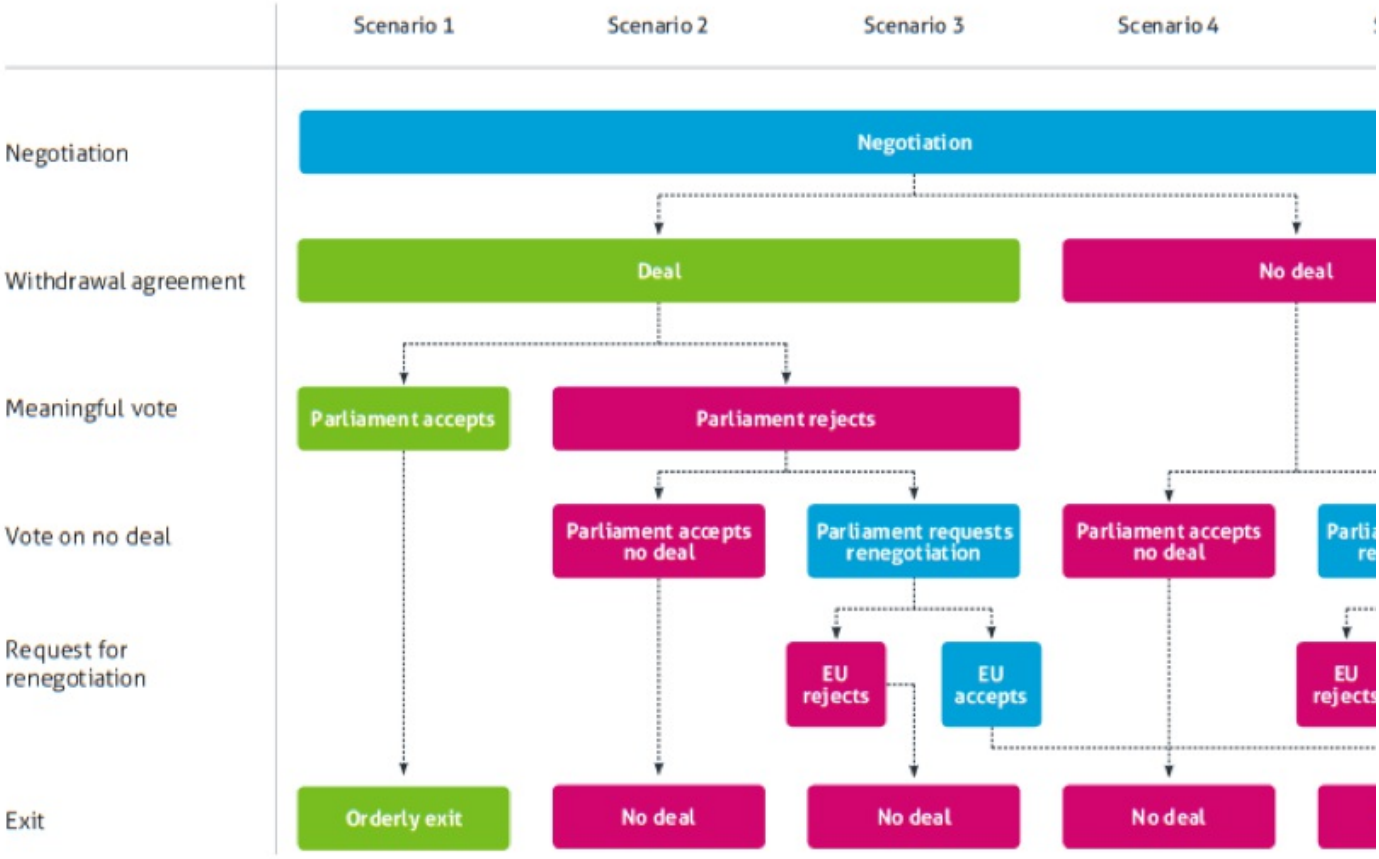
The Prime Minister's Brexit deal will face its biggest test in Parliament – here are some tools for her (and her opponents)

Brexit negotiations are entering the end game. The Prime Minister's Brexit deal will face its biggest test in Parliament, writes ***Joe Owen*** *(Institute for Government). He outlines multiple scenarios in which this process may unfold, and provides a selection of political options for both the Prime Minister and her opponents, while admitting that it is Parliament that will have last say on Brexit.*

Over the next few months, the government must conclude a withdrawal agreement with the European Union before seeking approval from Parliament in the form of a motion – the so-called 'meaningful vote' – on the deal. Only if both these challenges are met, legislation is passed to give effect to the agreement and both the UK and European Parliaments ratify the withdrawal treaty, will the UK leave the EU on 29 March 2019 in an orderly manner and with a transition in place. None of this is certain at the moment. There are multiple scenarios in play. In a recent Institute for Government publication, we looked at those scenarios – five different options for what might happen between now and March 2019.

Figure 1: Possible scenarios for the next phase of Brexit



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Some of these scenarios look less likely than others – at present, it's hard to see Parliament refusing to accept the Prime Ministers deal in favour of a leap over the cliff-edge. In any scenario where Parliament requests some kind of renegotiation, what happens next will depend largely on what it is Westminister wants to change – the EU is unlikely to reopen negotiation on the financial settlement or citizens rights, but may consider tweaked language in the non-binding, political declaration on the future relationship that will sit alongside the withdrawal agreement.

With the triggering of Article 50 and the passage of the EU Withdrawal Act, the defaults are set – the UK will be leaving the EU on 29 March 2019 with or without a deal. It's often said that there's no Parliamentary majority for 'no deal', but MPs set the default as no deal when they voted overwhelmingly in favour of starting the Article 50 process. The task now is finding a majority for something else. In our recent paper, we looked at a number of options for both the Prime Minister and her opponents in influencing the process over the coming months. A selection of those tools are set out below:

Tools for the Prime Minister to get a deal through Parliament:

Make the vote a confidence vote:

When, as Prime Minister, John Major was facing defeat over the Maastricht Treaty (an early dress rehearsal for the agonies that the current Prime Minister is going through), he used the trick of making a key vote a confidence vote to force his party into line. Back then, if the government lost a confidence vote, as the Callaghan government did in 1979, the next stop was a general election.

However, the Fixed-term Parliaments Act 2011 means that the Prime Minister can no longer make votes into formal votes of confidence in the same way: the Act requires specific votes to trigger a general election so governments can feasibly survive motions of confidence and censure tabled in other ways. That means using this option as a threat is a lot more difficult for the Prime Minister.

Unless a number of Conservatives and the DUP were prepared to vote down the government on such a motion, or the government itself wanted to trigger a general election as it did in 2017, this is unlikely to pass. The Prime Minister could say that a vote is akin to a vote of confidence in her; that she will resign if she loses a key vote. But that would trigger either a Conservative leadership election (something the Prime Minister may face in any case) or the prospect of the Queen asking someone else to form a government.

In short – changes to the traditional weapons of last resort for a Prime Minister make it easier for Conservative MPs to defy her on the deal without being pitched into an early general election.

Allow a free vote:

Edward Heath as Prime Minister used the free vote to get Parliament to agree to the UK's accession to the EU, conceding that a free vote gave licence to some Labour supporters of UK membership of the EU to cross the House of Commons floor and support the government. The current Labour leadership looks set to declare that any deal that the Prime Minister reaches fails Labour's six tests for Brexit (although those tests apply to the long-term relationship, not the withdrawal agreement). It will also seek to stop the Prime Minister from leaving the EU with no deal.

The Prime Minister has to date been able to win key votes, for example on the Trade and Customs Bills, thanks to a number of Labour Leavers (those who backed the 'Leave' campaign in the EU referendum). It is far from clear that there is a majority that the Prime Minister could assemble through this route, but if she could present opponents as 'frustrating Brexit' or 'risking the economy' she might be able to pull more MPs across the floor to offset her rebels.

Go down to the wire:

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Time is a constraint – but it could also be the Prime Minister's friend. Even if the UK initially rejected the EU's final offer, and any renegotiations went nowhere, the EU might reckon that the looming pressure of a no-deal Brexit might force the government back – not to renegotiate but to accept the deal on offer. But leaving everything until the last minute could also strengthen the government's hand to push the deal through Parliament – assuming that it had been able to resist mounting external pressure until then. If the UK held out against acceptance or ratification of the deal until the last minute, the EU could offer a brief extension to the Article 50 period to allow for the necessary ratifications. In extremis, Parliament could be forced to sit to pass all stages of the Withdrawal Agreement Bill in a day.

Agree a very vague formulation of the future relationship:

The autumn/winter Brexit decisions are about the withdrawal agreement and the transition. However, David Davis as Secretary of State for Exiting the European Union reportedly argued that there was a strong case for including as much detail as possible in the future framework declaration – to get Pro-Brexit colleagues to vote for the withdrawal agreement. And his successor, Dominic Raab, argued at his first appearance in front of the Exiting the EU Committee on 24 July 2018 that the withdrawal agreement might need to include a specific link to make payment of the financial settlement conditional on having a satisfactory long-term arrangement.

Given the glacial progress of negotiations, it is hard to see a detailed future framework being agreed by October or December. The Prime Minister may ultimately be best served by kicking the issue of the long-term relationship into the distance – especially if she and the EU can fudge a formula on Ireland. MPs may find it hard to vote against a transition on the basis of a high-level commitment to a 'deep/special/ambitious relationship'. The non-binding nature of the future framework declaration is both a disadvantage (the UK commits to the money with no long-term guarantees) but also an advantage for those who want a different form of relationship with the EU after Brexit.

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Options for the Prime Ministers opponents

The Prime Minister faces potential opposition from different flanks. There are there pro-Brexit colleagues in the Conservative Party, who may be unhappy at the withdrawal agreement – particularly if there are binding commitments on the Irish Border meaning the UK stays in a customs union for the foreseeable future. There are the Prime Minister's former 'Remain' colleagues who may be terrified at the prospect of a no deal or worried about the future framework. And there is Her Majesty's official opposition – who it can be assumed will use the vote to try and trigger an election.

Change Conservative Leader

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Changing leader does not necessarily mean another election – changes of prime minister under the UK system often occur without a general election (as the case of Theresa May shows when she took over from David Cameron) even when the party in power does not have a majority. That makes this option a much less scary prospect for Conservative MPs.

But any candidate must be confident they can muster enough support to defeat the Prime Minister in a confidence vote and then survive the two-stage electoral process (rounds of voting among Conservative MPs, with the top two candidates put to the party membership). To do that, they will need to persuade a large number of their colleagues that an alternative leader is desirable and more likely to deliver their preferred Brexit outcome – with many likely to be concerned that it would, in fact, do the opposite. Nonetheless, this still looks a more plausible route to challenge the Prime Minister than the prospect of Conservative MPs voting to bring down the government.

Amend the motions to require the Government to negotiate an alternative

If Parliament rejects the Prime Minister's deal, it might send her back to renegotiate the deal – or the government itself might decide to have another go. The motion to approve the deal will be amendable so Parliament could set conditions that the government would need to fulfil before bringing back a better deal to Parliament. But although the government could ask, it would be open to the EU to refuse to reopen a deal that the government had already accepted – and it might also expect that the UK would be obliged to accept the original, unamended deal as the clock ticked down towards a messy exit.

The EU has made clear that other options are available if the UK position "evolves". Simply renegotiating is, of course, no guarantee that a new deal will be any more successful than its predecessor, so there is a risk of continuing stalemate if there is no parliamentary majority for any renegotiated deal.

There is always the option of a new referendum – but it is not a simple way out of the impasse

All of these scenarios and tools suggest that Parliament has the last say on Brexit. But MPs could decide to give the choice back to the electorate – possibly in an attempt to break a parliamentary deadlock. That could be done through an amendment to the Withdrawal Agreement Bill – which would be legally binding – or by an amendment during the 'meaningful vote' – which would have significant political force.

But there are a number of big problems with taking this kind of route.

First, the UK does not have a comprehensive blueprint for referendums: important process details need to be decided every time it has one. It is perfectly possible that there would be proxy battles over such issues as timing and the franchise (there was an attempt to allow 16- and 17-year-olds to vote in 2016 EU referendum, and many EU residents in the UK and UK residents in EU countries feel they were disenfranchised). Since any change may tip the result one way or another, each would be highly contentious – and be played out in a polarised Parliament.

Second, and even more problematic, what would the referendum be about? Former Education Secretary Justine Greening has suggested a three-choice referendum: on leaving the EU with no deal, the Prime Minister's 'final negotiated deal' or staying in the EU. Of these options, only remaining in the EU is relatively clear-cut (and it would depend on the EU accepting the UK withdrawing its Article 50 letter before it left if the UK is to remain on the same terms as it enjoys now). The Prime Minister will not have a deal on the long-term relationship between now and the time the UK leaves the EU – not least since the EU has been clear that it has many problems with the white paper agreed at Chequers. The issue in the autumn is whether or not to accept a withdrawal agreement.

Third, the Electoral Commission has made it clear that it takes time (six months) for a referendum to be well conducted. If a parliamentary majority for a referendum crystallises late in the autumn, there is unlikely to be enough time to agree the details and run a vote ahead of the March 2019 deadline. The UK may be forced to ask the EU for an Article 50 extension to buy additional time, with no guarantees that Brussels will want to prolong uncertainty, particularly if it could increase the likelihood of no deal.

The Prime Minister has regularly been accused of spending too much time and effort negotiating with her own party, rather than Brussels. The Parliamentary challenge coming up does – to some extent – explain why. The challenge for the government is not just striking a deal in Europe, but getting an agreement that will command a majority in a divided yet increasingly assertive Parliament.

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This post gives the views of the author, and not the position of the LSE Brexit Blog, nor of the London School of Economics.

***Joe Owen** is an Associate Director at the Institute for Government working on the Brexit programme and is leading their research into Whitehall's preparation for Exiting the European Union.*

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