



## THE MECHANICS OF A FURTHER REFERENDUM ON BREXIT REVISITED: QUESTIONS FOR THE NEW PARLIAMENT

ALAN RENWICK, MEG RUSSELL, LISA JAMES & JESS SARGEANT



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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We remain grateful to the many people who contributed their time and insight to the first edition of this report, and who are named in its foreword. Jess Sargeant was first author of that edition, and has since left the Constitution Unit. Alan Renwick, Meg Russell, and Lisa James are pleased that she remains happy to be a named author of this new edition.

Despite the invaluable help of all those listed in both editions, any errors of fact or judgement in this report are our own.

# Executive summary

- Ever since the referendum decision on 23 June 2016 that the UK should leave the EU, arguments for and against a further such vote have been a mainstay of political debate. Now, with a general election on 12 December fast approaching, many parties have made a further Brexit referendum central to their manifesto proposals. The purpose of this report is not to argue for or against a referendum, but to examine objectively the options for such a poll, and the pros and cons of different options for its implementation. Given the contested politics of Brexit, any further poll would need to be designed carefully in order to maximise public legitimacy for the decision taken.
- Chapter 1 of the report explores the scenarios in which a referendum could plausibly come about. As the result of the 2019 general election is unknown, the report examines the likelihood of a referendum under different election outcomes. It finds that there are two main scenarios in which a referendum may occur. One is the formation of a Labour government which is committed to such a poll. The other is a Conservative government with only a minority of seats or a slender and unstable majority – which might be forced to concede a referendum in order to win parliamentary approval for its Brexit deal.
- Chapter 2 asks how long a referendum would take to organise, based on the key legal components of the process. It finds that the minimum timetable would be 22 weeks, and that any attempt to reduce this by circumscribing or omitting key processes could threaten the fairness and legitimacy of the outcome. Hence the claims of some that a referendum would take a year or more are exaggerated; but Labour’s proposed six-month timetable for renegotiation of a Brexit deal followed by a referendum is very challenging. There are also various other choices that could extend the timetable, as discussed in later chapters.
- The first such choice – of the referendum question to be posed – is explored in Chapter 3. This suggests that there are three options which might in theory be put to voters: remaining in the EU, leaving with a deal (as negotiated by Boris Johnson, or post-election by Labour), or leaving on a ‘no deal’ basis. By far the most likely configuration of options in a ballot is deal versus Remain. But Brexiteers could view such a referendum on a Labour deal as illegitimate, arguing that no ‘real’ Brexit option was on offer. A referendum on Johnson’s deal could enjoy wider public legitimacy, as well as being quicker to organise – though there are clearly deep concerns about it among both pro-referendum parties, and Brexit supporters in Northern Ireland. The alternative of a three-option referendum seems unlikely.
- Chapter 4 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 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 aspects of the conduct rules for referendums – notably around the regulation of online campaigning – urgently need updating. This could and should be done, even though time would be short. Broadcasters and others could also do further work to improve the quality of debate and the information available to voters. This would ideally include deliberative processes such as a citizens’ assembly or smaller citizens’ panel.



- Chapter 5 examines whether and how the referendum result might be made legally binding. It finds that there are three main legislative options: a legally non-binding referendum; a fully binding referendum based on legislation providing for the full domestic implementation of either result; and a halfway house, in which the result is binding but some of the detailed implementation follows later. An advisory referendum would be simplest and quickest, but would not create legal certainty. The second option would provide greatest clarity – but the greater complexity of the legislation could add to the minimum 22-week referendum timetable. A bill providing for a binding vote followed later by full implementation might pass relatively quickly, but could incur subsequent delay in the case of a Leave vote.
- Chapter 6 brings all of these themes together, asking how and when a further referendum might occur. It concludes that, if a minority Conservative government found itself forced to hold a confirmatory referendum in order to pass its deal, such a referendum could probably be held in May or June 2020. Under Labour’s plans, unless a new deal were secured very quickly, it could prove difficult to hold a referendum before the autumn. Although it might seem counterintuitive for a Labour government to offer a vote on Johnson’s deal, such a referendum could be held more quickly and might command wider public legitimacy.

# Introduction

On 23 June 2016 the UK electorate voted narrowly to leave the European Union in a referendum. Calls from some for a second vote began almost immediately, and disputes about whether this is desirable or practical have been a mainstay of the Brexit debate ever since. Now, with a general election on 12 December fast approaching, various political parties have made a further referendum on Brexit central to their manifesto proposals.

The first edition of this report was published just over a year ago, in October 2018 (Sargeant, Renwick and Russell 2018). Much has changed in the intervening 14 months, and the forthcoming general election will change things further still. This second edition of the report revises and updates our analysis in light of the new circumstances as they are currently understood. It considers the range of possible general election outcomes, and examines which might lead to a further referendum. The Labour Party has pledged to renegotiate a Brexit deal within three months of the election and hold a confirmatory referendum within six months. A referendum is also conceivable under a Conservative-led minority government, as a result of pressure from pro-referendum parties. Each of these scenarios may lead to different timetables, and different questions on the ballot paper. In various ways, the character of a further referendum, and the circumstances leading to it, would be significantly different from those discussed in last year's report.

This second edition of the report examines each of the key scenarios, mapping the different parliamentary majorities for a referendum which could form in the new parliament. It also examines the timetable requirements for a referendum – including an appraisal of whether Labour's proposed timetable is feasible.

If a referendum does take place, it is crucial that it should be structured and organised carefully, in a way that commands public respect. The report hence also examines and assesses the choices that would have to be made about how any further referendum took place. What options, for example, should be included on the ballot paper? How could campaign rules ensure maximum integrity and transparency? Could a further referendum be made legally binding? None of these questions have simple or straightforward answers, but they would be critical to any referendum's fairness and public legitimacy.

The purpose of this report is hence not to consider whether a further referendum should be held – that is a question to be decided by politicians, following the decision of the voters on 12 December. The full implications of holding a referendum – for example for the timetable governing future trade talks if voters reaffirm their wish to leave the EU, or for the wider public mood – are beyond the scope of this report. Rather, it focuses tightly on the mechanics of a referendum in itself. It examines how such a referendum might be called, and how it would best be conducted.

## The referendum debate so far

The first edition of this report identified five scenarios under which a referendum could plausibly come about: by making passage of the 'meaningful vote' (under section 13(1b) of the EU (Withdrawal) Act 2018) conditional on holding a confirmatory referendum; by applying the same condition to the passage of the implementing legislation; through the Commons rejecting a deal

and the government reaching for a referendum; through the government failing to agree a deal with the European Union and a referendum becoming a last resort; or – following an extension to Article 50 – through some other route at a later date.

We are now essentially in the fifth of these scenarios, with no prior routes having so far led to a referendum. Theresa May secured a Brexit deal, which was repeatedly rejected by the House of Commons. Her successor Boris Johnson then secured an alternative deal. The possibility that parliamentarians would make approval of the ‘meaningful vote’ motion on a Brexit deal conditional on support for a referendum did not materialise. In the case of Theresa May’s deal, MPs simply rejected the motion on each occasion in a yes/no vote. Some serious consideration of a further referendum did follow the second defeat of May’s deal, as part of the ‘indicative votes’ process – a backbench initiative which offered MPs a range of Brexit options, on 27 March and 1 April 2019. On these two occasions the proposal for a referendum was only narrowly rejected – by 268 votes to 295, and by 280 votes to 292, respectively. Only former Conservative Chancellor Ken Clarke’s proposal for a customs union with the EU came closer to securing a majority. Following the third defeat on her deal, Theresa May offered the possibility of including a confirmatory referendum in the implementing legislation, in order to gain Labour support (Stewart, Mason and Walker 2019). However, this plan proved unacceptable to many Conservatives, and she was forced out as party leader and Prime Minister soon afterwards.

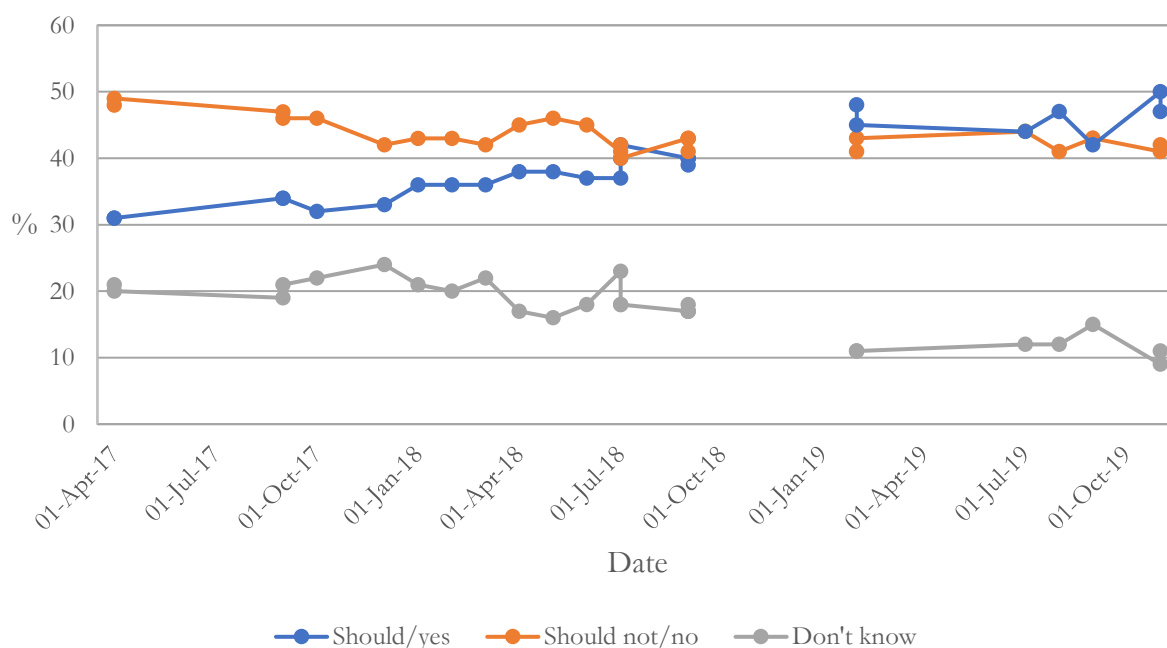
Boris Johnson surprised many when he secured an alternative deal from the EU27 in the autumn. It was put to a ‘meaningful vote’ on 19 October 2019, and this time MPs did make approval conditional on government action – but the action demanded was the introduction of the EU (Withdrawal Agreement) Bill to implement the deal in law. This could still have provided an opportunity for MPs to make approval of the Bill conditional on a further referendum; an amendment to this effect was tabled by Labour MPs Peter Kyle and Phil Wilson and signed by over 100 others. But support for such a plan remained untested because, although the EU (Withdrawal Agreement) Bill was introduced and passed its second reading on 22 October, it did not proceed to its committee stage – where amendments could have been considered. Instead, after MPs rejected the programme motion for the bill, the government proposed a different bill, to facilitate a general election – which is now underway.

The arguments for and against a further referendum have changed relatively little since the first edition of this report was published. Proponents argue that the public should be given the opportunity to decide whether or not they wish to proceed with Brexit in light of the deal negotiated by the government. Conversely, opponents insist that the 2016 referendum should be considered the public’s final answer, and that another vote would be even more divisive.

Within the UK’s two main political parties, the debate over a referendum has been constant and often heated. Some then-Conservative MPs – such as Sam Gyimah and Jo Johnson – voiced support for a referendum; but many have subsequently left the party or had the whip removed, and few are seeking re-election. The Labour Party, in contrast, has moved towards a further referendum and, as already indicated, now proposes to hold one on its future renegotiated Brexit deal. But this repositioning has not been straightforward; internal disagreements about whether Labour should back a referendum and if so how it should campaign simmered throughout much of 2019.

Politicians have not received a particularly clear steer from public opinion. As Figure 1 shows, public support for a further referendum appears to have increased since 2017, but supporters and opponents remain very evenly matched.

**Figure 1. Public opinion on a further Brexit referendum, April 2017 to November 2019**



Data for 2017–18 indicate responses to the question ‘Do you think there should be a second referendum to accept or reject the terms of Britain’s exit from the EU once they have been agreed?’ Data for 2019 represent responses to the question ‘Would you support or oppose a second referendum on British membership of the European Union?’ Source: NatCen Social Research at [www.WhatUKThinks.org/EU](http://www.WhatUKThinks.org/EU)

## Structure of the report

Chapter 1 begins by considering the scenarios that could lead to a further referendum, under a range of plausible election outcomes. Chapter 2 examines the necessary processes for holding a vote – such as passing primary legislation, testing the question, and preparing for the poll – and the minimum time needed to complete these. Chapter 3 introduces the potential options that could appear on the ballot paper and how voters could be asked to choose among them. Chapter 4 considers what rules would need to be settled before a referendum: what improvements to referendum law are most urgently needed to reflect the realities of modern campaigning, and what non-legislative changes to the campaign would be beneficial. Chapter 5 considers how the referendum could be made legally binding and whether that would be desirable. Finally, Chapter 6 ties all the aspects of the report together, identifying the possible scenarios for a further referendum and their associated timetables.

The report draws two principal conclusions. First, a further referendum on Brexit is clearly feasible, but the different scenarios under which one could occur would, in all likelihood, lead to slightly different forms of referendum. Second, as argued in the first edition of this report, if a decision is taken to hold a further Brexit referendum, it 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 any referendum campaign is fair, the poll is properly conducted,

the options on the ballot paper are clear, and the question allows voters to express their preferences unambiguously. These considerations guide the report's discussion of the logistical aspects of holding a further referendum.

Under the different scenarios set out in this report a referendum could be held – contrary to the claims of some opponents – in much less than a year. Nonetheless Labour's proposals – which are the most specific on offer at the general election – are challenging, in terms of the party's preferred timetable of negotiating a new deal and putting it to a referendum within six months. As the minimum timetable for organising a referendum is 22 weeks, this could only be achieved if a new deal were agreed extremely quickly. An alternative approach would be to put Boris Johnson's proposal to a confirmatory vote. That could have the benefit of increasing the legitimacy of the referendum amongst Brexit supporters, many of whom might not consider a referendum on a revised Labour deal versus Remain a true choice. This is the outcome most likely in the event of a minority Conservative government, but might also be considered under a Labour-led administration.

# 1. How could a referendum be triggered?

The previous edition of this report considered various scenarios in which politicians might decide to hold a further Brexit referendum. The parliamentary arithmetic meant that none of those came to pass – though, as noted in the Introduction, some of the votes on the matter in the House of Commons came pretty close. But the forthcoming general election means that the parliamentary arithmetic is, one way or another, set to change. The scenarios that might lead to a further Brexit referendum now depend largely on the outcome of that election.

Different parties and groups are approaching the election with strongly differing attitudes on the question of holding a further referendum. The scenarios considered below are therefore based on the parties' positions, and the plausible constellations of parties that might exist in the new House of Commons. Different constellations also suggest slightly different processes, as discussed further below and in the remainder of this report.

## The parties' positions on a further referendum

Almost all of the main political parties have expressed clear views either for or against a further Brexit referendum, both in their general election manifestos and elsewhere.

### Conservatives

The Conservative Party opposes a further referendum on Brexit. Boris Johnson is fighting the election on a promise to 'get Brexit done', with the intention to reintroduce the EU (Withdrawal Agreement) Bill and get it approved by parliament as soon as possible. He aspires to achieve this by the current Brexit deadline of 31 January, thereby avoiding the need to request a further extension to the Article 50 period. The Conservative Party's rejection of a referendum has long been clear, with Theresa May repeatedly speaking in opposition to the idea. Of those Conservative MPs who have previously expressed support for a new public vote, most have now departed the party and/or stood down from parliament. Shortly before she resigned as Prime Minister it was reported that Theresa May was prepared to offer parliament a vote on including provision for a referendum in her implementation bill, in order to secure Labour's support for proceeding with a version of her Brexit deal. However, this position was strongly rejected by other Conservatives, and this was seen as a factor in her ultimate downfall (Stewart and Walker 2019). Boris Johnson has so far retained a firm anti-referendum line, which the party's general election manifesto reaffirms (Conservative Party 2019: 5).

### Labour

The Labour Party entered the election campaign with a strong commitment to a further Brexit referendum. Labour's attitude towards a referendum has developed over time, with this commitment growing gradually stronger. In the parliamentary indicative votes of spring 2019, Labour whipped in favour of the two motions supporting a referendum, although some Labour MPs defied this by opposing the proposition or abstaining (Stewart and Elgot 2019). The party's manifesto pledges that 'Within three months of coming to power, a Labour government will secure



a sensible deal. And within six months, we will put that deal to a public vote alongside the option to remain' (Labour Party 2019: 89).

## **Liberal Democrats**

The Liberal Democrats have long supported a further referendum on Brexit, and solidly backed this during the parliamentary indicative votes. At its annual conference in autumn 2019 the party announced a new policy of moving straight to the revocation of Article 50 (i.e. halting Brexit) without reference to a referendum. However, this policy would only come into effect in the event of a majority Liberal Democrat government, which is, to say the least, unlikely. The party's manifesto restates this position, but also says that 'in other circumstances, we will continue to fight for a people's vote with the option to stay in the EU, and in that vote we would passionately campaign to keep the UK in the EU' (Liberal Democrats 2019: 11).

## **Green Party**

The Green Party currently holds just one House of Commons seat, but has also been at the forefront of campaigns for a further referendum (and, along with the Liberal Democrats and Plaid Cymru, has been part of the 'Remain Alliance' of parties that have stood down in each other's favour in certain seats at the general election in order to maximise the chances of such an outcome). Its manifesto promises to give voters 'an immediate final say on the terms of any Brexit deal, through a People's Vote, with Remain as an option on the ballot paper' (Green Party 2019: 29).

## **Brexit Party**

The Brexit Party is not currently represented in the House of Commons, and is standing at the general election in fewer than half of all constituencies nationwide. However, it is in principle possible that one or more Brexit Party MPs will be elected in December. The party has expressed its opposition to Boris Johnson's deal, on the basis that it is 'not a proper Brexit' (Brexit Party 2019). Nonetheless, in standing down candidates in previously Conservative-held seats in November, party leader Nigel Farage explicitly stated that one reason for doing so was that, in his view, 'this ensures that this general election will not result in a hung Parliament and second referendum' (Brexit Party 2019).

## **Scottish National Party**

The Scottish National Party has solidly backed a further Brexit referendum. In the indicative votes, all SNP members present supported the motions in favour of a referendum. In its manifesto, the party indicates that '[w]e will support a referendum with remain on the ballot paper to allow Brexit to be stopped for the whole of the UK' (Scottish National Party 2019: 10).

## **Plaid Cymru**

Likewise, Plaid Cymru has expressed consistent support for a further referendum. Its four MPs backed both motions for a referendum during the parliamentary indicative votes. In a statement on 31 October 2019 the party leader Adam Price stated that 'Plaid Cymru will stand in this election on a policy of stopping Brexit by supporting a Final Say referendum with the option to Remain on the ballot' (Price 2019). The party's manifesto confirms this, saying 'We are campaigning to give the decision back to the people in a referendum' (Plaid Cymru 2019: 5).

## Northern Irish parties

In the 2017 parliament the only Northern Irish party to take seats in the House of Commons was the Democratic Unionist Party (DUP). An additional seat was won by the independent unionist member Lady Sylvia Hermon, who is now standing down; Sinn Féin won seven constituencies, but does not take up its seats at Westminster. The DUP supported Brexit, and had opposed a referendum, but strongly rejected Boris Johnson's deal. Consequently there have been suggestions that it would now rather support a referendum than accept the deal, if faced with that choice (Murphy 2019).

On 12 December other parties may win representation in Northern Ireland and take their seats at Westminster. The Alliance Party is aligned with the Liberal Democrats and supports a referendum. The Social Democratic and Labour Party (SDLP) opposes Brexit and supports a further referendum (Ainsworth 2019). The Ulster Unionist party (UUP) in contrast moved to a position of supporting Brexit after the 2016 referendum – but has (like the DUP) expressed serious concerns about Boris Johnson's deal (McHugh 2019). In November 2019 the new party leader, Steve Aitken, suggested that the problems are such that it would be preferable to remain in the EU (McBride 2019). This implies possible support for a further referendum.

## Independent members

In the 2017 parliament a large number of members switched parties, and many ended up sitting as independents. Most of these members have now retired, but some are running in December 2019. They include, for example, Dominic Grieve and David Gauke, former Conservatives who are running as independents, and Anna Soubry and Chris Leslie of the Independent group for Change, all of whom have backed a further referendum. Although it is generally difficult for independent candidates to be elected to the House of Commons, in the current volatile political environment, some of these members may be returned.

## Potential constellations in the House of Commons, and scenarios

The degree to which there is parliamentary support for a further Brexit referendum after the election clearly depends on the makeup of the House of Commons, in terms of how many seats are won by each of the above parties and groups. To keep things relatively simple, there are four broad scenarios: two of which might plausibly lead to the decision to hold a referendum, and two of which would not.

To first dispense with the latter scenarios, which are of less immediate interest to our analysis, the most obvious and probable is the election of a Conservative majority government. If the Conservatives win with a comfortable majority of seats, Boris Johnson is likely to press ahead with his EU (Withdrawal Agreement) Bill in order to proceed with Brexit by 31 January 2020. Although opposition parties may propose amendments to the bill in order to try and force a referendum, the government should be able to defeat these in the House of Commons if its majority holds firm. Should similar amendments be proposed in the House of Lords these could likewise easily be rebuffed by MPs, provided that the Conservative parliamentary party remained cohesive.

The other scenario in which a referendum would be off the table is if a ‘revoke’ majority were to exist in the House of Commons. This however appears very unlikely. Revocation of Article 50 is the officially-preferred position of the Liberal Democrats, and might be supported by other minor parties, and perhaps a handful of Labour members. But the likelihood that these groupings will collectively command a Commons majority is close to zero.

In the context of this report, the other two scenarios are more interesting, as they would be much more likely to lead to an in-principle decision to hold a further Brexit referendum. It is therefore worth discussing these in greater detail.

### **Conservative-led minority or unstable majority government**

The first possibility is that the Conservatives return to power, but that the result of the election is again a hung parliament, or possibly one with a very slim Conservative majority. In the event of a hung parliament, there would be very few mechanisms for the Conservatives to build a solid Commons majority on Brexit. The party could either seek to govern alone, or could seek support of other parties or groups – through a formal coalition, or the kind of ‘confidence and supply’ arrangement that Theresa May previously reached with the DUP.

As seen above, however, the only grouping that might support pushing ahead with Boris Johnson’s Brexit deal without a referendum is the Brexit Party – which is unlikely to win many, if any, parliamentary seats. As the Brexit Party has claimed that Johnson’s deal is ‘not a proper Brexit’ this scenario could result in pressure for changes to the deal, or to pursue a ‘no deal’ exit. Some Conservative Party MPs themselves might be sympathetic to such moves, with either grouping supporting amendments to the EU (Withdrawal Agreement) Bill on key matters such as the status of EU law during the transition period. If Johnson’s pro-Brexit majority failed to hold on such amendments, this could force him to seek support from other groups, any of which are likely to make their support conditional on putting the deal to a referendum. However, in the event of a narrow Brexit-supporting majority in the House of Commons, the greater likelihood is that a referendum is avoided.

If the Conservatives have no majority, and cannot bolster their numbers through support from Brexit Party MPs, the only other possible partners for a Johnson government are the Northern Ireland unionist parties (the DUP and perhaps the UUP). However, Johnson has so alienated these forces over his Brexit deal (due to its different treatment of Northern Ireland and the rest of the UK in a future relationship) that they would not support the deal. Notably, all 10 DUP MPs voted against it on 19 October. This raises the question of whether the DUP would try to force a referendum on Prime Minister Johnson; based on the statement above, the UUP might well join an alliance to do so.

The position of other parties is much more clearly in favour of a referendum. Should the Conservatives fall short of an overall majority and be unable to form a stable alliance with the Brexit Party or Northern Ireland’s unionist parties to block such a move, other parties and independent MPs would seek to use what parliamentary strength they had to pursue a referendum. The likeliest route is again for Johnson to reintroduce his EU (Withdrawal Agreement) Bill, but for other parties to introduce amendments making its approval conditional on support for the deal in a public vote. Alternatively, as the government is still bound by section 13(1b) of the EU (Withdrawal) Act 2018, such a demand could be made during the process of Johnson pursuing

another in-principle ‘meaningful vote’ on the deal – before the bill is reintroduced. In order to proceed with Brexit, as things stand, parliament must approve both the legislation and the section 13 motion – though the order in which these steps happen is not prescribed. However, if the EU (Withdrawal Agreement) Bill is reintroduced first, and is unamended from its October version, this would revoke section 13, removing the need for a further ‘meaningful vote’. Whichever of these routes were taken, the government could face a choice between introducing referendum legislation, or being unable to proceed with its Brexit deal.

## Labour-led government

The final scenario, which leads much more directly to a referendum, is a government led by the Labour Party. If Labour were to win an outright majority at the general election, it would presumably pursue its manifesto policy of renegotiating the Brexit deal and putting this to a public vote. In the 2017 parliament some Labour MPs voted with the Conservatives on different versions of the Brexit deal, and some also explicitly opposed a referendum. Hence if Labour’s majority were narrow, the pursuit of its general election pledge might become uncertain. However, Labour’s ‘Brexit rebels’ (like those on the Conservative side) mostly retired from the House of Commons when the election was called, so any resistance to the leadership’s approach in future seems likely to be more limited. In addition, having fought an election on a pledge to hold a referendum, few if any Labour MPs would actively seek to block this policy. Hence a Labour majority government seems very likely to lead to a further Brexit referendum.

Given the current state of the polls, however, it seems more probable that any Labour-led administration would be a minority or coalition government, in a hung parliament situation. This too makes progression to a referendum extremely likely. The Liberal Democrats, Greens, SNP, Plaid Cymru and all or most independents elected – as well potentially as some from the Northern Ireland parties – would enthusiastically back a public vote.

In terms of the process leading to a referendum in this scenario, there might be differences between a majority and a minority Labour government. With a majority, as noted above, Labour looks set to try and reopen negotiations with the EU27, pursuing a referendum after a new deal has been secured. In a minority government situation on the other hand, particularly if the other pro-referendum parties held a large number of seats, Labour could come under pressure to move straight to a referendum on Boris Johnson’s deal – a possibility explored further in Chapter 3.

## Conclusion

The level of parliamentary support for a further referendum depends, ultimately, on the outcome of the general election. Although that outcome is, as yet, unknowable, various possible results could lead to a referendum.

Given Labour’s manifesto commitment to hold a referendum on its renegotiated deal, the formation of a Labour-led government appears to be the scenario leading most obviously to a referendum – although a minority Labour government could come under pressure from other referendum-supporting parties to drop its plan of renegotiating the deal first.

A slim Conservative majority or a Conservative minority government might also result in a referendum. Although the Conservative Party opposes a further vote, a minority government

could be forced to accept one as the price of passing Johnson's deal. Even a small backbench rebellion could put a Conservative government with a slim majority in a similar position.

These differing scenarios open up questions about both the timetable for a referendum and the nature of the options that would be put to voters. These questions are explored in subsequent chapters.

## 2. How quickly could a referendum be held?

If a referendum is to be held in the UK, various processes must be completed, all of which take time. Arguments about how much time would be needed for a further referendum have been core to debates about the viability of holding such a poll, coming from both proponents and opponents of a new vote. Theresa May's Downing Street, for example, reportedly produced a paper saying that a further referendum could take more than a year (Watts 2019). Conversely, some referendum supporters have suggested that such a vote could be held in as little as six weeks (Simor 2019a).

This chapter of the report therefore considers what a realistic *minimum* timetable for a further referendum would be. It 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. This provides an essential first step to analysing objectively the claims of both referendum proponents and opponents, and particularly the timetable set out during Labour's election campaign.

In the event of a referendum, various choices would have to be made that could affect the timetable – some of which may extend it beyond the minimum requirement identified here. Chapter 1 has already referred to the possibility of a Labour government seeking to negotiate a fresh deal with the European Union in advance of a further referendum. Chapters 4 and 5, which address the rules for the referendum and the potential to make the vote legally binding, also consider the impact that these choices could have on the timetable. Hence the actual timetable under different scenarios is a question returned to in the final chapter of the report.

### 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 Chapter 4). The bill often provides for the last two of these to be specified in secondary legislation; but, in the case of a further Brexit referendum, in the interests of speed and transparency, parliament might favour specifying them on the face of the bill.
- **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 (including two weeks' notice of when the Commission will be given the exact proposed question wording – Electoral Commission 2015: 48). It 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 period 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. The first of these two options was followed for the 2016 vote.

## 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 of 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 was strictly necessary.

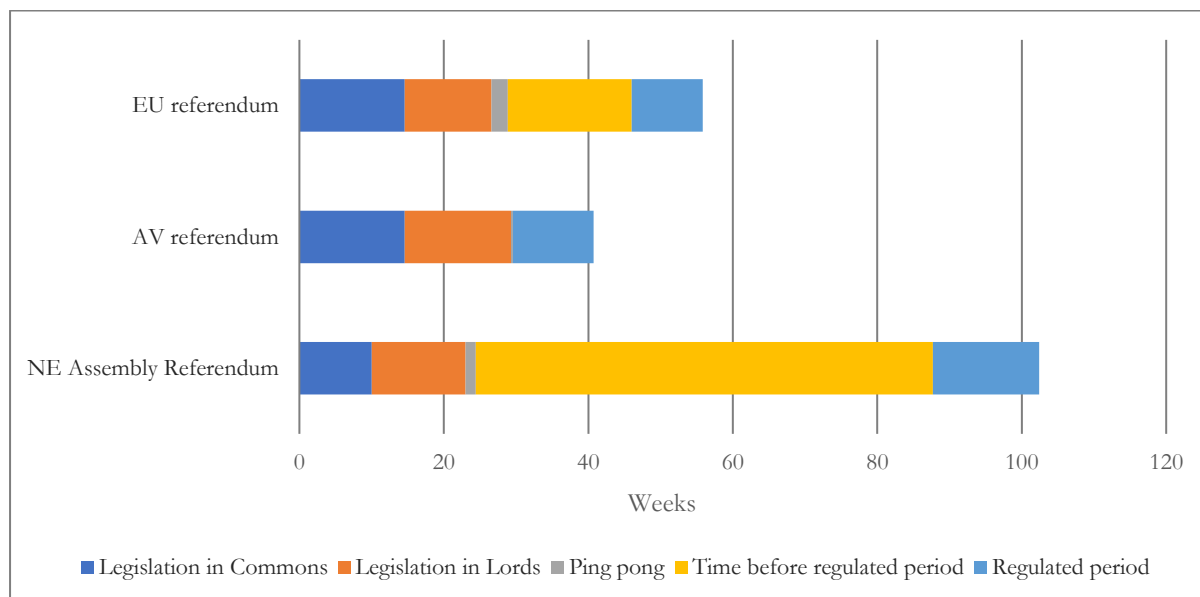
Starting with legislation, both the European Union Referendum Act 2015 and the Parliamentary Voting System and Constituencies (PVSC) Act 2011, which enabled the AV referendum, took just under seven months to pass through parliament. However, in both cases the bill was introduced shortly before the long 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

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<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.

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.

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



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

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 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 chapters 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?

There is no fixed timetable setting out how long it takes for legislation to pass through parliament: this depends enormously on the circumstances relating to any particular bill. With political will, legislation can be rushed through very rapidly. Most recently, the bill providing for the general election passed through both chambers in just two days. To give a more standard example of an

urgent bill, the Prevention of Terrorism Act 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).

The minimum time in which legislation for a referendum might pass through parliament is likely to be dictated by three main factors:

- First, this would clearly be highly dependent upon the result of the 2019 general election and the composition of the new parliament, as discussed in Chapter 1. The key factor would be the size of the House of Commons majority that emerged for a referendum and the extent of the consensus within parliament about what form that referendum should take.
- Second, the complexity of the legislation also matters. That depends partly on factors that are examined later in the report: the referendum question (Chapter 3); any proposals to change the franchise or the regulatory framework for the referendum (Chapter 4); and any decision to make the referendum result legally binding (Chapter 5). But even in the simplest case, legislation for a referendum would unavoidably be more complex than was the bill to facilitate the current election. The Early Parliamentary General Election Act 2019 has just two sections, comprising fewer than 200 words. By contrast, the European Union Referendum Act 2015 had 14 sections and three lengthy schedules, spanning 67 pages. Subjecting such a detailed bill to proper scrutiny is necessarily the work of weeks, not days.
- Third, an important factor specific to a further Brexit referendum would be whether an attempt was made to renegotiate the Withdrawal Agreement and Political Declaration before the referendum. As noted in Chapter 1, this is Labour Party policy. In order to maintain its referendum timetable, Labour also proposes to legislate for this vote ‘immediately’, apparently without waiting for the renegotiation to conclude. Yet that would require parliament to vote on whether to hold a referendum without knowing what exactly the referendum would be on. Finalising the wording of the question in those circumstances would be very difficult, as would testing of the question. It is therefore doubtful that completing the legislative process would be possible until after the renegotiation had concluded.

If the government had majority Commons support for a further referendum, passing a programme motion allowing for expedited passage through the Commons would be relatively easy, though this timetable would need to include sufficient time for proper scrutiny of the detail (which would take place on the floor of the House, as a constitutional bill). 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. In any case, 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, would 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 bill facilitating the general election (and before that, 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 would probably 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.

Overall, the unavoidable complexity of referendum legislation means that passing it would take at least several weeks – a timetable that could be extended further by the factors noted above. The legislative process would run concurrently with question testing, which is examined next. More precise estimation of timings is hence discussed at the end of the chapter.

## 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. The norm is hence 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 potentially places 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 briefly in Chapter 3, there is a small possibility that the referendum question could offer three options: a form not previously used in the UK, which would necessitate particularly careful testing. Therefore, it is likely that something similar to the usual process, albeit perhaps on a somewhat condensed timetable, would be necessary.

As was noted above, a further complication would arise if, as Labour appears to be proposing, an attempt were made to run the processes of legislating and therefore of question testing concurrently with a renegotiation of the withdrawal deal. It would be difficult to test and finalise the referendum question in these circumstances. The Electoral Commission would be attempting to research whether people understood the options they were being asked to choose between when one of those options had not yet been defined. The process would be much more robust if this eventuality could be avoided.

Assuming that any renegotiation of the withdrawal deal had been concluded, and 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, or a renegotiated deal were still awaited, 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 if the options in the referendum became clear late in the legislative process. This could especially disadvantage newly formed groups. It is currently unclear whether there are any campaign groups which would immediately be ready to contest a referendum.
- 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 in fact 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. Although many of the arguments regarding Brexit are by now well-rehearsed, to shorten the campaign period to below four weeks would be a major departure from past practice. Most voters have not considered the merits of the Brexit deal in detail, and this would particularly apply if Labour had recently negotiated a new deal to put to a referendum. Cutting the campaign period could therefore undermine the legitimacy of the vote, and would be ill-advised.

Of course, the time needed for a referendum could be shortened if the system of designating lead campaigners were simply abandoned – as some referendum proponents have appeared to suggest (Simor 2019b). But that system was introduced in 2000 for very good reason, after detailed examination of previous referendums concluded that it was needed to ensure at least a minimum level of fairness in the conduct of campaigns (Committee on Standards in Public Life 1998: 155–72). It would be unwise to toss it aside for the convenience of saving a few weeks.

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, but takes a minimum of just five weeks; the current election is due to take place just over six weeks after parliament decided to call it. 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 adapted.

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. In the probably unlikely event that the referendum question offered three or more options with a preferential voting system (see Chapter 3), more time would likely be needed to develop and test new guidance to voters and electoral administrators. The precise amount of time is difficult to judge; government and parliament would need to take guidance from the Electoral Commission, but the analysis below assumes an additional six weeks.

## **Summing up: Minimum referendum timetable and implications for Article 50**

There are clearly many uncertainties in the timescales discussed above. The biggest is the timing of the legislation – which is greatly dependent on politics and the circumstances in which the referendum is triggered (as explored in Chapter 1). Table 1 outlines a minimum timescale according to which each process could be completed and a referendum held, estimating this total 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.

At the time of writing, there are already fewer than 22 weeks until the currently scheduled exit day of 31 January 2020. Any discussion of a further referendum thus depends on the assumption that the EU would agree to another extension of Article 50. This assumption is, on current evidence, a reasonable one. European leaders have consistently listed a further referendum – along with ratifying a deal or holding a general election – as a legitimate reason for the UK to request further delay. On 18 September 2019, prior to the most recent extension, the European Parliament adopted a resolution which reiterated its support for extending the Article 50 period beyond 31 October 2019 ‘if there are reasons and purposes for such an extension (such as to avoid a “no-deal exit”, to hold a general election or a referendum, to revoke Article 50, or to approve a withdrawal agreement)’ (European Parliament 2019). Nonetheless, there can be no absolute certainty about this matter.



**Table 1. Referendum timescales**

Process	Minimum time to complete	Conditions necessary for minimum timescale	Factors that could increase timescale
Passage of legislation	11 weeks	A stable Commons majority 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 Decision to seek renegotiation of the withdrawal deal Decision to make the referendum result legally binding (see Chapter 5)
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 Multi-option referendum (see Chapter 3)
Period between legislation and campaign	1 week	Same regulatory framework and conduct rules as 2016 referendum	Major changes to the regulatory framework (see Chapter 4) Changes to conduct rules for multi-option referendum
Regulated campaign	10 weeks	Application of PPERA timetable	
<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.

Clearly, the need to secure a further extension to Article 50 in order to hold a referendum underscores the need for careful planning and realism about the timetable. The length of the extension required in the event of a referendum depends on the full range of options discussed in this chapter, some of which are elaborated in those that follow. We therefore return to this question in the final chapter of the report.

## Conclusion

Holding another Brexit referendum would take a minimum of 22 weeks – around five months. While previous referendums have taken longer to organise this should not be seen as a guide for the future – as the sense of urgency has not previously been so great as it would be in the case of a further Brexit vote.

This conclusion is, at least superficially, compatible with the Labour Party's proposed six-month referendum timetable. Nevertheless, Labour's proposal to proceed to a referendum only after having renegotiated the Withdrawal Agreement and Political Declaration puts that timetable in jeopardy – a theme returned to in the final chapter of the report. We have also highlighted other potential sources of delay – relating to the referendum question, the regulation of the referendum process, and the issue of whether the referendum result would be made legally binding. These matters are examined in turn in the following three chapters.

### 3. What form might the question take?

Having considered the circumstances in which a further referendum on Brexit might be called, and the minimum timetable for such a referendum, this chapter reviews the options that could be placed on the ballot paper and the likely form that the referendum question would take under different scenarios. In doing so, it considers the key criteria that should be met by a referendum question, and how the different possible question formats measure up.

The chapter begins by outlining each of the possible options, before moving on to examine the structure of the ballot as a whole.

#### The possible options

There are three options that might conceivably be put to voters: remaining in the EU; leaving the EU on the terms negotiated between the UK government and the EU; and leaving the EU without a deal. The deal option, as explored below, could take two forms, depending on whether it is based on the deal concluded by Boris Johnson or a revised one negotiated by a Labour-led government.

In examining these possible options, it is important to consider how reasonable they would be to put to voters in a further referendum. That requires that they meet at least two standards: first, they should be *feasible* – an option should be put to voters only if it can be delivered; second, they should be *clear* – voters should be able to know what it is they are voting on. As discussed later in the chapter, it is also important that the options put to voters are sufficiently distinct from each other, and that they are seen to offer a real choice.

#### Remain in the EU

The first possible option is that the UK should remain in the EU. The clarity and feasibility of this option was confirmed by the decision of the European Court of Justice in *Wightman and others v. Secretary of State for Exiting the European Union* (2018), which established that the UK could unilaterally revoke its Article 50 notification ‘in accordance with its constitutional requirements’ (paragraph 75). This left no doubt that the UK could retain its current EU membership terms, including such favourable features as the budget rebate and opt-out from the euro, whereas a need for consent might have allowed member states to seek concessions from the UK in return. There would thus be no practical or legal impediment to putting the Remain option to voters in a referendum.

The nature of the UK’s ‘constitutional requirements’ – in particular, whether revocation could be carried out using the executive’s prerogative powers or would require primary legislation – has been a topic of debate amongst lawyers (McGaughy 2019, Phillipson and Young 2018). To avoid such arguments, the simplest route would be for the bill facilitating the referendum explicitly to empower the executive to revoke the UK’s Article 50 notification (and repeal the relevant domestic legislation) in the event of a vote for Remain, to avoid any need for subsequent legislation.

## Leave the EU with the existing deal or a new deal

The second possible option is that Brexit should take place on the terms agreed in the negotiations between the UK government and the EU. As indicated in Chapter 1, there are two potential deals on the table here:

1. the deal already concluded by Boris Johnson's government;
2. a new deal negotiated by a Labour or Labour-led government.

A third possibility, that Theresa May's version of the Brexit deal somehow gets revived, looks highly unlikely, so we do not consider it further.

Either deal would have two parts: a Withdrawal Agreement, setting out the terms of the UK's exit from the EU; and a Political Declaration, proposing a framework for the future UK–EU relationship.

Taking the feasibility criterion first, this has clearly been met in the case of Johnson's deal: it has already been agreed with the European Union, so could certainly be put to voters. A Labour deal, meanwhile, would of course be feasible only if such a deal had in fact been struck with the EU. Whether EU leaders would be willing to reopen negotiations once again remains, at present, quite unclear.

The clarity criterion is harder for any deal to meet. The details would provide greater clarity than was available for the broad Leave option in 2016. Nonetheless full clarity would be lacking. It is present with respect to the Withdrawal Agreement, which is an exact legal text. But the Political Declaration is a general statement of intent, which is legally non-binding. And most Brexit debate has in fact focused upon the future relationship, not the Withdrawal Agreement – including questions of the UK's relationship to the Single Market and Customs Union after the transition period. The UK government could set out in precise terms the form of future relationship that it would seek, but there is no guarantee that this could be delivered. Considerable uncertainty would therefore remain as to what this option might mean in practice, even if – as Labour proposes – a more detailed Political Declaration could be agreed.

## Leave the EU with no deal

A final possible option is that of leaving the EU without a deal. This would be a feasible option, in the sense that a 'no deal' Brexit could happen if the UK chose it, irrespective of what the EU might do. But, even more than voting on a deal, it struggles to meet the criterion of clarity. By definition, a 'no deal' exit would mean no agreement over the future relationship with the EU. A future government's approach to that relationship, and what might be possible, would be unclear. Campaigners could offer a prospectus, but there would be no certainty as to whether this could be delivered. In addition, many MPs think a 'no deal' Brexit would cause unacceptable harm to the country. Such MPs might well therefore conclude that they would be neglecting their duty as representatives if they allowed 'no deal' onto the ballot paper.

## The structure of the ballot under different scenarios

In Chapter 1, two credible post-election scenarios were identified that might lead to a referendum: a Conservative-led minority or unstable majority government; and a Labour-led administration.

The first of these scenarios implies no new renegotiation, and pursuit of Johnson's withdrawal deal. Hence this would likely be put in any referendum alongside the option to remain in the EU.

Given the party's policy, a Labour-led government looks most likely to pursue a referendum pitting a revised withdrawal deal against remaining in the EU. As discussed in Chapter 2, such a renegotiation – even if it succeeded – would make adhering to Labour's six-month referendum timetable difficult. But it could bring other problems as well. Whereas Johnson's deal has been accepted by the vast majority of leading Brexit supporters, many of them would probably reject a Labour deal, which is likely to propose a much closer future relationship with the EU than is currently envisaged. This could have consequences for the legitimacy of the ballot, as further discussed below.

Other referendum routes are however possible, particularly if either of the main parties is under pressure from other parliamentary groupings. If a minority Labour government was dependent on support from other pro-referendum parties, it might be urged to abandon the renegotiation plan and offer a speedier referendum pitting the Johnson deal against Remain. This could have some benefits for legitimacy. Meanwhile, if a minority Conservative government was reliant on the support of Brexit Party MPs, those MPs might demand inclusion of a 'no deal' option on the ballot – turning it into a three-option referendum. But reliance on Brexit Party support is unlikely, while there would almost certainly be some Conservative MPs who would strongly oppose such a move. Another form of three-option referendum, under Labour, could pit Johnson's deal, or 'no deal', against both a renegotiated deal and Remain. This could enhance the legitimacy of the ballot among Leave supporters, but it is difficult to envisage the political circumstances that could bring it about.

The various options for the ballot paper, considering all of the criteria – of feasibility, clarity, legitimacy and voter choice – are discussed further below. Three-option referendums were considered more fully in the previous edition of this report. They are discussed below only briefly here given their diminished likelihood.

## **Labour deal vs. Remain**

Labour's formally preferred option of pitching a newly negotiated deal against Remain would use a binary question format familiar to voters, campaigners, and electoral administrators, being the same as in 2016. Hence, implementing such a poll to a tight timetable would be relatively straightforward. But the preceding discussions have already identified two associated problems with this approach.

First, renegotiation of the existing withdrawal deal would cause delay. As explained in Chapter 2, it would be very challenging for a Labour-led government to stick to its proposed six-month timetable if it opted to go down this route.

Second, such a referendum would risk stoking dissatisfaction amongst Brexit supporters. Any deal negotiated by Labour would represent a 'softer' form of Brexit than Johnson's deal, making it unacceptable to many Conservative Brexiteers. Meanwhile the Brexit Party, which has already denounced Johnson's deal as 'not a proper Brexit', would clearly find a Labour deal even less acceptable. A ballot pitting this deal against Remain would thus be particularly vulnerable to the charge that there was no 'real' Brexit option on offer. Indeed, some have already drawn attention to this problem (Finkelstein 2019; Jenkin 2019). Such a referendum might result in an angry public backlash, and perhaps a boycott among Brexit supporters, undermining the legitimacy of the poll.

Some referendum proponents might be prepared to take that risk (as a boycott by Brexit supporters would boost the chances of a Remain outcome), but this could have damaging long-term consequences for democratic trust.

## **Johnson deal v. Remain**

Notwithstanding the concerns noted above regarding the lack of clarity over the terms of the UK's future relationship with the EU in the Johnson deal, each of the options in this referendum could credibly be put to voters in a referendum held on a tight timescale. As with the Labour deal, it would offer a straight binary choice and take a familiar, administratively unproblematic format.

A referendum offering these options would also reflect the major strands of opinion in the current Brexit debate: it would pit Remain against a Leave option now accepted by the vast majority of Brexit supporters (though with the important exception of many in Northern Ireland). While most of this group are hostile to a referendum in principle, such a ballot option would at least be widely seen as providing a real choice, so could enjoy a degree of legitimacy among most Brexiteers.

This question formulation is the obvious one to pursue if a Conservative government is forced into holding a referendum. It could also be forced on a minority Labour government if other Remain-supporting groups in parliament wanted to proceed to a speedy poll. Even some within the Labour Party are clearly uncomfortable with the pledge to renegotiate, though the manifesto commitment would make it hard to shift from this position. There is an important caveat to this possibility, however: that a referendum should offer only options which the government and parliament are prepared to implement. Thus, if a Labour-led government were to accept a vote on Johnson's deal, it would also need to commit to implementing that deal in the event of a Leave vote, and be able to hold a parliamentary majority together to do so. This could be particularly difficult in light of Labour's concerns about the deal, and those of many, including the DUP and UUP, about its possible impact on Northern Ireland and the Union. Nonetheless, the legitimacy concerns expressed above, alongside the effects on the timetable, could mean that this route had some attractions even under a Labour government.

## **Three-option ballots**

In the previous edition of this report, considerable space was given to discussion of possible three-option referendum structures. With some Conservative MPs unhappy with Theresa May's approach to negotiations, some pressure for a ballot pitching 'no deal' against a deal and Remain seemed possible. Today these pressures seem less likely. Johnson's deal is acceptable to most Brexit supporters, reducing the pressure for a 'no deal' option. Likewise, under Labour, while there might be concerns about a revised 'soft Brexit' deal, the simplest way to allay these would be through proceeding instead with a binary ballot pitching Johnson's deal against Remain. In this scenario parliamentary pressure for including a 'no deal' option would be limited, while the prospect of offering voters both forms of deal would be problematic. As discussed above, much of the detail that voters care about is in the Political Declaration rather than the legally binding Withdrawal Agreement. To present voters with two opposing versions of the Political Declaration, both of them quite general and subject to future negotiations, would hugely undermine the clarity of the ballot. This would be ill-advised, and seems politically unlikely.

In addition, as discussed at greater length in the previous edition of this report, three-option referendums bring challenges of their own. Once more than two options appear on the ballot

paper, it can become unclear where the majority preference lies. There are various possible voting methods for such a ballot, including First Past the Post, the Alternative Vote (AV), a two-question format, or a process seeking the so-called ‘Condorcet winner’. But each of these could create anomalies, and the different systems could actually lead to different outcomes (see Sargeant, Renwick, and Russell 2018: 36–41 for full details). As noted in Chapter 2, a multi-option referendum would be administratively harder to conduct within a tight timeframe than a conventional binary vote.

## Conclusion

There are three options that might conceivably be put to voters in a further Brexit referendum: leaving the EU with a deal; leaving with no deal; and remaining in the EU. The nature of Boris Johnson’s deal means that the pressure for including a ‘no deal’ option is now significantly reduced. On the other hand, Labour’s intention to negotiate a new deal means that there may be two versions of the ‘deal’ option on the table. Hence the most likely referendum questions are simple binary ones, between Johnson’s deal and Remain, or a revised deal and Remain.

The analysis above suggests that only the second of these possible referendums – asking voters to choose between the Johnson deal and remaining in the EU – would be relatively unproblematic. A ballot pitting a revised deal against Remain, by contrast, could introduce delays, while it risks being seen by many Brexit supporters as denying them a true choice – which, in turn, could undermine the legitimacy of the vote. Thus, even if it was a Labour-led government that sought to proceed with a public ballot, a referendum between Johnson’s deal and Remain could hold some attractions in terms of likely public legitimacy among Brexit supporters. Nonetheless there are clearly some deep concerns about Johnson’s deal among pro-referendum parties, and among Brexit supporters in Northern Ireland.



## 4. 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 Chapter 2, 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 – which need to appear in the legislation authorising any specific referendum. In addition, in some respects – most notably in relation to the regulation of digital campaigning – PERA is now grossly out of date. As in all previous referendums, therefore, 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 an obvious starting point for doing this. But lessons learnt during and since that vote suggest an urgent need for further revisions.

This chapter 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 these have been applied in past referendums; others are needed in light of recent developments. In discussing options for change, it is important to be mindful of the tight timeframe within which any referendum would be conducted, and we hence highlight those reforms that seem most feasible within such a timeframe. As noted in Chapter 2, the Electoral Commission has argued that the legislative framework for elections or referendums should not be altered within six months of a vote. But the failings of existing law are so great that some flexibility on this principle seems necessary.

Finally, the chapter moves beyond legal rules to consider the approach that broadcasters and others might take to the vote. This is crucial for encouraging an informed and considered campaign.

In the first edition of this report, this chapter included an additional section examining what further adjustments would be needed in the event that a three-option referendum were called (Sargeant, Renwick, and Russell 2018: 47). Given that such a referendum now looks highly unlikely, we do not repeat that analysis here.

### 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 further referendum have argued that it should be based on an extended franchise, including 16- and 17-year-olds and EU citizens resident in the UK (e.g., Liberal Democrats 2019: 81).

Notwithstanding such arguments, the first edition of this report reached a strong conclusion that the franchise for any further referendum on Brexit should be the same as for the 2016 vote. It noted that there are valid arguments for enfranchising the groups just mentioned, and that there is 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, when the issue was debated during parliamentary scrutiny of the European Union Referendum Bill in 2015, amendments to extend the franchise to these groups were not successful. Importantly, the report pointed out that, if the result of the 2016 referendum was overturned, and this could be seen as resulting from a change to the franchise, many Brexit supporters would likely view the 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). Finally, the report noted that, although the rules are not fixed, the practice is well established in the UK of basing the referendum franchise on the corresponding parliamentary franchise.

It might be possible to make a stronger case for deviating from the 2016 referendum franchise in a referendum held after the 2019 general election. In particular, if the referendum was called by a parliamentary majority comprising parties that had proposed amending the franchise during the general election campaign – as Labour (2019: 82), the Liberal Democrats (2019: 79), the Green Party (2019: 35), the SNP (2019: 43), and Plaid Cymru (2019: 80) have all done – there would be a clearer legitimacy argument for applying those changes. Doing so would mirror the 2014 Scottish independence referendum, where the SNP had announced its intention to extend the franchise to 16- and 17-year-olds in all Scottish elections.

Nevertheless, key problems with changing the franchise identified in the previous edition of this report – particularly the concern about undermining the legitimacy of the result – still apply. It therefore remains preferable that the franchise for a further Brexit referendum should be the same as that 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 been transformed. A slew of recent reports from bodies such as the Electoral Commission (2016, 2017, 2018a), the Information Commissioner’s Office (2018), the Public Administration and Constitutional Affairs Committee (PACAC) (2017, 2019), the Digital, Culture, Media, and Sport Committee (2018, 2019), and the Independent Commission on Referendums (2018) facilitated by the Constitution Unit have identified an urgent need to improve referendum (and election) laws in multiple ways to ensure that campaigns remain as fair and transparent as possible in the modern age.

Some of the changes that are needed will take significant time to implement. There is general agreement, for example, that election and referendum law in the UK needs to be comprehensively simplified and consolidated (Association of Electoral Administrators 2019; Electoral Commission 2019; House of Commons Public Administration and Constitutional Affairs Committee 2019), and that will not be a speedy process. Given that a further referendum on Brexit would likely be conducted on a short timescale, it would be impossible to apply such changes to it. Furthermore, some proposals may be too contentious to be implemented swiftly.

Table 2 outlines the key specific 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 rapidly. Pursuing them

all would certainly put pressure on the basic 22-week referendum timetable, but they ought to be deliverable with sufficient political will. Amber suggests that a proposal might be politically difficult, or require a significantly longer timescale. Red indicates a change whose implementation, in contrast, would take several years.

**Table 2. Proposed improvements to referendum regulation**

Option	Apply?
<b>Digital campaigning</b>	
Extend imprints to online campaign materials	Green
Require spending returns to disaggregate digital spending transparently	Green
Establish a legal framework for online political advertising	Yellow
<b>Financial regulation</b>	
Introduce improved joint spending rules	Green
Require earlier spending returns for large campaign groups	Green
<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	Yellow
<b>Designation of lead campaigners</b>	
Introduce a ‘fit and proper person’ test as part of the designation process	Yellow
Earlier designation	Yellow
<b>Public information</b>	
Clearly labelled referendum addresses	Yellow
Citizens’ assemblies to recommend which options should be put to voters	Green
Citizens’ assemblies to produce public information	Yellow
<b>Review of election and referendum law</b>	
Comprehensive review, consolidation, and simplification of existing provisions	Red

## Digital campaigning

Widespread and deep concerns have grown in the last three 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 former Prime Minister and other ministers (May 2017; BBC 2018) and in a range of reports (e.g. Electoral Commission 2018a, 2019; Digital, Culture, Media and Sport Committee 2018, 2019; Hankey et al. 2018; Public Administration and Constitutional Affairs Committee 2019). They have also been prominent in many other countries (e.g., Vogel and Kang 2017; 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), the Independent Commission on Referendums (2018: 190), and others have all recommended that imprint rules should be extended to cover digital campaign materials. The Johnson government, like its predecessor under Theresa May, has accepted the principle (Cabinet Office 2019; Prime Minister’s Office 2019: 105), but has not acted. Given such wide agreement, it is 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, which 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 that 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.

The major internet companies have taken a range of important steps over the last year in tackling the abuse of online political advertising. Facebook, for example, has established a searchable repository of political advertising appearing on its site, while Twitter has banned political advertising entirely and Google has introduced more restrictions on targeting for political advertisements. While such steps are welcome, there is also wide agreement – including from the tech companies themselves (e.g., Allan 2019) – that they are not enough, and that decisions about the rules of online campaigning should be made democratically, not by internet bosses in Silicon Valley. Policy development remains relatively embryonic in this area, however, so it may be too early to legislate before a further Brexit referendum. As discussed below, a non-legislative approach may at this stage be better.

## Financial regulation

Beyond the rules on spending returns mentioned above, several other aspects of financial regulation need urgent attention.

First, joint (or ‘common plan’) 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. But those rules have been subject to much 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 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).

A recent Court of Appeal case has clarified related rules on whether a donation from one registered campaign group to another counts as a campaign expense (*The Good Law Project v. Electoral Commission* 2019). But some view the nature of the clarification as unhelpful (Simor 2019a), while further clarification of the joint spending rules themselves would remain highly desirable. The Electoral Commission (2017: 38–40) has proposed how this should be done.

Second, 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.

## 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 spanned 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 would be likely to find support on all sides of the referendum debate; including them in the legislation would therefore be advisable to ensure 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 of 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 would likely 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.

## 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’; the commonest reasons they gave for their view were that the conduct of the campaigns was ‘one-sided/unbalanced/biased/partial’ or 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. These proposals – which included using citizens’ assemblies – were subsequently built on in a further Constitution Unit report (Renwick and Palese 2019). As Table 2 indicates, some forms of citizens’ assembly would be feasible in the context of a further Brexit referendum, and could be pursued by government. It appears more likely, however, that other actors, such as broadcasters, would take the lead. We therefore consider such initiatives in the next section, relating to changes that would not involve legislation in the short term.

## Review of election and referendum law

As already noted, repeated calls have been made for a much wider review of legislation relating to elections and referendums in the UK. The rules are currently scattered across many separate statutes, and there are often inconsistencies between them. The job of reviewing this legislation is already well under way: the Law Commission published an interim report on the matter more than three years ago (Law Commission 2016) and plans to produce a final report in 2020. But that project focuses on the consolidation and simplification of existing rules, not on more fundamental questions about the best regulatory framework for elections and referendums in today’s rapidly changing circumstances. Such a root-and-branch review is badly needed, but would likely take some years to bring to fruition. It would clearly not be feasible ahead of a further Brexit referendum.

## Beyond legislation

So far, this chapter 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 broadcasters, internet companies, researchers, and others involved in the referendum process.

As noted above, recent attention has focused on the need to enhance the transparency of online advertising, and internet companies have begun to develop their own rules in this area. But



regulation through law is sorely needed, and that will take time to develop. In the short term, government should liaise with internet companies to encourage each to provide a comprehensive, useable repository of any political advertising they carry, including detailed information alongside each advertisement on who has sponsored it, how much has been spent on it, and to whom it has been targeted (Digital, Culture, Media and Sport 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). Renwick and Palese (2019) developed these proposals further, arguing for an ambitious approach that puts the information wishes and needs of voters at the heart of political campaigns.

It would again take some time to bring such proposals to fruition. In the short term – including in any further Brexit 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. This shift is clearly evident in their approach to the current general election campaign, and there remains scope to develop it still 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 could examine how to build such analysis into their coverage from the start.

A mechanism that has received much more attention since the first edition of this report was published is the use of citizens’ assemblies, which both the Independent Commission on Referendums (2018: 177) and Renwick and Palese (2019: 228) have recommended should be piloted in future referendums. Such assemblies have been used in two principal ways in referendum contexts. In Canada and Ireland, they have been convened well ahead of the vote, to encourage considered debate and deliberation of the issues and help decide what options should appear on the ballot paper. In Oregon, by contrast, they have been used during the campaign, to foster informed and reflective discussion of options that have already been set.

Had citizens’ assemblies been built into the processes preceding the 2016 referendum, that vote might have taken a very different form; it could also have been less divisive and better informed (Renwick, Palese and Sargeant, 2018). Given that public debate on Brexit has become so polarised, the expectations we can have for the impact of such mechanisms today must be more limited. But they could still play a valuable role.

Holding a citizens’ assembly of the first type would not be possible within the tight timescale of a further Brexit referendum. But an Oregon-style process (see Renwick and Palese 2019: 203–27 for details) could be feasible. A citizens’ assembly – or, perhaps more likely, a smaller citizens’ panel – would hear the arguments and evidence in relation to the referendum options and weigh their strengths and weaknesses. It would offer a citizens’ view as to which arguments should be given more or less weight and on which points campaigners on each side ought to provide more detail



or evidence. Such a process, if taken up, for example, by broadcasters, and used to help shape ongoing debate, might foster deeper engagement among voters with the complexities of the choice before them. It could potentially be achieved within a 22-week referendum timetable, although a slightly extended timetable would allow time for more thorough planning and thereby help to ensure that the process would run smoothly.

## Conclusion

Calling a further referendum on Brexit would require legislation. The first two parts of this chapter 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, it is preferable that 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. Table 2 highlighted in green those reforms that could be implemented speedily. Given political will, these could be applied within the referendum timetable set out in Chapter 2 – though a slightly extended timetable would nonetheless make that easier and allow more time for detailed consideration.

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.

## 5. Would a referendum be legally binding or advisory?

One of the key choices for the designers of any further Brexit referendum would be whether to make its result legally binding. The result of the 2016 referendum was, in strict legal terms, advisory, though politicians have in fact treated the outcome as binding them politically. For reasons discussed below, it would have been difficult to make the 2016 referendum fully binding, but the situation is now different and a further referendum could more easily be given that legal status. This would have the advantage of increasing clarity and certainty for voters. But it would also introduce some additional complications.

### What it would mean for the result to be binding

What it means for a referendum result to be legally binding depends on the context. In many countries, when a constitutional referendum is held, the vote represents a decision on a constitutional amendment in the literal sense (i.e. a change to the text of the constitution). What will change as a result of the decision is therefore very explicit, and the referendum itself has legal status in bringing that change about.

Within the UK's constitutional system, there is no single text to amend, and no constitutional document that has a status of 'higher law'. Hence the effect of the binding mechanism would be to place a legal duty on government ministers to implement the referendum result, via the referendum legislation stipulating the actions that ministers must take when one or other option wins the vote. Ministers would be breaking the law if they failed to take those actions. In formal terms, parliament itself cannot be legally bound – the principle of parliamentary sovereignty famously meaning that no existing parliament can 'bind its successors'. So theoretically parliament could seek to overturn a referendum result by changing the law. But it is very hard to imagine this happening: in the event of a vote on a clearly-defined proposition (such as a referendum pitting a specific deal against Remain), politicians would make a clear commitment to implement the result.

The most recent UK-wide referendum before the Brexit vote – the 2011 referendum on the voting system for elections to the House of Commons – was binding in the sense just set out. The legislation providing for the referendum – the Parliamentary Voting System and Constituencies Act 2011 – specified in full detail how the proposed new voting system (the Alternative Vote, AV) would work. It then indicated what the responsible minister would have to do under either of the possible referendum outcomes. Section 8 of the Act set out that, in the event of more votes being cast for AV than for the status quo, the minister would have to bring the relevant parts of the Act into force; otherwise an order would be issued to repeal these provisions. Following the No vote, the latter is what happened.

Some other referendums held in the UK have also been legally binding. Notably, the legislation for the 1979 referendums on devolution to Scotland and Wales provided full details of the proposed devolution schemes, but in the event that the specified majorities for change were not reached required the minister to lay before parliament an order to repeal these provisions (Scotland Act 1978 s.85; Wales Act 1978 s.80). By contrast, other referendums – including the 1975

referendum on membership of the then European Community, the devolution referendums in Scotland, Wales, Northern Ireland, London, and the North East of England between 1997 and 2004, and the 2014 referendum on Scottish independence have in law been only advisory.

The legislation underpinning the 2016 Brexit referendum could potentially have made the result binding in a limited sense: by placing ministers under a legal obligation to trigger the Article 50 process within a specified time period in the event of a majority vote to leave the EU. But it could not have bound ministers actually to conclude the Brexit process in any particular way: as the referendum was on the principle of Brexit, rather than on any worked-up proposal, it was too unspecific to be made legally binding in this sense. Developing the full plans for Britain's departure clearly required negotiation with the EU27, and the terms could not therefore have been set down in advance by a UK-only referendum.

The situation is now very different from that in 2016. A withdrawal deal does exist, so the option of making the vote to leave on those terms legally binding is potentially available. It would also be possible to stipulate the actions required of ministers in the case of a vote to remain in the EU.

The section below sets out the alternative approaches to making the different referendum results binding or not; the final section examines the legislative options for achieving these outcomes.

## **What should be binding?**

There are essentially three options as to whether any further referendum would be made legally binding or advisory: making it entirely advisory, entirely binding, or a mixture of the two.

### **Whatever the referendum result, it is only advisory in law**

This would be the simplest option to legislate for, as no special legally binding provisions would be required in the case of either outcome. On the other hand, it would clearly provide the least clarity and certainty for voters. There may well be a view that building in certainty is unnecessary: as noted above, the 2016 result was treated as politically binding, with MPs agreeing to trigger Article 50 by an overwhelming margin – thus recognising the political mandate from the referendum, even if this conflicted with their personal views. However, constitutional conventions have been strained to breaking point in recent months, and MPs have several times felt no alternative but to bind ministers to doing things that normally would be taken for granted. It could be felt that the same is necessary for a referendum.

### **Whatever the referendum result, it is legally binding**

In this case, the legislation would stipulate what ministers would have to do under each of the possible outcomes. That is what was done for the 2011 voting system referendum, and it is the approach that gives the greatest possible clarity and legal certainty. It also treats both possible outcomes equally. But, as discussed below, it would almost certainly extend the time required to legislate for the referendum.

## One possible result is legally binding, the other not

While it may seem odd to differentiate between results, there may be reason to do so:

- If a Conservative-led government is formed after the election and is forced down the referendum path, parliament may be confident that ministers would implement the Withdrawal Agreement if voters backed this option, but less confident that ministers would revoke Article 50 in the case of a vote to remain in the EU. In that case, making only the Remain option legally binding would alleviate the primary concerns about implementation.
- In the opposite scenario of a Labour-led government there might, in contrast, be confidence that ministers would implement a Remain vote but not a Leave vote.

There is precedent for making a referendum result legally binding only under one of the possible results: this is what was done for the 1979 devolution referendums. Specifically, the legislation stated what ministers should do if the required majority in the referendums was not reached; but it placed ministers under no explicit obligation in the event that this majority was reached. The reason for this was straightforward: the devolution plans were set out in the legislation and were government policy, so there was little reason to doubt that ministers would want to implement them if they secured public support.

Notwithstanding this precedent, there would be substantial political risk in treating one of the possible referendum outcomes as legally binding and the other as advisory. Leave and Remain supporters alike suspect that there are senior political figures who wish to block their preferred outcome. Appearing to skew the referendum playing field in this way would not help to alleviate such concerns. The section below will hence discuss the legislative options available to make both referendum outcomes binding.

## The legislative options to make the outcome binding

### Legislation for a referendum and full implementation

The most obvious way to make a referendum legally binding would be to provide both for the referendum itself and for the full legal consequences of either possible referendum result in the same piece of legislation. This legislation would require responsible ministers either to revoke Article 50 or to ratify the deal promptly following the referendum result. It would also incorporate the changes to UK law needed to fully implement each outcome, including:

- provisions to repeal the EU (Withdrawal) Act 2018 and other key Brexit-related legislation, plus all other legal changes necessary to revert to the status quo ante in the event of a vote to remain;
- full provisions implementing the Withdrawal Agreement in the event of a vote to leave – i.e., similar to those in the existing EU (Withdrawal Agreement) Bill.

This approach would match that taken for the referendums in both 1979 and 2011. It also seems the option more likely to come about. Labour's manifesto proposes to 'introduce a Withdrawal Agreement and Referendum Bill, providing the legal basis to conduct and implement the outcome of the referendum' (Labour Party 2019: 91). As discussed earlier, were a Conservative government

to be forced to accept a referendum as the price for passing its deal, that would probably happen through an amendment to Johnson's EU (Withdrawal Agreement) Bill.

Legislation combining full implementation provisions with the details of the referendum itself would clearly be complex. This would be the case not only for a Leave result, but also for a vote to remain in the EU, given that a great deal of detailed 'delegated' legislation has been passed to provide for Brexit in the last three years. In the case of a Leave vote, the aspects of implementing legislation – for example, regarding parliament's role in negotiations on the future relationship – could prove controversial and require significant debate. This route should therefore be expected to result in a referendum timetable longer than the 22 weeks suggested in chapter 2.

### **Legislation for a referendum and immediate implementation of key changes only**

Given the complexities of the first approach, a simpler and more pragmatic alternative might be sought. One possibility could be to use the referendum legislation to provide only for implementation of the result in international law, alongside repeal of the most obvious UK statutes, while leaving the more detailed and complex domestic legal aspects until later. The legislation could thus require responsible ministers:

- in the event of a vote to remain, to write to the President of the European Council revoking the UK's declaration of its intention to leave the EU under Article 50 of the Lisbon Treaty, and to repeal the EU (Withdrawal) Act 2018, and other key Brexit-related legislation – but without a full review of other provisions (such as delegated legislation made under the EU (Withdrawal) Act 2018);
- in the event of a vote to leave, to ratify the deal (replacing the existing requirements for parliamentary ratification under the EU (Withdrawal) Act 2018), but leaving the domestic implementation of the Withdrawal Agreement to a separate Act.

Such legislation could be quicker to draft, and would probably pass through parliament more swiftly than would comprehensive implementation legislation. However, further action would still be required to tie up legal loose ends. The detailed legislation to implement a Remain result could potentially be prepared alongside the referendum itself. It could then either be passed before the referendum date or be ready for introduction immediately afterwards. So long as the key provisions (as indicated above) had already been repealed, this would provide legal certainty in the event of a Remain result. In preparing for a Leave outcome the situation would be slightly different. The EU (Withdrawal Agreement) Bill could potentially be passed during the referendum period, with a clause stating that it would not be brought into effect except in the event of a Leave vote. But if its passage were deferred until after the referendum result, this would leave a degree of legal uncertainty, and could potentially cause further delay to the UK's ultimate departure from the EU.

This route entails somewhat greater risks than does full implementation. It requires a firm parliamentary majority for the implementing legislation – which might not be available in the case of a hung parliament or a slim majority for either party. There would remain a risk that implementing legislation introduced before a referendum could be delayed by parliamentary disagreements and fail to pass quickly. But such an approach would have the advantage of allowing the referendum legislation to proceed more speedily, keeping to the 22-week minimum timetable.

## Conclusion

There are advantages and disadvantages in each of the possible approaches:

- Making the referendum advisory, as in 2016, would be simplest and quickest. It would not add further pressure to the referendum timetable, and would treat both possible outcomes equally. On the other hand, it would not create legal certainty for either side. There could be concerns that a government might find ways to avoid implementing a referendum result that it did not like.
- Meanwhile, making only one outcome binding – whatever the reasons for doing so – could breed further mistrust among either Leave or Remain supporters. If the referendum is to be binding, it seems sensible for both results to be equally so.
- The likeliest route to this outcome would, as the Labour Party proposes, be to legislate for the referendum and full implementation of the result together. This would provide maximum clarity and legal certainty – but would also risk delay beyond the 22-week timetable described in Chapter 2. A similar outcome seems likely if a referendum is forced on a Conservative government, as this would probably come about through amendment to the EU (Withdrawal Agreement) Bill.
- An alternative route could be to include only the international side of implementation, alongside the most obvious repeals, in the referendum bill. Such legislation would be simpler and would probably therefore pass more quickly. But separate implementing legislation would still be needed – making this a somewhat riskier option.

## 6. Fitting it all together: how and when might a further referendum occur?

This report has explored the circumstances that might lead to a further referendum on Brexit, and the form that such a referendum might take, given different scenarios. It has not advocated for or against a referendum, or assessed the broader impact that such a vote might have. Rather, it has explored the practical implications of the different options: in terms of the processes to bring a referendum about, the standards that it should meet, the options for reforming regulation, and, crucially, the timetable.

Chapter 2 concluded, in line with the earlier edition of this report, that the minimum timetable from the point at which parliament decides in principle to hold a referendum to the date on which that referendum is held is roughly 22 weeks – or five months. Claims that organising a referendum would take a year or more are therefore overstated. However, very clearly, a decision to proceed with a referendum would require a further extension to the Article 50 period, which currently expires on 31 January 2020. And there are various factors that could put pressure on the minimum timetable, requiring a somewhat longer period of planning and preparation. This closing chapter considers how the pieces fit together, and what the overall timetable would likely be. The most obvious implication of this is for the length of Article 50 extension which a future government should request if seeking to hold a referendum.

Summing up the points in earlier chapters, the factors likely to impinge on the timetable include the following:

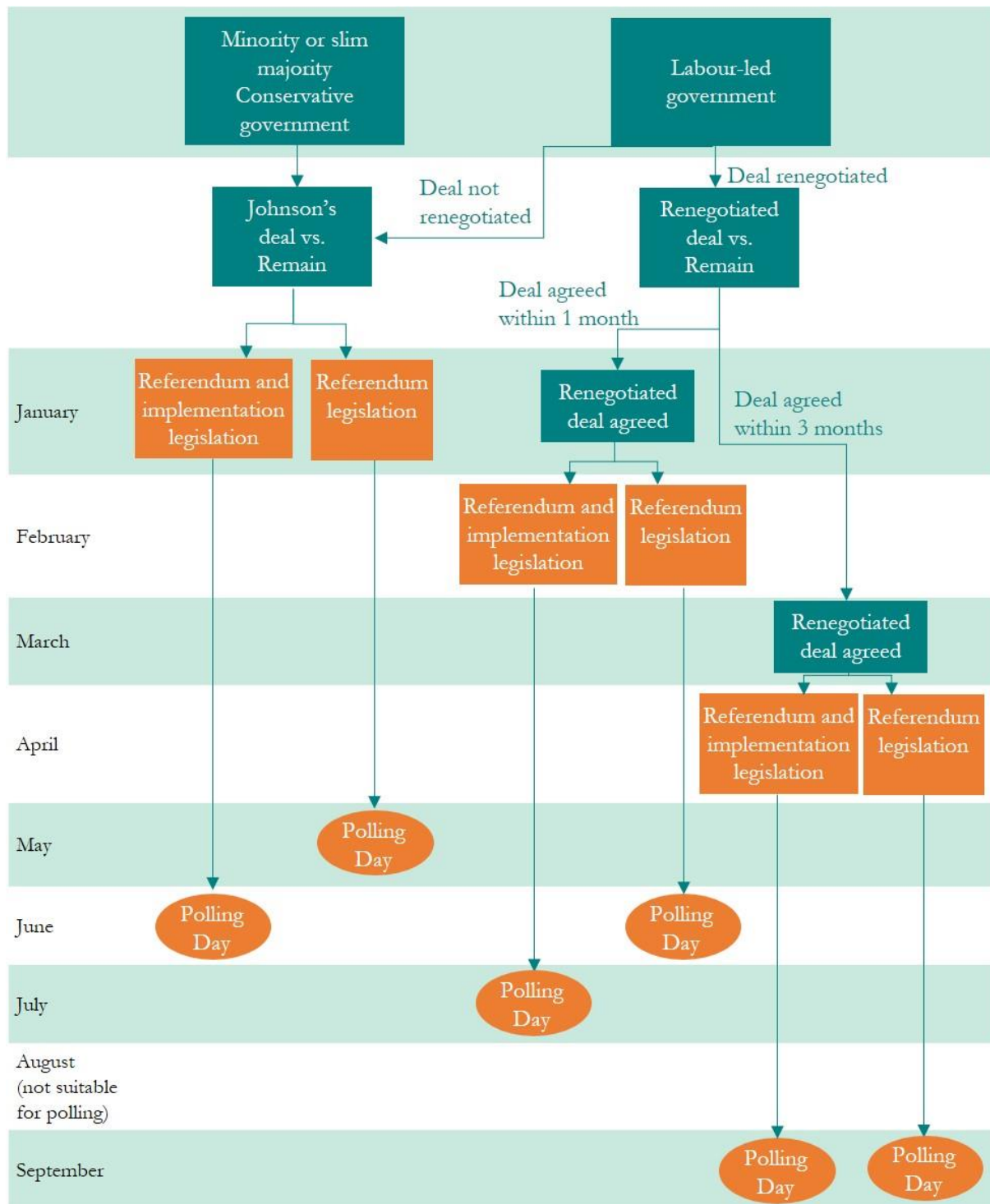
- Is the referendum to be held on a pre-existing Brexit deal, or is time required (as Labour’s policy implies) for further renegotiation before proceeding to a referendum?
- How contentious would the referendum bill be in parliament? This depends partly on the constellation of parties and groups in the House of Commons after the general election, and also on the content of the bill.
- What form would the referendum question take? This may be one of the points of contention in parliament. We conclude that (unlike when the previous edition of this report was published) a three-option referendum is unlikely. Moving to such a format would slow down the process.
- To what extent would campaign regulation be tightened up and updated via the referendum bill? Some updating is essential, and could be incorporated within the 22-week timetable. Other more major changes might be desirable, but in the interests of speed would likely be set aside.
- Would the referendum result be made legally binding? This is not essential, but would be beneficial to provide clarity and certainty for voters. Preparing for a fully legally binding referendum would be likely to take slightly more time.

The effect of these factors is summarised in Figure 3, in simplified form. This assumes a simple binary referendum question, rather than building in the unlikely possibility of a three-option poll. It allows for slow and fast timetables for Labour’s renegotiation with the EU27 – respectively



allowing three months for this process (as proposed in the party’s own timetable) or just one month (to allow Labour to meet its promise of holding a referendum within six months). A six-month timetable could not accommodate other delays, which might arise, for example, if some of the changes to the regulatory framework proved particularly controversial, or if making the referendum result binding proved difficult. If the timetable restriction were relaxed, these changes could be more easily fitted in.

**Figure 3. Possible routes to a referendum**



The quickest route to a referendum would clearly be to proceed immediately after the election to a binary vote on Boris Johnson's deal versus Remain. The scenario most likely to bring this about is a minority Conservative government dependent on support from pro-referendum forces in the House of Commons (potentially, any other group except the Brexit Party). In this case, the passage of the European Union (Withdrawal Agreement) Bill could be made conditional on the approval of the deal in a referendum. The bill already exists, and was introduced into the House of Commons shortly before the general election. It could therefore be quickly reintroduced. An assurance from the Prime Minister that a referendum amendment would be accepted could secure the bill's second reading, and see it proceed to committee stage where such an amendment could be introduced. If approved in principle, provisions to allow for the referendum could then be included within the bill.<sup>2</sup> This would result in a referendum that was binding in the event of a Leave vote, as the bill to implement the outcome would already be on the statute book. Referendum supporters would no doubt want to ensure that it was also binding in the event of a vote for Remain, by including provisions requiring the Prime Minister to revoke Article 50 and repeal existing Brexit legislation. If the Commons majority for this compromise solution held together, a referendum might be held in late May or June 2020 – assuming that the regulatory changes were limited to the essentials. In terms of regulation, Remain-supporting MPs would clearly wish to ensure some tightening up, particularly regarding the government's role in the referendum campaign and the extent to which it could use its resources to encourage a Leave vote.

As suggested at various points throughout this report, there could – perhaps counterintuitively – be some attractions for a Labour-led government in pursuing a similar course. Given that Johnson's deal already exists, this would expedite the referendum timetable. In addition, it would maximise the legitimacy of the referendum among Brexit supporters, who would likely consider a Labour deal (which envisages a closer future relationship with the EU) as not offering a 'real Brexit'. However, importantly, a Labour government would need to be prepared to implement Johnson's deal in the case of a Leave vote. Labour's own concerns, alongside those of the Northern Irish unionist parties and others about the deal's potential impact on the Union, would be a significant obstacle. If this route were to be chosen, one key difference to the scenario under a Conservative-led government is that a parliamentary coalition in favour of a referendum might prefer to set aside the EU (Withdrawal Agreement) Bill and move straight to an in-principle referendum on the deal versus Remain. This could speed matters up slightly, given the delays that are possible during the passage of that bill. However, it would likely attract criticism from Brexit supporters, who would prefer the certainty that a Leave outcome in a further referendum would be legally binding and have immediate effect. From the point of view of legitimacy, therefore, it could still be beneficial for the parliamentary majority to demonstrate its commitment to respecting the outcome by passing the EU (Withdrawal Agreement) Bill on a conditional basis.

Labour's proposed timetable of renegotiating the deal and holding a referendum within six months is challenging. As discussed in Chapter 2, it would be difficult in practice to test and finalise the referendum question unless the deal had already been secured. This would hence slow down the party's proposed six-month referendum timetable, unless a new deal was secured very quickly indeed. Making that deal binding in the event of a Leave vote, through passing a full Withdrawal

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<sup>2</sup> In theory the EU (Withdrawal Agreement) Bill could then be set aside, to make way for the speediest possible passage of a referendum bill, but this seems very unlikely under a Conservative government. It is a more likely possibility in the event of a Labour-led administration, as discussed below.

Agreement and Referendum Bill, as the party proposes, would be wise; but it would add to the timetabling challenges. The alternative of a non-binding referendum on an agreement that included a perhaps necessarily vague Political Declaration (given the haste of the negotiations) could meanwhile be problematic in terms of the clarity and certainty of the Leave outcome. It would add to the pre-existing concerns among Brexit supporters, who would both oppose a referendum in principle and likely consider this an unacceptable deal. If this kind of dissatisfaction led Brexit supporters to boycott the referendum it would raise very serious concerns about the legitimacy of the outcome, which could have long-lasting negative effects.

Allowing more time for Labour's renegotiation would stretch the timetable beyond the party's preferred six months, requiring a minimum of closer to eight months. This would imply a referendum in the autumn of 2020. If a longer timetable were allowed, this could provide space for more careful consideration of the reforms necessary to campaign regulation, perhaps with some consultation on these matters taking place alongside the negotiations with the EU. Clearly this could have advantages; however, these would be counterbalanced by the inevitable frustrations and uncertainties that would be created by further delay.

In general, as pointed out by the Constitution Unit's Independent Commission on Referendums (2018), the UK could greatly improve how it uses this form of public participation – in terms of campaign regulation, but also improving opportunities for informed discourse, and building other participation mechanisms into the process. As discussed in Chapter 4, referendums can usefully involve citizens in setting the question, deliberating on the options, and producing trustworthy briefing materials for other citizens in making their choice. Scope for using mechanisms such as citizens' assemblies for a further Brexit referendum is more limited than it would have been before the poll held in 2016. Nevertheless, some measures of this kind – such as a broadcaster-led citizens' panel examining the implications of each of the options on the ballot paper – could, and ideally should, be included. They would be feasible within six months, while extending the referendum timetable to around eight months would allow such options to be developed more fully.

## Conclusion

A further referendum on Brexit is most likely to come about if a Labour-led government forms after the coming election, though it could also happen if a weak Conservative government were forced to accept such an outcome by pro-referendum parties. Holding a referendum would take a minimum of 22 weeks, or five months. Keeping to that timetable would be easiest – and the legitimacy of the vote would likely be highest – if the referendum offered a straight choice between leaving the EU on the terms of Boris Johnson's deal or remaining in the EU. This would allow such a referendum to take place in May or June 2020. If a Labour-led government sought to renegotiate the deal first, by contrast, the six-month timetable that the party proposes may well prove challenging. A slightly longer timetable would, however, make it easier to address the most egregious failings in current referendum campaign regulations, and take steps to improve the quality of campaign discourse. It would also be easier to make the result of the vote legally binding under a slightly longer process. Even taking this into account, a referendum, if parliament wanted to pursue such a route and there was a House of Commons majority to deliver it, should be possible by September 2020.

Whatever the parliamentary arithmetic, any further referendum is likely to remain publicly contentious. If one is to be held, it is imperative that it should enjoy maximum legitimacy and thus that it should be conducted well.

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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. Now, as the UK approaches the general election on 12 December 2019, many parties have made proposals for a further public vote on Brexit central to their manifestos. With the general election outcome currently unknown, this report examines the scenarios under which a referendum might occur and considers the key questions which its advocates in the new parliament may face.

The report seeks not to argue for or against a further referendum. Instead it aims to inform debate about how such a referendum could be run. It sets out the choices which politicians would have to make, including about the question on the ballot paper, the feasibility of making the result legally binding, and the appropriate rules for holding the poll – including the necessary updates to rules for online campaigning. Finally, it considers how this could all fit together in terms of a timetable.

The report concludes that a further referendum is, currently, a possibility in the new parliament in two key scenarios. First, a Labour-led government could pursue the party's policy of holding a confirmatory referendum. Second, a minority Conservative government might be forced to accept such a poll as the price of passing its Brexit deal. Labour's policy of renegotiating the deal and holding a referendum within six months is challenging but potentially feasible. Nonetheless, for the referendum to command public legitimacy, Leave supporters would need to consider the deal a 'proper' Brexit. There could therefore, perhaps counterintuitively, be some benefits in Labour holding a referendum on Boris Johnson's Brexit deal.

A further Brexit referendum will depend, crucially, on the make-up of the new parliament. But if one 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. In 2017–18 the Unit organised the Independent Commission on Referendums.

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