement to be approved, allowing the EU (Withdrawal Agreement) Bill to be introduced, but a referendum requirement to be inserted during the passage of that bill. Here the politics are very similar to scenario A, and the primary difference is that the later start date for the process has knock-on effects for the whole referendum timetable.

Under this scenario there are two key variables: the point in the parliamentary process at which the referendum requirement is added, and the nature of the referendum question. This results in four different routes, with different timing consequences:

- If a referendum requirement were added to the bill during the Commons stages, the delay would be minimised (particularly if this happened at second reading). Assuming that the EU (Withdrawal Agreement) Bill is introduced shortly after the ‘meaningful vote’ motion, in early December, a referendum bill could potentially be introduced by the government early in the New Year (as discussed in section 3, an alternative would be to add referendum provisions to the Withdrawal Agreement Bill itself, but this seems unlikely). If a two-option question (i.e. accepting the deal versus remaining in the EU) were chosen, a 22-week timetable would allow polling day in early June 2019 (scenario B1).
- If the same route were followed, but a three-option referendum question was agreed, the additional six weeks required for question testing and preparation for the poll would push polling day to at least late July 2019 (scenario B2).
- At the other end of the parliamentary timetable, if a referendum requirement was added during the bill’s passage through the House of Lords, and then needed to be agreed by the House of Commons during ‘ping pong’ this might delay the trigger by around six weeks – to late February. This would likely allow polling day on a two-option question to occur no sooner than late July (scenario B3).
- If the referendum amendment occurred in the House of Lords under similar circumstances, but a three-option referendum question were chosen, the additional six weeks preparation required would delay polling day to at least early September 2019 (scenario B4).

Again, these timetables are highly speculative; but it is unlikely that progress could be made more quickly, while it is very possible that delays could occur (as discussed under scenario A).<sup>3</sup> These

timetables would be far more likely to cause difficulties for the European Parliament elections, and require a lengthier extension to Article 50.

### **Scenario C: Parliament rejects the withdrawal agreement**

The third possible outcome on the ‘meaningful vote’ motion is that the House of Commons rejects it outright. Here the timetable would in theory be similar to those in the previous two scenarios, but the politics would be far more acrimonious. There could also be a difference in terms of the referendum question offered to voters.

Under this scenario there are again two routes to a referendum, depending on the question chosen:

- One possibility would be a two-option referendum, where the alternatives are remaining in the EU or leaving without a deal. This could occur on the basis that, parliament itself having rejected the deal, it did not wish to offer this to voters – although (as discussed in section 5) such an outcome seems unlikely. Assuming that the rejection was followed by a ‘neutral terms’ motion in the first half of December, with legislation introduced shortly afterwards, in the New Year, and that a 22-week lead-in period was required, the first possible polling date would be mid-June 2019 (scenario C1).
- The more likely route following an in-principle parliamentary rejection of the withdrawal agreement is a three-option referendum. The government would be likely to argue for keeping the negotiated deal in play, while parliamentarians might well concede that the public should be given a voice on the deal even though they themselves had rejected it. If legislation were introduced to the same timetable in early New Year, the additional six weeks of preparation for a three-option vote would result in a polling day of late July at the earliest (scenario C2).

In this case, more than those above, the timetable outlined here is likely to prove optimistic. If the House of Commons rejected the deal the political environment would be very difficult. Although in principle the government could concede quickly and come forward with a bill, this seems unlikely. Instead, arguments of various kinds within and between the political parties could ensue. Even once the bill had been introduced, its parliamentary passage would probably be very difficult, partly due to arguments about the nature of the referendum question (including the possible choice between scenarios C1 and C2).

### **Scenario D: No deal is reached**

The fourth scenario is that no deal is reached between the UK government and the EU. Talks could potentially break down, and attempts to reach a deal be abandoned, at any point. However, the UK government would probably continue pursuing a deal until the last available moment – including, possibly, as an alternative response to rejection at the ‘meaningful vote’ stage. As explained in section 3, the European Union (Withdrawal) Act 2018 provides that, if no deal is reached by 21 January 2019, the government must lay a statement before parliament within five days, setting out how it intends to proceed; it then has five days to table a motion in ‘neutral terms’ for parliamentary consideration. This would allow a motion to be considered in early February.

For the UK to leave the EU without a deal would likely cause significant disruption (UK in a Changing Europe, 2018), so the case for asking the electorate whether they wished to leave on this

basis would be strong. Politically, the majority of MPs would want to avoid a ‘no deal’ Brexit, making a decision to call a referendum quite likely. Should this route be chosen, referendum legislation might be introduced in mid-February 2019.

In this scenario, there being no UK–EU deal, only two options would remain on the table. Hence the question would straightforwardly be a two-option one, asking voters if they preferred the UK to remain in the EU or to leave the EU without a deal. The 22-week minimum period to prepare for such a referendum would lead to an earliest possible poll date of mid-July 2019.

The likelihood of meeting the minimum timetable under this scenario would be greater than under some others above. It is possible, of course, that a decision to pursue a referendum would not be taken quickly after talks collapsed – with some wishing to revive negotiations (see scenario E). But there would in practice be very little time to resolve these questions, given the currently agreed exit day of 29 March 2019. In the absence of other politically tenable options on how to proceed, the principle of a referendum could well face less resistance than in other scenarios. As one option would have been excluded by circumstance, there would also likely be little debate on the question. Legislation might therefore pass through parliament in the minimum time, and no extra administrative planning time would be needed.

### **Scenario E: A final decision is delayed**

The final scenario is one in which the government successfully negotiates an extension to the Article 50 period not (at least in the first instance) to permit a referendum, but rather to allow the Brexit negotiations to continue. That might happen because the UK government and the EU conclude that they need more time to reach a satisfactory deal. It could occur as a result of the House of Commons rejecting the negotiated deal (as an alternative to scenario D). Alternatively, it could happen because parliament decides that a broad political declaration on the future relationship between the UK and the EU gives insufficient basis either for parliament itself to endorse the deal or for a referendum to be held. The EU has so far said it will not negotiate the details of the future relationship until Brexit has occurred. But if the EU27 all agreed, more time might then be taken to define this future relationship more precisely.

This scenario simply shifts the start date for any final decision on Brexit, potentially to long after March 2019. Once the negotiations had ended, the remaining steps of the process could lead to events as set out in scenario A, B, C or D – but with a far later start date and an indeterminate polling day in the future.

## **The timetable implications for Article 50**

Having considered the various possible scenarios that could lead to a second referendum, it is now possible to review in the round the likely implications of each scenario for two crucial elements of timing: the extension to the Article 50 period and, below, how to handle the European Parliament elections.

Two questions are worth consideration with respect to the extension of Article 50 and the timetable effects.

The first is when such an extension would be requested, and any knock-on effect that this could have on the timing of the referendum. The scenarios above do not build in any delay for the

request to extend Article 50, though all of them require such an extension to take place. Instead the scenarios as presented assume that legislation to facilitate a referendum would be introduced very quickly following an in-principle parliamentary decision to hold such a poll. Given that time is short, this could be a logical response on the part of the government. As discussed in section 2, there have already been indications from EU partners that an extension would be forthcoming to facilitate a democratic process in the UK. This might be reiterated more clearly in the early stages of any of the scenarios above, giving the government confidence to begin the legislative process while pursuing an Article 50 extension in parallel. On the other hand, the lack of absolute certainty regarding an extension might cause the government to delay the introduction of a referendum bill. In this case, all of the scenarios above would be delayed, possibly by a matter of weeks. However, as seen below with respect to the European Parliament elections, such delay could be ill-advised.

The second and more significant question about the timing of an Article 50 extension is the length of that extension. At the very least, this period would clearly need to extend beyond the referendum date – i.e. sometime from mid-May to early September under scenarios A–D, and far longer under scenario E. In practice, given the uncertainty of all of the timetables above, and the opportunities for delay, an extension significantly beyond the earliest possible polling day would be advisable, under any scenario.

Beyond this, the time period needed would depend on the outcome of the referendum, and in planning an extension it would therefore be necessary to take account of different possible outcomes. A referendum decision to remain in the EU would be a return to the status quo ante and require little preparation (aside from the European Parliament elections, below). A decision to leave without a deal would require time for both the UK and the EU27 to implement, and in some cases legislate for, contingency measures (Durrant 2018). Current EU thinking is that at least three months would be needed between a final decision to effect Brexit without a deal and exit day (Barigazzi 2018). A decision to proceed with the deal would necessitate less preparatory work, as the UK would shift into a transition phase in which most existing arrangements would be maintained. It could be actioned immediately if the EU (Withdrawal Agreement) Bill had already received royal assent (scenario B). A significant delay would, however, be necessary if legislation to implement the agreement had not yet been passed (which might potentially occur under several scenarios). Hence under several of these scenarios an Article 50 extension until late 2019 might be required.

## **The timetable implications for the European Parliament elections**

As discussed in section 2, the European Parliament elections create one of the most inflexible obstacles when considering the options for a further Brexit referendum. While the UK constitution is famously flexible, and most things can be achieved with political will, the EU treaties serve like a rigid written constitution in binding member states on certain issues. This includes the obligation to hold European Parliament elections every five years, with the next such elections due in May 2019, for a parliament that will begin its work on 2 July 2019. A final consideration is therefore how the different referendum scenarios would allow handling of this obligation.

Clearly, the earlier a referendum is held the less problematic this factor is. In this context, the various scenarios can be broadly divided into four groups:

- Scenario A1, whereby approval of the ‘meaningful vote’ motion is made conditional on a referendum, and a two-option question is chosen (offering ‘deal’ vs. ‘remain’), offers the best possibility of organising UK MEP elections before the European Parliament first meets. If the fastest possible version of this timetable is adhered to, it is the only scenario that potentially permits the referendum to take place in May 2019. Although this would not allow the election of MEPs to take place at the same time as that in other member states, there should be adequate time to organise elections before the end of June. Of course, even this is uncertain, if the date for a deal slips or the referendum legislation proves controversial (e.g. over the exclusion of a ‘no deal’ option).
- A referendum date in June, under the most optimistic timetable, could be possible under three different scenarios: A2 (conditional approval of the meaningful vote motion, followed by a three-option referendum), B1 (early intervention in the Commons stages of the EU (Withdrawal Agreement) Bill, followed by a two-option referendum) or C1 (rejection of the ‘meaningful vote’ motion, likewise). None of these scenarios would allow MEP elections to be held before 2 July, but perhaps these elections could be held soon after the parliament first sits. As discussed in section 2, a delay of this kind would cause some inconvenience at EU level, but might be accommodated with some discomfort through reorganisation of European Parliament business. Nonetheless, any of these timetables could slip, making such disruption difficult to bear.
- Four scenarios show a possible earliest referendum date in July, which would prevent MEP elections being held until at least August (or more likely September, given the holiday season): B2 (early intervention in the Commons stages of the EU (Withdrawal Agreement) Bill, followed by a three-option referendum), B3 (a two-option referendum forced during the bill’s Lords stages), C2 (a three-option referendum following rejection of the ‘meaningful vote’ motion), or D (a ‘remain’ versus ‘no deal’ referendum following a failure to reach a deal). Scenario B4 (a three-option referendum triggered during the Lords stages of the bill) would be even slower. Any of these scenarios could make it very difficult to avoid holding the UK’s European Parliament elections without risk of both legal challenge and significant disruption at EU level, making them significantly more problematic. In so far as possible, politicians should focus on avoiding these kinds of timetable problems (though the nature of scenario D could make such delay unavoidable).
- Finally, continued negotiations (scenario E), which could result in an Article 50 extension of a year or more, would almost certainly require the UK to hold MEP elections to the original timetable. Although this would be awkward, at least an early agreement of a long Article 50 extension would allow comfortable planning for the elections, and MEPs might hold their seats for a year or more.

This discussion demonstrates that, purely in terms of the knock-on effects for the European Parliament elections, an early decision on the triggering of a referendum would have significant benefits. If this intervention occurred at the time of the ‘meaningful vote’ motion, either a two-option or a three-option referendum could potentially be accommodated without causing grave difficulty. On the other hand, other scenarios, including a referendum forced through amendment to the EU (Withdrawal Agreement) Bill at the House of Lords stages, even if this were based on a simple two-option format, could cause significant problems.

## A referendum after Brexit?

In all of the scenarios discussed above, a referendum takes place before the UK leaves the European Union. The possibility of a new referendum before Brexit is understandably the current political preoccupation. But it is of course possible that the UK may pursue Brexit without a referendum, and leave the EU on or after 29 March 2019. In that case the UK might choose to hold a further referendum on its relationship with the EU years down the line. This could be at the end of the transition period when the future trading relationship is agreed, or at some other point triggered by a significant shift in public opinion. Of course, if the UK chose to rejoin the EU at a later date, having formally left, it would need to negotiate the terms of its new membership like any other accession state. Matters such as any possible budget rebate and membership of the euro would be on the table. Such a scenario would raise all sorts of additional issues and complexities that this report cannot address. But it is worth remembering that the 2016 referendum was not the UK's first referendum on Europe – that took place in 1975 – and even if there is no further referendum before Brexit day, it may well not be its last.

## Conclusion

There are numerous possible routes to a further referendum on Brexit. Some we have ruled out altogether, such as a vote on returning to negotiations after a deal has been reached (as there would be no guarantee that a different deal would be forthcoming – see section 4), a 'yes/no' vote on the deal (on the basis that a 'no' vote would be open to interpretation and could create major problems for parliament – see section 5), or a vote between a deal and a 'no deal' Brexit (which, as also discussed in section 5, would be very unlikely to find parliamentary support). This chapter has focused only on the more viable options, and the timetables that might result – particularly in terms of polling day, the length of an Article 50 extension required, and the consequences for the UK's potential participation in the 2019 European Parliament elections.

The scenarios set out above show that there are limited options for holding a referendum without causing significant difficulties for these elections. The time necessary to prepare for a referendum (discussed in section 1), means that an early trigger would be needed in order to avoid these difficulties entirely. This could occur if the House of Commons made its approval of the 'meaningful vote' motion on a negotiated Brexit deal conditional on the result of a referendum. A two-option referendum ('deal' vs. 'remain') would be quickest, and could potentially happen in May 2019; a three-option referendum (including 'no deal') could also be accommodated with relatively little difficulty. After this the timing becomes more problematic. Depending on the speed with which the government introduces the EU (Withdrawal Agreement) Bill, a referendum condition added at its early stages could prove relatively unproblematic, but would make a three-option referendum more difficult. A similar intervention at the Lords stages would be more problematic still. Hence if MPs want to press for a referendum, and avoid accusations that they are creating intractable timetable problems, they need to take responsibility for this themselves, and to act quickly.

All of the scenarios just mentioned presuppose a deal. If instead no deal is reached between the UK and the EU, a referendum condition imposed by MPs, who overwhelmingly wish to avoid a 'no deal' Brexit, seems quite likely – unless this outcome instead triggered a general election, which itself could be followed by a referendum. In this case it would be difficult to avoid some disruption

to the European Parliament process, but to prevent a widely-resisted outcome such as a no deal Brexit, some means could probably be found to manage this situation.

In the end, the path ahead necessarily remains unknown. Many key things – the outcome of the negotiations, the state of public opinion, and the mood in the political parties – could yet change in unpredictable ways. While a further referendum on Brexit is far from a certainty, it is also wholly plausible in a range of different scenarios, probably including others not considered here. Despite the challenges that such a poll could create, most things are possible in UK politics given the political will. And if the political will existed to hold a referendum in the UK, that would almost certainly be accommodated in one way or another by the EU27.

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Ever since UK voters opted to leave the European Union in the June 2016 referendum, some have called for a further 'Brexit' referendum. As time has passed, these calls have become louder and more widespread. By the summer of 2018, they frequently led the news. But many calls for a referendum have been lacking in detail – in relation, for example, to the question to be asked or the necessary timetable.

This report seeks not to argue for or against a further referendum, but to consider the practical questions that need to be addressed should politicians choose to hold such a poll. It sets out the preparations necessary for a referendum, the potential trigger points in parliament during the Brexit process, the options that could be put to voters, the viable formats for a referendum question and the appropriate rules for holding the poll. Finally, it considers how this could all fit together in terms of timetable and wider implications for the Brexit process.

The report concludes that it would be perfectly possible to hold a further referendum on Brexit, though there would be obstacles to navigate – in particular, the need to extend the Article 50 period beyond 29 March 2019, and the knock-on effects for the European Parliament elections. Some question formats would be problematic, but others much less so. Referendum regulation should be updated, particularly regarding online campaigning. Crucially, if a further Brexit referendum is to be held, the result must command maximum legitimacy. That requires careful preparation and design.

## **About the Constitution Unit**

The Constitution Unit is a research centre based in the UCL Department of Political Science. We conduct timely, rigorous, independent research into constitutional change and the reform of political institutions. Since our foundation in 1995, the Unit's research had significant real-world impact, informing policy-makers engaged in such changes – both in the United Kingdom and around the world. The Unit recently organised the Independent Commission on Referendums, which reported in July 2018.

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