



Brexit: The State of Play

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Introduction

On Monday 10 December, after just three of the five required days of Parliamentary debate, the Prime Minister told the House of Commons that she intended to postpone the ‘meaningful vote’ on the motion to approve the UK’s EU Withdrawal Agreement.

The vote had been scheduled for Tuesday, 11 December. However, after the initial three days of debate it was clear that the Prime Minister did not have the support to pass the motion on the basis of the current terms of the Withdrawal Agreement and Political Declaration.

The decision was immediately followed by a vote of no-confidence in the Prime Minister. Though Theresa May won this vote by a comfortable majority, the 117 votes against her leadership indicate the depth of the divisions in the Conservative Party ahead of the rescheduled vote in mid-January.

The Prime Minister has since been in Brussels, seeking further “assurances” from the EU as to the legal status and effect of the Northern Ireland backstop provision. This culminated in an appeal to EU leaders at the European Council Summit of 13-14 December.

The December European Council

At the December European Council, Mrs May suggested a number of possible changes to the deal to make it more politically palatable for MPs, expressing a preference for legally binding guarantees rather than political ones. The latter of these two options is the preferred one of the EU27, who are reluctant to make any changes to the terms of the Withdrawal Agreement itself, preferring to focus on changes to the non-binding Political Declaration on the Future Relationship.

The discussion largely focused on the controversial topic of the temporary or indefinite nature of the backstop. Possible resolutions put forward by the Prime Minister included suggestions on the sequencing of the transition and future relationship negotiations, proposing, among other things, a commitment to conclude the negotiations by a specific date.

The Negotiations: A Refresher

Phase One (Complete)

In Phase One, the following priority issues were up for discussion:

- Citizens’ rights
- The UK financial settlement
- Issues pertaining to Ireland and Northern Ireland

On 19 March, and at the subsequent European Council meeting on 22-23 March, agreement was reached on the first two issues, and commitments were made to address many, though not all, of the issues relating to Ireland.

Phase Two (Complete)

In addition to finalising the open issues above, in particular the **Northern Ireland backstop**, Phase Two dealt with the following:

- Transitional arrangements for the UK after March 2019
- A Framework for the future relationship between the EU and UK
- Governance arrangements for the Withdrawal Agreement
- Text of the Northern Ireland Backstop

Other suggestions included a commitment to begin the future relationship negotiations immediately after the UK Parliament ratifies the deal – an idea which is firstly not practical, since the parties cannot legally begin trade negotiations until the UK becomes a third country, and secondly, would amount to little more than a token gesture, in light of the short timeframes involved.

A further suggestion floated by the Prime Minister was for the Political Declaration on the Future Relationship to be given legal status, alongside the Withdrawal Agreement. However, this too would be somewhat problematic, particularly in light of the vaguer language of the Declaration.

For the EU's part, there is a willingness to be helpful to the Prime Minister, however it is clear that some of her suggestions are unworkable, and there are question marks over whether those changes *which are workable* would have any measurable impact upon the debate in the UK.

Ultimately, the Council concluded the following (bold emphasis ours):

*The European Council reiterates that it wishes to establish as close as possible a partnership with the United Kingdom in the future. **It stands ready to embark on preparations immediately after signature of the Withdrawal Agreement to ensure that negotiations can start as soon as possible after the UK's withdrawal.***

*The European Council underlines that the backstop is intended as an insurance policy to prevent a hard border on the island of Ireland and ensure the integrity of the Single Market. **It is the Union's firm determination to work speedily on a subsequent agreement that establishes by 31 December 2020 alternative arrangements, so that the backstop will not need to be triggered.***

*The European Council also underlines that, **if the backstop were nevertheless to be triggered, it would apply temporarily, unless and until it is superseded by a subsequent agreement that ensures that a hard border is avoided. In such a case, the Union would use its best endeavours to negotiate and conclude expeditiously a subsequent agreement that would replace the backstop, and would expect the same of the United Kingdom, so that the backstop would only be in place for as long as strictly necessary.***

While this is not necessarily the final word, on the matter it remains to be seen whether EU leaders will be willing or able to go significantly further than this.

What options are available to Theresa May?

If no stronger assurances can be given by the EU, Theresa May will face an uphill battle in securing the consent of the UK Parliament. However, one possible option to satisfy the concerns of MPs would be to give them a stronger voice in the direction of the negotiations over the Future Relationship. A number of ideas are being floated in and around Westminster, including the possibility of creating a parliamentary committee or a citizens' assembly, or both, to consider the preferred format for that relationship. These would both require strict time limitations, of course, in order for the negotiations to commence as soon as possible.

Beyond this, if Parliamentary consent cannot be obtained, a general election or even a second referendum may be required to break the deadlock.

The next section of this note outlines the process for debating and ratifying the Withdrawal Agreement.

Withdrawal

Phase One

Priority issues in this phase include:

- Reciprocal rights for UK and EU citizens
- Agree on methodology for calculating the UK's liabilities
- Northern Ireland and the Good Friday Agreement

'Sufficient Progress' was declared on the Phase One issues in December 2017

Unresolved issues from Phase One, for example the Northern Ireland backstop, were discussed in Phase 2

Transition and future relationship

Phase Two

Phase Two of the negotiations focused on:

- The Northern Ireland backstop
- Defining transitional arrangements for the UK after it leaves the EU; and
- Defining a framework for the UK's future relationship with the EU

The sides agreed on transitional arrangements prior to the European Council on 22-23 March 2018.

A deal was reached by negotiators on the evening of Tuesday 13 November, and was approved by EU leaders at a special Brexit summit on 25 November 2018.

The last months will be set aside for finalisation and approval of the deal by the UK Parliament, European Council and the European Parliament.

Approval phase

Post-Brexit

19 June 2017

Opening of negotiations

22-23 June 2017

European Council Summit

1 July 2017

Estonian Presidency of the Council of the EU begins

24 September 2017

German Election

19-20 October 2017

European Council Summit

14-15 December 2017

European Council Summit

1 January 2018

Bulgarian Presidency of the Council of the EU begins

22-23 March 2018

European Council Summit

28-29 June 2018

European Council Summit

1 July 2018

Austrian Presidency of the Council of the EU begins

18 - 19 October 2018

European Council Summit

25 November 2018

Emergency Brexit summit

13 - 14 December 2018

European Council Summit

1 January 2019

Romanian Presidency of the Council of the EU begins

7 January 2019

Debate over the Meaningful Vote is scheduled to begin

14 January 2019

Provisional date for the Meaningful Vote

21-22 March 2019

European Council Summit

29 March 2019

The UK leaves the EU

Transition period begins

1 July 2020

Final date for extension of transition period

31 December 2020

Provided there has been no extension, transition period ends

The UK parliament and ratifying the Withdrawal Agreement

As has become clear in recent weeks, the House of Commons vote is a significant challenge for Prime Minister Theresa May and for the finalisation of the Brexit process. This section provides an overview of the procedure for parliamentary ratification, and notes the currently declared positions of MPs in the House of Commons.

As noted in the introduction of this document, the meaningful vote was originally scheduled for Tuesday, 11 December but has now been postponed. In a House of Commons statement on 17 December 2018, Prime Minister May said that the debate would be resumed in the week of 7 January 2019. The vote is due to take place in the following week.

This vote will follow a five-day debate on a motion to approve the Brexit deal in the House of Commons, during which MPs will again have the opportunity to table amendments to the motion (note that all previously tabled amendments are now disregarded).

The ‘meaningful vote’ is provided for in the EU (Withdrawal) Act, passed in June, which provided MPs the right to a vote on the final text of the Brexit deal. The UK Government therefore cannot ratify the Brexit deal, and legislate for its implementation, unless it has been approved by the House of Commons. It must also be debated in a motion to ‘take note’ in the House of Lords (a motion used to describe a debate without the need for a specific decision).

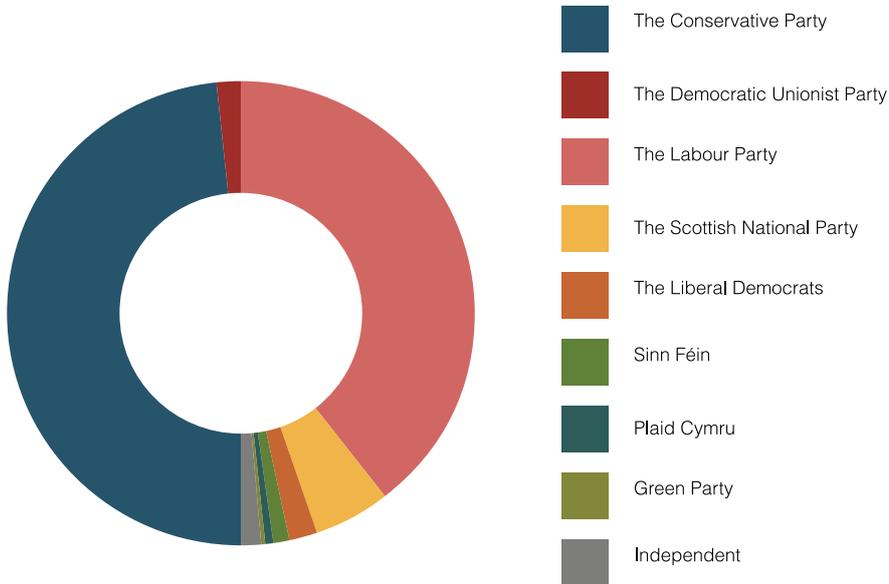
Among the challenges Theresa May faces is the current composition of the House of Commons, in which she is reliant on the DUP for her small working majority, as well as the deep divisions the deal has created within her own party.

Composition of the House of Commons and positions on the Withdrawal Agreement

The House of Commons is composed of 650 seats, with an MP elected for each constituency in the UK. After the 2017 elections, the Conservative Party lost its single-party majority in the House of Commons, resulting in a confidence and supply arrangement with the DUP.

The Conservatives hold 315 seats (down from the 330 they held in the previous Parliament). The party’s confidence and supply partner, the DUP, holds ten seats. The Government therefore holds a working majority of just 13 MPs. A simple majority of votes is needed to pass the deal. The diagram on the following page shows the makeup of the current Parliament.

Party composition of the House of Commons and official party positions on Brexit deal



The Conservative Party

- Official position: **In favour**
- Notes: Many Conservative MPs are opposed to the deal, for example the Eurosceptic European Research Group (ERG). The website, *Conservative Home* have identified 99 MPs who may or will vote against the deal.¹

The Scottish National Party

- Official position: **Opposed**
- Notes: The SNP campaigned against Brexit and are in favour of a special deal keeping Scotland in the Single Market and Customs Union.²

Plaid Cymru

- Official position: **Opposed**
- Notes: Plaid Cymru campaigned against Brexit and is against the current deal. The Party is in favour of a People's Vote.

The Democratic Unionist Party

- Official position: **Opposed**
- Notes: The DUP campaigned for Brexit but has stated its opposition to the current deal.

The Liberal Democrats

- Official position: **Opposed**
- Notes: In favour of a People's Vote (second referendum).

Green Party

- Official position: **Opposed**
- Notes: The Green Party campaigned against Brexit and is against the current deal. The party is in favour of a People's Vote.

The Labour Party

- Official position: **Opposed**
- Notes: Many Labour MPs were opposed to Brexit and the party has at times struggled to put forward a coherent position on the issue.

Sinn Féin

- Official position: **Opposed but abstaining**
- Notes: Sinn Féin MPs are elected on a policy of abstentionism and will not be voting on the deal.

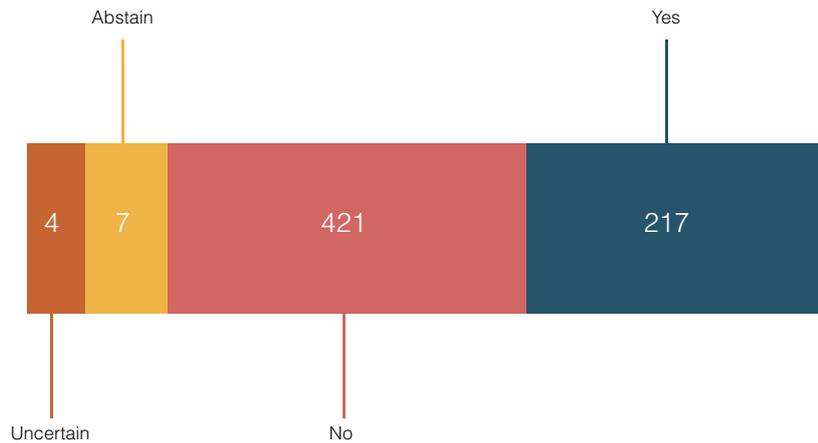
Independent

- **1 In favour**
- **4 Opposed**
- **4 Unconfirmed**

¹Mark Wallace, 'Our estimate of how many conservative MPs oppose the Brexit deal.' Conservative Home. 6 December 2018. Accessed at: <https://www.conservativehome.com/parliament/2018/12/our-estimate-of-how-many-conservative-mps-oppose-the-brexit-deal-not-100-but-64.html>

²Ian Blackford, 'If Northern Ireland can get a special Brexit deal, so must Scotland.' Scottish National Party news. 19 November 2018. Accessed at: <https://www.snp.org/if-northern-ireland-can-get-a-special-brexit-deal-so-must-scotland/>

Stated positions of MPs on the Brexit vote*



*Please note that this diagram is based purely on stated and reported positions prior to the debate and is not intended to predict the result of the vote. These positions may have changed by the time the vote is called.

Section 13 of the European Union (Withdrawal) Act

During the passage of the Withdrawal Act through Parliament, it was amended to provide for a ‘meaningful vote’ on the final text of the Withdrawal Agreement and Political Declaration. Section 13 of the European Union (Withdrawal) Act was amended so that Government would be unable to ratify the deal unless the following four conditions are met:

1. The Government lays the negotiated Withdrawal Agreement and Political Declaration before Parliament, along with a statement that political agreement between the negotiating teams has been reached;
2. A motion to approve the deal is debated and passed by the House of Commons;
3. A motion to take note of the Withdrawal Agreement and Political Declaration has been tabled and debated in the House of Lords; and
4. An Act of Parliament has been passed containing provisions for the implementation of the Withdrawal Agreement.

Considering that the Prime Minister has spent the past week seeking further “assurances” from the EU as to the legal status and effect of the Northern Ireland Backstop provision, and as this process is not yet complete, it is somewhat unclear as to whether step 1 (the statement that political agreement has been reached) will need to be repeated. In either instance, the House of Commons will in January proceed to debate and potentially amend the motion to approve the deal. As before, MPs are likely to table amendments to attach conditions to the motion to approve the bill.

Debate Procedure

On Tuesday, 4 December 2018 the House of Commons voted on the Government's Business of the House motion, which outlines the procedure for debate. This procedure will again apply to the vote in January 2019.

Notably, the approved motion included a crucial cross-party amendment, which would give Parliament the right to amend Government's plans, should the current deal be voted down.

The agreed procedure allows for five days of debate with up to eight hours each day. At the end of this debating period, the Speaker of the House of Commons may then select up to six amendments to the Government's motion for approval of the Withdrawal Agreement. These amendments can be debated on the final day, and will then be voted upon.

Possible outcomes

As noted above, up to six amendments to the Government's motion may be selected by the Speaker of the House to be debated and voted upon on Tuesday, 11 December 2018. It is likely that any amendments to the motion will attempt to attach conditions to the bill's ratification.

Although the Government would not be obliged to observe amendments to the motion, there could be legal ambiguity as to whether the Government has the authority to ratify the deal, if the motion is amended to the extent that there is uncertainty as to whether Parliament actually approves it.

For example, ahead of the first vote in December, the Labour Party tabled an amendment to the motion which rejected both the agreed deal, and the possibility of a no-deal Brexit, and asked the Government to 'pursue every option that prevents' these outcomes. The Labour Party amendment at that time read:

1) declines to approve the negotiated withdrawal agreement and the framework for the future relationship because it fails to provide for a permanent UK-EU customs union and strong single market deal and would therefore lead to increased barriers to trade in goods and services, would not protect workers' rights and environmental standards, allows for the diminution of the United Kingdom's internal and external security and is likely to lead to the implementation of a backstop provision in Northern Ireland that is neither politically nor economically sustainable;

2) declines to approve the United Kingdom's leaving the European Union without a withdrawal agreement;

3) and therefore resolves to pursue every option that prevents the United Kingdom's either leaving the European Union without a withdrawal agreement or leaving on the basis of the negotiated withdrawal agreement laid before the House.

An amendment of this type would be an example of one that could give rise to a degree of legal ambiguity, as described above. The EU has already stated that the agreed deal is final, and while there may be tweaks to some elements arising from Theresa May's visits to Member State capitals and Brussels, there can be no full renegotiation. If the UK did not leave on the agreed terms and could not renegotiate, this would leave it with very few realistic options.

The Department for Exiting the European Union has indicated that the Government could run the risk of litigation should they attempt to ratify a deal passed on a heavily amended motion.³ Rt Hon Dominic Grieve QC, former Attorney General, has suggested that any amendment to the motion could be fatal to the process of approval.

Next steps in the UK

If Parliament approves the deal, the Government must legislate to implement it. This process could be still more challenging, as Acts of Parliament are subject to greater scrutiny and debate than the motion to approve the Withdrawal Agreement will be. Ahead of the December vote, Nigel Dodds, the deputy leader of the DUP, has previously indicated that the party will withdraw its support from the Government, if the motion were approved. This would present significant challenges to the Government in legislating for the deal's implementation.

If Parliament rejects the deal, the Government has three weeks to make a statement outlining how it will proceed. In this case, a motion will be tabled in the House of Commons. Parliament may table amendments to this motion, in what may be viewed as an opportunity to direct the Government's plans.

However, before the three weeks elapse in which the Government must outline its plans, there are a number of options open to it:

- The Government may choose to table a **new motion** in the House of Commons to approve the deal, possibly adapting the wording slightly to take into account some of the amendments or elements contained in the initial Commons debate.
- The Government could technically begin **legislating for the implementation of the deal** before the motion is approved by Parliament. Sir David Natzler, Clerk of the House of Commons, suggested that it could be possible to introduce the bill with a retrospective provision saying that the passage of the motion through the House would be enough to meet the Conditions in Section 13.

Conclusions

Any amendments to the political agreement on the UK's withdrawal may ultimately be quite minor, and perhaps not even legally binding, and it is not clear that this will be sufficient to satisfy the concerns of MPs. How MPs will vote if faced with the choice of a 'no deal' or the deal on the table, remains to be seen.

The 'meaningful vote' is a decisive moment in the Brexit process, but in light of the divisive nature of the agreement, overcoming the opposition of many MPs – including within the Conservative Party – will be a challenge for Theresa May. Even if the deal can be ratified by Parliament, there could be further issues, whether arising from the currently tabled amendments to the motion for approval, or from the subsequent process of legislating for the agreement.

If the consent of Parliament cannot be obtained, or if the motion to approve is amended to the extent that legal ambiguity is created, the options open to the Prime Minister would be extremely limited. This has the potential to create something of a crisis in UK politics – perhaps leading to a second referendum on Brexit or a general election. In light of the exceedingly limited time left before the March 2019 withdrawal date, both of these scenarios would almost certainly require an extension to the Article 50 process, lasting anywhere from weeks to months, and this in turn would require the unanimous consent of the European Council.

State of play on key negotiating issues

Negotiating Issue	Status	Comments
Sequencing of negotiations	Agreed	The UK conceded on this first issue and the EU has held firm on its schedule
Rights of citizens	Agreed	Safeguard for the right to stay and continue working for EU citizens currently living in UK and family members, and UK citizens and family members currently living in EU.
The UK's liabilities (the 'divorce bill')	Agreed	The methodology for calculating the settlement has been agreed
Irish issues, including: <ul style="list-style-type: none"> • The Common Travel Area • Preserving the Good Friday Agreement • The Northern Ireland Border 	Agreed	<p>Agreement reached on the continuation of the Common Travel Area.</p> <p>Agreement on the principles for preserving the Good Friday Agreement.</p> <p>The backstop consists of a single UK EU-UK customs territory, with a series of measures implemented to ensure a "level playing field". Northern Ireland will also remain aligned to certain parts of the Single Market.</p> <p>This is agreed at a negotiating level, but proved highly controversial in the UK Parliamentary debates, leading to the UK Prime Minister to seek some renegotiation on the backstop provisions.</p>
Framework for future relations	Agreed	The Political Declaration on the Future Relationship was agreed on 25 November 2018. EU leaders have indicated that they would be open to minor alternations to the Political Declaration in an effort to make the backstop more palatable to the UK Parliament.
Transitional Arrangements	Agreed	Extension of the EU acquis until December 2020. Possibility for extension. The UK will not have voting rights or representation in the EU institutions in this period.

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