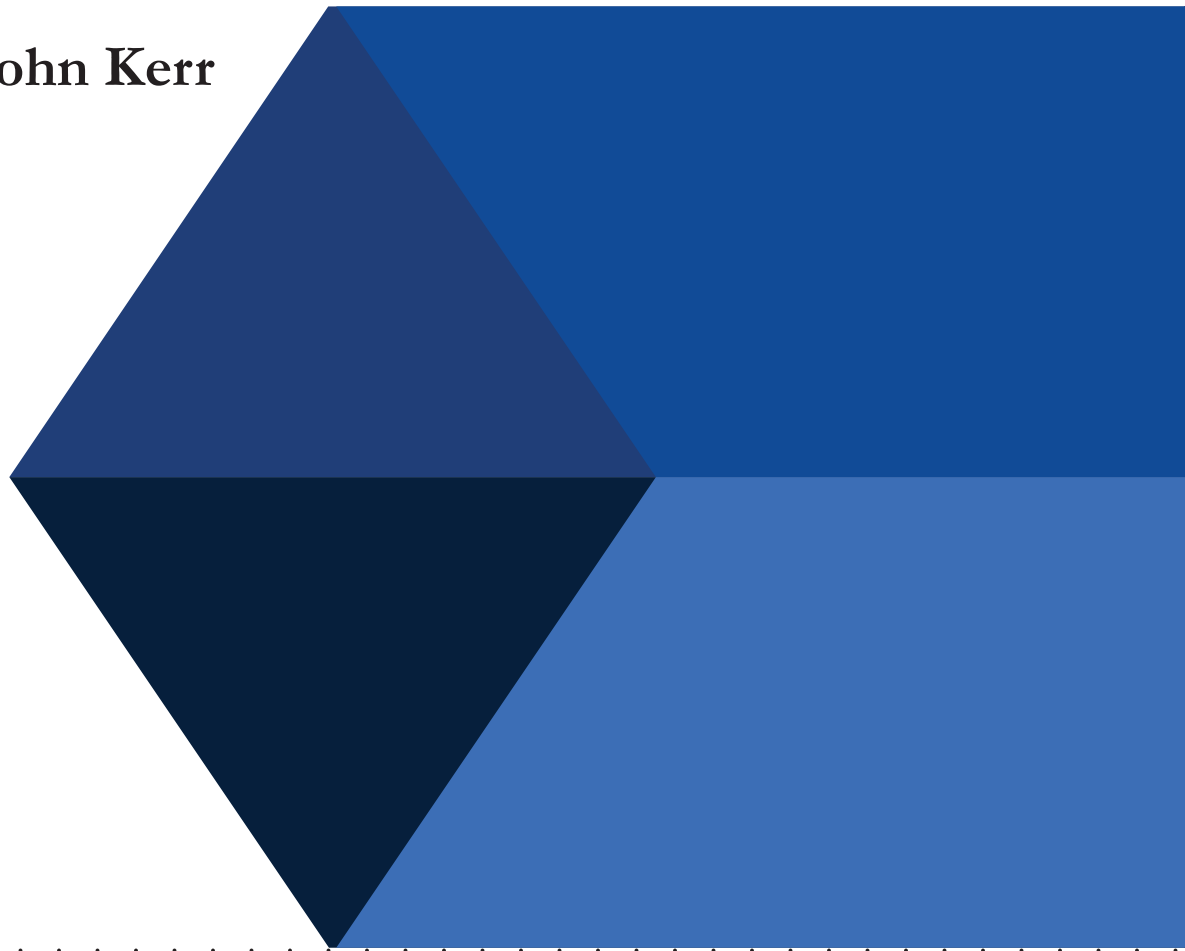


# Roadmap to a People's Vote: The Route Opens Up

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Foreword by John Kerr



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## **Acknowledgments**

The first edition of the *Roadmap to a People's Vote* was published in September 2018. In producing that paper, the People's Vote campaign consulted the following people and is grateful for their input and advice: Vernon Bogdanor, Richard Corbett MEP, Stephen Dorrell, Jonathan Faull, Dominic Grieve MP, Chris Leslie MP, Caroline Lucas MP, Nicola Murphy, Catherine MacLeod, Jean-Claude Piris, Matt Qvortrup, MT Rainey, Alan Renwick, Meg Russell, Jess Sargeant, Lord Wallace of Tankerness QC and John Williams.

This updated edition takes account of changes in the political context since September 2018. Like the first edition, it includes a foreword by John Kerr, who sits as an independent peer in the House of Lords.

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## **Foreword**

In our first *Roadmap to a People's Vote*, published in September, we wrote that our country faced “a political, economic and possibly constitutional crisis”, and that “we do not have the luxury of time”. Four months on, with the contradictions of Brexit no nearer resolution, but the promises made in 2016 now plainly undeliverable, the contours of the crisis are even clearer, and the Article 50 clock ticks ever louder. What has changed since the summer is that the case for consulting the people has strengthened, in four main ways.

First, the terms of the Government's proposed withdrawal “deal” are now known and have been criticised both by those who voted for Brexit and those who did not. A clear majority of MPs are on record as rejecting them. And no wonder: despite the wording of Article 50 (see Annexe 1), they provide no clear framework for an eventual permanent relationship with our European neighbours but would, for an indefinite period, leave us stuck in the limbo of obeying EU rules in which we no longer had any say. Facing a heavy defeat, the Prime Minister chose to deny the Commons their “meaningful vote” in December, but the four wasted weeks since then have not changed the deal.

Second, responding to the warnings of business, trade unions, farmers, the City, the NHS, universities, investors and markets, MPs from across the House, including several ministers, have rightly ruled out a no deal Brexit. This is because the scale of the disruption a no deal Brexit would cause has become much clearer, and with it the irresponsibility of claiming that crashing out in March with nothing agreed is the only default option if the Commons votes down the May deal. Such blackmail won't work.

Third, Parliament has acted to ensure that it can step in, taking back control and breaking the deadlock. An amendment passed by the Commons in December means that if, or rather when, the May deal is rejected, Parliament will, within 21 days, have the right to vote, on an amendable motion, on the way forward. MPs will not sit on their hands if the Government tries to run down the clock. And they will be aware that polls now consistently show a majority of the public favour staying in the EU if they are given the chance through a People's Vote.

Lastly, and perhaps most significantly of all, the EU Court of Justice confirmed on 10 December (see Annexe 2) that the UK has the absolute right to stop the Article 50 process, withdraw Mrs May's letter, and remain an EU member state. When we said, back in September, that “the die is not irrevocably cast”, some claimed that our staying in the EU would require the permission of the other 27, who would be able to make us pay a price: the Court has confirmed that they were wrong; the decision is for us alone; and the terms of our membership could not be changed to our disadvantage.

This updated edition of the *Roadmap to a People's Vote* takes account of these developments. There now is a withdrawal deal on the table and it hasn't been well received. Parliament has made it clear that it will intervene to prevent a no deal Brexit. There is a viable third

option: we could retain the deal we already have as a full member of the EU. Parliament can step in to insist that the people should have the right to decide. If UK now seeks the necessary postponement of the 29 March deadline in order to hold a People's Vote, the EU27 would willingly agree.

How would the people vote? The polls now show a consistent 8% lead in favour of staying in the EU. Strikingly the margin rises to between 16 and 26 points if responders are asked to choose between keeping the deal we now have and either of two specified options for leaving: the Government's deal, or no deal. These are facts MPs of all parties might wish to keep in mind as they consider the options the Government is now offering. They should reflect on how the will of the people can be best expressed now that the public can make an informed choice.

**John Kerr**

## **Executive Summary**

### **Withdrawing the Article 50 letter**

- The UK's Article 50 letter notified the EU of our intention to leave on March 29 this year. But intentions can change. As the Court of Justice of the European Union has confirmed, until the Article 50 deadline – if necessary extended – expires, we still have all the rights of a member-state, including the right to change our minds.
- The CJEU has also confirmed evoking the Article 50 letter would be cost free, since the terms of our EU membership cannot be changed without our agreement as a member state. However, if we were to leave and then at some future stage re-apply for membership, the terms would have to be negotiated afresh.

### **Parliamentary routes**

- MPs will have a series of opportunities to either encourage or even force the Government to legislate for a People's Vote. The most likely route is for Parliament to reject the Brexit deal when the meaningful vote comes before the Commons, and then amend the subsequent motion that the Government is required to bring within 21 days.
- Holding 'indicative votes' would solve nothing. At this late stage in the process, it would be pointless for Parliament to have votes on forms of Brexit that have not been negotiated and which - even if there were time - would not be accepted by the EU.
- In passing the legislation for a People's Vote, given the urgency of the situation, there would be a major incentive for MPs and the Government to proceed relatively swiftly. The principles of clarity, speed and simplicity should be applied at every stage.
- It would be necessary to obtain an extension of the Article 50 timetable to allow a People's Vote to take place. It is our view that in these circumstances the EU would grant an extension, and that the Government would not face any political or procedural obstacle to holding the People's Vote that could not be overcome.

### **The question, franchise and rules**

- Ultimately it will be up to MPs to decide the question on the ballot paper, in consultation with the Electoral Commission. Our preference would be for a binary choice: either the Government's deal vs staying in the EU; or an alternative, deliverable form of Brexit vs staying in. What would be wrong would be for an abstract form of Brexit to be on the ballot paper – it must be a specific plan for a deal – or no deal - rather than a “cake-and-eat-it” proposal which has not been accepted by the EU.

- We do not entirely rule out a referendum with three options, if it could command majority support in Parliament. But, for reasons of simplicity, speed and clarity, as well as past experience, it is unlikely such a proposal would prevail.
- There is a strong case for widening the franchise, and for tighter rules on campaigning on social media. But given the tight timescale and the need for speed, clarity and simplicity, there may be practical limits on what changes could be made. Changes must not become a barrier to the imperative of giving the people a vote now that they can make an informed choice.



## **Introduction**

At present, there appears to be little likelihood that the Government will secure sufficient support for the agreement negotiated with the European Union for it to pass through the House of Commons. Two and a half years on from the 2016 referendum, nobody has come forward with a proposal that could secure a majority in the present circumstances. The blunt reality is that such a proposal does not exist. The problem is not so much a failure of negotiation so much as one to do with the premise of Brexit itself. There is no deal that can fulfil many, let alone all, of the promises made before and after the referendum of 2016. Nor is there a deal that is as good as the one we already have inside the EU.

If, as is expected, the Government's Brexit deal is rejected by the House of Commons, we believe the only credible way forwards for MPs will be to hand the decision back to the people. As this paper makes clear, there will be numerous opportunities for MPs to secure a People's Vote. Regardless of the Government's stated opposition to letting the public decide, it is highly plausible that events - or Parliament itself - will force them to embrace the idea as the best means of breaking the logjam and avoiding a no deal exit.

This paper provides a roadmap to a People's Vote, step by step, answering the questions about practicalities and timetables, and setting out the democratic arguments, guided by the need for simplicity, speed and clarity. It addresses important issues, including:

**The Article 50 process:** how the process can be extended and, if necessary stopped, and what the implications would be.

**Legislating for a People's Vote:** how Parliament could either force or encourage the Government to legislate for a People's Vote.

**The question, franchise and rules:** what the question on the ballot paper might be, and what the voting rules and franchise should be.

## **1. Is it too late to think again?**

The process of departure from the European Union is laid down in Article 50 of the Lisbon Treaty (see Annexe 1), which says that a member state which decides to withdraw from the EU “shall notify the European Council of its intention” and that “the Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification”. The Prime Minister, Theresa May, invoked Article 50 by sending a letter to the President of the European Council, Donald Tusk, on 29 March, 2017. The deadline is therefore 29 March, 2019.

But sending the letter was not an irrevocable act. The Director of the EU Council’s Legal Service at the time of drafting Article 50 was Jean-Claude Piris. He points out that: “The Article 50 procedure provides for notification by the interested state only of its ‘intention’ to leave... In law, the word ‘intention’ cannot be interpreted as a final and irreversible decision. Legally, you may withdraw an intention, or change it or transform it into a decision.” Therefore, if the UK withdrew its intention, “in legal terms this would stop the two-year clock, removing the possibility that Brexit would occur automatically after these two years... The UK would still be in the club.”<sup>1</sup>

On Monday 10 December, the European Court of Justice (ECJ) ruled on the revocability of Article 50, confirming that the UK can decide to withdraw the Article 50 notification, subject to following its own constitutional requirements (see Annexe 2).<sup>2</sup> The ruling stated that this can be done “unilaterally, in an unequivocal and unconditional manner, by a notice addressed to the European Council in writing... and that revocation brings the withdrawal procedure to an end.”<sup>3</sup> It did not express a view on what domestic constitutional process the UK should go through to revoke its notice, but said this should be “in accordance with its constitutional requirements and following a democratic process”.

The ruling also confirmed that were the UK to opt to stay in the EU, we could stay in on our current terms – including our opt-outs on the single currency and the Schengen area, and opt-ins on the European Arrest Warrant and Europol. The rebate negotiated under Margaret Thatcher would also be unaffected. For the avoidance of any doubt, this was confirmed by Günther H. Oettinger, the European Commissioner for Budget and Human Resource, who said the rebate “is something which is a permanent one and it needs to be respected.”<sup>4</sup>

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<sup>1</sup> <https://www.ft.com/content/b9fc30c8-6edb-11e6-a0c9-1365ce54b926>

<sup>2</sup>

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=208385&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=252944>

<sup>3</sup> <http://curia.europa.eu/juris/document/document.jsf?sessionid=30070EAD3C16AB345376A71509ACC49D?text=&docid=208636&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1>

<sup>4</sup> <https://ec.europa.eu/avservices/video/player.cfm?ref=1164645>

The court's decision on the revocability of Article 50 has all but killed any threat that the UK could crash out of the EU with no deal, given there is no majority for this in Parliament and there is now an emergency brake. And, crucially, it is confirmation that a vote to stay in the EU could be implemented – with no price to pay, either financial or political.

Taking a time-out isn't possible. We couldn't leave the EU and then, if we found it cold outside, come back in on the old terms: Article 50(5) (see Annexe 1) is clear that a full Accession negotiation would be required. Once we'd left, the UK's budget rebate, would be gone. If we were at some point to re-apply for membership, the terms would have to be negotiated afresh: a much more difficult prospect than having negotiated them while a member of the EU with all the leverage that goes with the UK's weight and power as one of the biggest member states.

The Government insisted, against House of Lords advice, on writing the 29 March exit date into the EU (Withdrawal) Act. However, if the Government were to change its position, either voluntarily or because it was forced to do so by Parliament, it can propose an affirmative resolution changing the date. The die is not irrevocably cast.

## **Conclusions**

The UK's Article 50 letter notified the EU of our intention to leave on March 29 this year. But intentions can change. As the Court of Justice of the European Union has confirmed, until the Article 50 deadline – if necessary extended – expires, we still have all the rights of a member-state, including the right to change our minds.

The CJEU has also confirmed evoking the Article 50 letter would be cost free, since the terms of our EU membership cannot be changed without our agreement as a member state. However, if we were to leave and then at some future stage re-apply for membership, the terms would have to be negotiated afresh.

## **2. Roadmap to a People's Vote**

The EU (Withdrawal) Act ensures that any deal must be put to Parliament through a meaningful vote – now scheduled to take place in the week beginning 14 January 2019 – and must be ratified through an Act of Parliament before it can come into force. In addition to this, a procedural amendment passed by the House of Commons in December ensures that if the deal is rejected, MPs will vote on a further motion, which will also be amendable, within a month – likely by the middle of February 2019. Even in the unlikely event that the Government were to ignore the clearly expressed will of Parliament and try to leave the EU without a deal in place, MPs have a range of other tools at their disposal.

So, far from the Government being able to resist pressure for a People's Vote, the reality is that if a majority of MPs are prepared to vote for it, they will have a series of opportunities to encourage or even force the Government to produce the necessary legislation. While there is not yet a majority for this in the House of Commons, cross-party support has grown significantly since the launch of the People's Vote campaign in April 2018. A large number of Labour MPs and at least nine Conservative MPs are now publicly supportive, and it is now the official policy of the SNP, Liberal Democrats, Plaid Cymru and Greens. Should the Prime Minister's deal be rejected by, support for a People's Vote is likely to intensify.

Since the Withdrawal Agreement was finalised in November 2018, it has been apparent that there is little prospect of the Government getting it through the House of Commons. The last-minute postponement of the meaningful vote, originally scheduled for 11 December, was an admission by the Prime Minister that the Commons is overwhelmingly opposed to the deal. While there have subsequently been various proposals for alternative forms of Brexit, none of them have been agreed with the EU.

It is noteworthy that the Oxford Dictionaries decided to shortlist “cakeism” as one of its words of the year in 2018. The idea that we can somehow “have our cake and still eat it” has come to symbolise a negotiating stance from the United Kingdom that has frustrated and infuriated the European Union from the outset of Brexit talks. However, for it still to be a feature of our political discourse, just a few short weeks before we are due to leave the EU, is an extraordinary malfunction of our political process.

For too long the UK has indulged itself in a game of fantasy Brexit in which different forms of “cake-and-eat-it” deals are mooted and dismissed by the EU. There will be little patience for another round of it now and, in any case, there is now no time for a substantial renegotiation to take place. Indeed, the EU has insisted it will not re-open discussions about the text of the Withdrawal Agreement or the accompanying Political Declaration.

This is recognised by some of the more serious-minded ministers and shadow ministers in Parliament. Keir Starmer, the Shadow Secretary of State for Exiting the European Union, recently told an interviewer: “the chance to get the right deal has now gone. And

discussions about other options – discussions about a public vote – have to be seen in the context of the Prime Minister having run down the clock on the opportunity to negotiate something that could reflect what happened in June 2016.”<sup>5</sup>

Therefore, with scant prospect of a renegotiation, and with a majority of MPs opposed to both the deal and a ‘no deal’ Brexit, Parliament is gridlocked. The only credible alternatives left are a People’s Vote, or a revocation of the Article 50 letter. Once the deal has been rejected by the House of Commons, MPs must do everything within their gift to secure the former.

There have been reports that the idea of a People’s Vote is also under consideration in the Cabinet Office.<sup>6</sup> This is unsurprising. The Prime Minister remains adamant – in public at least – that she does not support the idea of putting her deal to a popular vote as a means of breaking the impasse. But she has made similar statements about other issues during her premiership, before doing the precise opposite. Regardless of what the Government says today about a People’s Vote, it is plausible that it may yet be forced by events, Parliament - or both - to embrace the idea as the best means of breaking the logjam and avoiding a no deal Brexit. If a majority of MPs favour a People's Vote, it will be up to the Government to respect the sovereignty of Parliament and respond by producing the necessary draft legislation. The political reality is that the Government could not remain in office if, in practice, it sought to defy the will of Parliament when MPs have supported a People’s Vote.

Once the principle of holding a People’s Vote is secured, the necessary legislation to make it happen would have to be taken through Parliament. The Bill process would set the question, the rules, the franchise and the date of the vote – a process that Parliament would of course not want to rush. But if there was any possibility of the UK crashing out of the EU without a deal, there would be a major incentive – at least for the vast majority of MPs who oppose a “no deal” Brexit – to proceed relatively swiftly.

There is no set time for a Bill to move through both Houses; legislation can receive its second and third readings in the same day in the House of Commons, and there are many precedents for this. A “cut and paste” of the legislation from the 2016 referendum could help make the progress through both Houses more straightforward, as could retaining the same franchise and legislating for a simple and straightforward question and format (see Chapter 3).

Once the Bill is published with the proposed referendum question, the Electoral Commission would be required – in accordance with the Political Parties, Elections and Referendums Act 2000 – to consider the wording of the question and to publish a statement on its intelligibility. It may, as in 2015, recommend alternative wording, and the

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<sup>5</sup> <https://www.youtube.com/watch?v=JwHSia4cFUk>

<sup>6</sup> <https://www.thetimes.co.uk/article/theresa-mays-team-plots-new-eu-referendum-cl5xrwh52>

Bill could be amended accordingly.<sup>7</sup> As Meg Russell, Alan Renwick, and Jess Sargeant at the UCL Constitution Unit have pointed out, given the tight timescale it may be possible for the Electoral Commission to “condense” the timetable for testing the question.<sup>8</sup> Following that, a designation period would be required to determine the respective campaigns, followed by the campaign period itself.

It would make sense to begin making preparations immediately and to make a request for an extension of the Article 50 timetable. It would also be necessary to secure an extension of the Article 50 timetable (see page 15). And, although the EU (Withdrawal) Act states that the UK will leave the EU on 29 March, 2019, it also gives the Government power to propose an affirmative order to Parliament ‘to amend the definition of exit day’ to a later date.

## **Legislating for a People’s Vote: Parliamentary Options**

There are a number of different routes to securing a People’s Vote. In the interests of speed, clarity and simplicity it would be preferable for the Government to bring forward the legislation proactively. But failing that, the most likely route is for Parliament to reject the Brexit deal when the meaningful vote comes before the Commons, and then amend the subsequent motion that the Government is legally required to bring within 21 days.

Generally, in the British parliamentary system, the Government has almost full control of the timetable and agenda of the House of Commons. Provided it can command a majority, it usually cannot be forced to act against its will. Therefore, if the Prime Minister is determined to prevent the Commons from resolving that the public should be given a final say on the Brexit deal, that is a high bar to overcome.

However, even with its deal with the Democratic Unionist Party, the Government has a working majority of just 13. And we have already seen a number of examples of it failing to command a majority in the House of Commons on Brexit-related issues. The first was on Dominic Grieve MP’s “meaningful vote” Amendment 7 to the EU Withdrawal Bill at the end of 2017. Latterly, the House of Commons inserted Phillip Lee MP’s New Clause 17 at the Report Stage of the Trade Bill, committing the Government to continuing UK participation in the EEA medicines regulatory network.

The Government’s working majority has looked increasingly unreliable since the Prime Minister brought back her deal. On 5 December, the Government suffered no less than three defeats. Two of these were particularly significant. First, the Government was found to be in contempt of Parliament over its failure to publish in full the Attorney General’s

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<sup>7</sup> [https://www.electoralcommission.org.uk/\\_data/assets/pdf\\_file/0005/82625/Referendum-Questions-our-approach.pdf](https://www.electoralcommission.org.uk/_data/assets/pdf_file/0005/82625/Referendum-Questions-our-approach.pdf)

<sup>8</sup> <https://constitution-unit.com/2018/08/30/how-long-would-it-take-to-hold-a-second-referendum-on-brexit/>

legal advice on the Withdrawal Agreement. Second, MPs backed an amendment tabled by Dominic Grieve which ensures MPs will have a proper say over what happens next, in the event that the Government's deal is defeated. On both occasions, the DUP voted against the Government.

Meanwhile, a growing number of Conservative MPs now back the idea of a People's Vote. Nine have publicly made the case for a People's Vote, while numerous others – including the Work and Pensions Secretary, Amber Rudd – have acknowledged that it may prove to be the only way forward if the Government's deal is rejected by Parliament. In these circumstances, a working majority of 13 looks extremely fragile.

Parliament is sovereign. And the combination of the meaningful vote and the Government's lack of a reliable majority means that it is MPs – not the executive – who are in charge of this process. Although it is impossible to predict how events will play out – or to second guess how the Prime Minister, the political parties, or the different factions within them, will react to the changing circumstances – it is clear that there will be a number of possible routes to legislating for a People's Vote.

### ***The meaningful votes***

The 'meaningful vote' due to take place in mid-January will present MPs with a clear opportunity to express their opposition to the Government's deal. The motion will be amendable, so MPs are also likely to have a further opportunity to make clear their opposition to leaving with no deal.

If the motion is defeated, the EU (Withdrawal) Act makes clear that the Government will have to make a statement to Parliament within 21 days, to be debated within seven sitting days, setting out how it intends to proceed. Parliament will then have an opportunity to vote on that plan in a 'neutral terms' motion. Although this had previously meant that the motion would likely be unamendable, a procedural amendment tabled by Dominic Grieve on 4 December guarantees that any subsequent motions will in fact be amendable. Despite the fact the debate was subsequently curtailed and the vote itself deferred, the Government has confirmed that the Grieve amendment will still apply. In a statement to the Commons on 20 December, Andrea Leadsom, the Leader of the House, confirmed that "Paragraph 11 of the order of 4 December remains an order of the House; that has not changed."<sup>9</sup>

The consequence of this is that, assuming the deal is rejected, the House of Commons will have a further, amendable 'meaningful vote' by the middle of February. It is likely to be at this point that a People's Vote amendment has the optimal chance of success. Although amendments to either of the meaningful votes will not be legally binding, a People's Vote

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<sup>9</sup> HC Deb, 20 December 2018, c1010

amendment at that stage in the process will, as the UCL Constitution has put it, “in practice be politically binding on the government.”<sup>10</sup>

In recent months, some MPs who support a People’s Vote have been tempted to table an amendment to the Government’s motion on its Brexit deal because they fear this may be the only opportunity they get to express their views. But the Grieve amendment provides a guarantee that this will not be the case. In any event, amending the first motion brought by the Government’s has never offered the most likely route by which a new referendum could be achieved because the Labour Party has made clear it would not support it until other options, including a General Election, have been exhausted. There is also a risk that some opponents of a People’s Vote would use the defeat of such an amendment to say it had been taken off the table. Fortunately, a combination of good sense among MPs and the growing likelihood of the Government’s deal being defeated, has reduced the likelihood of an amendment being tabled at the wrong time.

More recently, there has been speculation that a series of “indicative votes” could be held on various forms of Brexit and the prospect of a People’s Vote before or after the meaningful vote in January. This would solve nothing. At this late stage in the process when there is so little time left for renegotiation, it seems pointless for Parliament to have indicative votes on forms of Brexit that are likely to contain elements of what has become known as “cakeism” when there is no indication that they would be regarded as viable forms of Brexit. The real options available to Parliament at this late stage are to accept the deal negotiated by the Government, crash out with no deal, hold a General Election – or recognise that there is no majority for any of these and hand the final decision back to the people.

### ***Other parliamentary devices***

In the unlikely event that the Government were to ignore any such amendment and to seek either to leave with no deal or to force a last-minute capitulation by enough MPs to get the deal through the Commons, there are a range of other mechanisms available to MPs. These can be used to prevent a no deal Brexit and force the Government to accept the principle of a People’s Vote.

It is inconceivable that the Government could go for months on end without any legislation passing through Parliament. If it really were to threaten leaving the EU with no deal, significant amounts of legislation would have to be passed in preparation, potentially presenting a series of further opportunities for MPs to table amendments and force the Government’s hand. The Government published 106 technical notices over the course of the summer. Analysis by the Institute for Government indicates that to prepare for no deal the Government will need to pass further legislation in at least 51 areas.<sup>11</sup> Any primary

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<sup>10</sup> <https://www.ucl.ac.uk/constitution-unit/research/elections-and-referendums/mechanics-further-referendum-brexit>

<sup>11</sup> <https://www.instituteforgovernment.org.uk/charts/what-government-needs-do-prepare-no-deal-brexit>



legislation could be amended to pave the way to a People's Vote. Legislation already passing through Parliament, including the Finance Bill and the Trade Bill, could also be amended.

It is true that much of the legislation relating to no deal preparations could be done through statutory instruments (SIs) granted by the EU (Withdrawal) Act. But the House of Commons has the ability to block SIs. Doing so would be a powerful expression of opposition to leaving with no deal.

Although the Government controls the parliamentary timetable, it is unlikely that in these circumstances, it could resist calls for either an Opposition Day debate or backbench business. Either of these would provide another opportunity to test the will of Parliament. Whilst such motions are not legally binding on the Government, a vote in these circumstances would in practice be impossible for ministers to ignore.

Even if the Government was effectively to go on strike, MPs have other tools at their disposal. A defeat of the Government through a vote of no confidence seems unlikely at present, but if ministers were seeking to force a no deal Brexit it is possible this could change. If MPs wished to apply pressure by expressing no confidence in a particular minister, rather than the Government as a whole, they could potentially use a mechanism called parliamentary censure, which would see MPs vote to cut or remove that minister's salary in a bid to force their resignation.

Ministers may wish it were otherwise but Parliament remains sovereign and its hands are not tied. MPs cannot be forced to vote for a deal they do not believe is in the national interest. The default alternative is not to simply crash out with no deal – both the Government and the Commons will have a shared interest in avoiding such an outcome. If MPs have just rejected the deal, an even larger number will line up to reject no deal and – in the absence of any other viable alternative – are likely to back a People's Vote. Regardless of the legal niceties, political reality will dictate that the Government cannot simply ignore the Commons.

## **Extending the Article 50 process**

Article 50(3) says that a member state leaves the EU two years after notifying its intention to withdraw “unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period” (see Annexe 1). Such a decision would be taken at the level of the European Council.

The People's Vote campaign is in regular contact with politicians and officials from across Brussels and key European capitals. In our conversations it has been made clear repeatedly that there is little appetite among the EU27 for granting an extension to the UK in the hope of making adjustments to the 2018 deal. In their view, that negotiation has now

concluded. The EU has other issues to contend with and would not wish to prolong the process of the UK's departure.

However, it is also clear from our conversations that the EU would still prefer the UK to stay, and that should the UK request an extension to allow for a People's Vote, it would be granted. Therefore, it is our clear conclusion that there is no obstacle either in the politics or the procedure of Brexit to the UK delaying the 29 March 2019 deadline if this delay was judged necessary by parliament so that it could consult the people in a democratic vote.

## **European Parliament Elections**

There is another timetable question to be answered: what about the European Parliament elections scheduled to take place two months after the Article 50 deadline, between 23-26 May, 2019? As things stand, if the UK has left the EU on 29 March, the UK's seats will be distributed among the EU27 and there will be no European Parliament elections in the UK. The EU has decided how it would allocate the ex-UK seats.

If Parliament votes for a referendum, there are three options. First, the People's Vote could take place before, or even on, the day of the European Parliament elections by 26 May 2019. This would require Parliament to quickly agree to hold a People's Vote, and to pass the necessary legislation swiftly.

Second, the Government could request that the UK delays holding its European Parliament elections, to allow for a People's Vote to take place in June or even early July 2019. If the UK were to vote to stay, it would then elect its MEPs subsequently.

Third, the UK could elect our representatives to the European Parliament as planned between 23-26 May and hold the People's Vote at a later date. If we subsequently voted to leave the EU following a referendum, those UK MEPs would be withdrawn. The reallocation of seats to the EU27 would happen at that point. Indeed, the EU legislation on the reallocation of seats provides specifically for its entry into force to be the date of Brexit, so there are no legal problems with a delayed Brexit (or no Brexit).

We do not underestimate the complications, both political and practical, in holding European parliamentary elections to elect MEPs who may or may not sit for more than a few months. However, the long-term problems for our country and our democracy that will follow from a badly negotiated Brexit, are ultimately of far greater significance.

## Conclusions

MPs will have a series of opportunities to either encourage or even force the Government to legislate for a People's Vote. The most likely route is for Parliament to reject the Brexit deal when the meaningful vote comes before the Commons, and then amend the subsequent motion that the Government is required to bring within 21 days.

Holding 'indicative votes' would solve nothing. At this late stage in the process, it would be pointless for Parliament to have votes on forms of Brexit that have not been negotiated and which - even if there were time - would not be accepted by the EU.

In passing the legislation for a People's Vote, given the urgency of the situation, there would be a major incentive for MPs and the Government to proceed relatively swiftly. The principles of clarity, speed and simplicity should be applied at every stage.

It would be necessary to obtain an extension of the Article 50 timetable to allow a People's Vote to take place. It is our clear view that in these circumstances the EU would grant an extension, and that the Government would not face any political or procedural obstacle to holding the People's Vote that could not be overcome.

### 3. The question, franchise and rules

If Parliament votes in favour of a People’s Vote, it will then have to take a view on what the question should be, and on the rules and franchise of the vote. These are important decisions and should be guided by the need for legitimacy, as well as the principles of clarity, speed and simplicity that have underpinned this report.

#### The question

The question to be put to the public in a People’s Vote would be a matter for our elected representatives to decide. There are currently three plausible options for consideration in a referendum on Brexit: a deal; no deal; or staying in the EU. The various types of ballot that have been floated have been summarised by Meg Russell, Alan Renwick, and Jess Sargeant at the UCL Constitution Unit in the following way<sup>12</sup>:

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

It has been suggested that the Government might seek to win a mandate for its deal through a referendum that offers the public only a choice between taking the deal or crashing out of the EU with no deal. But such a vote would exclude what every public opinion poll now shows is the most popular option. MPs would be able to amend the

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<sup>12</sup> <https://constitution-unit.com/2018/09/13/if-theres-a-second-referendum-on-brexit-what-question-should-might-be-put-to-voters/#more-7039>

legislation to re-enfranchise the majority of their voters by ensuring the option of staying in the EU is on the ballot paper.

There have been suggestions that the electorate should choose from three proposals: to endorse the deal, to stay in the EU, or to leave the EU with no deal. There are at least ten different ways of formulating this question. One such possibility would be to use an Alternative Vote system, in which voters rank the options in order of preference, with the option that comes third being eliminated and voters second preferences then being allocated to the top two options.

Alternatively, as has been suggested by Dominic Grieve, voters could be asked a Yes-or-No question on whether to accept the deal. If the answer is No, there would then be another ballot on whether to leave with no-deal or stay in the EU.<sup>13</sup> Vernon Bogdanor has proposed a different order, that the first stage would be to ask voters if they still wished to leave the EU, and if they did, the second stage “perhaps a week later” would ask whether voters favoured a deal negotiated by the government, or “some alternative form [of Brexit]”.<sup>14</sup> The alternative in such a scenario would almost certainly have to be no deal as there would be little time to re-negotiate.

The attraction of a multi-option referendum is that it provides a wider choice for voters. However, there are downsides. The process is time consuming and would require an awareness campaign to explain the procedure. This might turn off voters and lead to apathy, and a consequent lack of legitimacy. There are few precedents in the UK context for such a vote. When a three-way choice was suggested for the Scottish referendum of 2014, it was rejected as unduly complicated. As Meg Russell, Alan Renwick, and Jess Sargeant have written: “Such votes are unfamiliar in the UK, so administrators would probably need more time to plan for the poll and for regulating the campaign.”<sup>15</sup>

For simplicity of understanding, clarity of outcome and legitimacy of the result, most referendums offer voters a binary choice. Each of the three most recent referendums in the UK – the 2016 EU referendum, the 2014 Scottish referendum, and the 2011 Alternative Vote referendum – offered voters a simple and binary question.

The Electoral Commission, whose role is to assess the proposed question in a referendum, says in its guidelines that the question should “be easy to understand, be to the point, be unambiguous, avoid encouraging voters to consider one response more favourably than the other, avoid misleading voters”. For this reason, we would expect it to favour a binary question once again.

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<sup>13</sup> <https://www.independent.co.uk/voices/brexit-second-referendum-eu-theresa-may-deal-trade-talks-immigration-a8461076.html>

<sup>14</sup> <https://www.theguardian.com/commentisfree/2018/jul/23/brexit-broke-parliament-people-fix-election-dilemma>

<sup>15</sup> <https://constitution-unit.com/2018/09/13/if-theres-a-second-referendum-on-brexit-what-question-should-might-be-put-to-voters/#more-7039>

Ultimately it will be up to MPs to decide in consultation with the Electoral Commission. Our preference would be for a binary choice: either the Government's deal vs staying in the EU; or an alternative, deliverable form of Brexit vs staying in. What would be unacceptable would be for an abstract form of Brexit to be on the ballot paper – it must be a specific set of proposals. We are confident that the option of staying in the EU would be on the ballot paper because it is the most popular choice in the country right now and neither MPs nor the Electoral Commission would want to disenfranchise more than half of the voting public.

We recognise there are arguments in favour of other formulations and we do not entirely rule out, for instance, a referendum with three options, if it could command majority support in Parliament. But, for reasons of simplicity, speed and clarity, as well as past experience, it is unlikely such a proposal would prevail.

## **The franchise**

There is a strong case for extending the franchise to three groups who are profoundly affected by Brexit: expatriate (for longer than 15 years) UK citizens; EU citizens resident in the UK, and young people, aged 16 and 17.

One of the most divisive legacies of the 2016 referendum is the sense of frustration among the young, who overwhelmingly want to stay in the EU and will have to live with this decision longest, over how their futures had been decided by older voters (who voted by a majority for Brexit). There is also recent precedent in the 2014 Scottish referendum for voting by 16 and 17-year-olds.

Meanwhile, the need to remedy the injustice done to expatriates (in both directions) has been underlined since 2016 by the great uncertainties suffered by the millions affected, as the Government has failed to guarantee their rights in the negotiations with the EU.

We would support considering these extensions of the franchise. But there may be practical limits on what changes could be made in the short timescale for legislation on a referendum. This report has repeatedly emphasised the need for simplicity, speed and clarity in the weeks ahead and, given the fierce urgency of even bigger democratic questions around Brexit, we do not want efforts to widen the franchise to become a barrier to the imperative of giving the people a vote on the outcome of the negotiations.

## **Social media rules**

A similar argument should apply to the debate around tightening the rules on the use of social media in political campaigning. There is a strong democratic case for much better regulation and transparency in political advertising on the internet, or even going further.

Such arguments have been made even more relevant given the controversy over digital advertising and the data used by the Vote Leave and Leave.EU campaigns in 2016.

However, we also recognise that there may not be time for legislation in this area if we are to give people a democratic voice on the outcome of Brexit negotiations. Instead, the companies running social media platforms should be challenged to show that they are taking all actions within their power to prevent abuse; and if not, subsequent legislation will be tougher in proportion to their failures. They should be on notice of the reputational damage that will be done if they are called out for slack vigilance of activities that subvert the democratic process.

The Electoral Commission's recent report on digital campaigning said: "Social media companies should work with us to improve their policies on campaign material and advertising for elections and referendums in the UK."<sup>16</sup> This should begin without waiting for legislation.

The chair of the Commission, Sir John Holmes, underlined the companies' responsibility in his foreword to its recent report: "We also call on social media companies to play their part in transforming the transparency of digital political advertising and removing messages which do not meet the right standards. If this turns out to be insufficient, the UK's governments and parliaments should be ready to consider direct regulation."<sup>17</sup>

## Conclusions

Ultimately it will be up to MPs to decide the question on the ballot paper, in consultation with the Electoral Commission. Our preference would be for a binary choice: either the Government's deal vs staying in the EU; or an alternative, deliverable form of Brexit vs staying in. What would be unacceptable would be for an abstract form of Brexit to be on the ballot paper – it must be a specific set of proposals.

However, we recognise there are arguments in favour of other formulations and we do not entirely rule out, for instance, a referendum with three options, if it could command majority support in Parliament. But, for reasons of simplicity, speed and clarity, as well as past experience, it is unlikely such a proposal would prevail.

There is a strong case for widening the franchise, and for tighter rules on campaigning on social media. But given the tight timescale and the need for speed, clarity and simplicity, there may be practical limits on what changes could be made. Changes must not become a barrier to the imperative of giving the people a vote on the outcome of the negotiations.

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<sup>16</sup> <https://www.electoralcommission.org.uk/find-information-by-subject/political-parties-campaigning-and-donations/digital-campaigning>

<sup>17</sup> Ibid.





## **Annexe 1 - Text of Article 50**

1. Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.

2. A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.

3. The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.

4. For the purposes of paragraphs 2 and 3, the member of the European Council or of the Council representing the withdrawing Member State shall not participate in the discussions of the European Council or Council or in decisions concerning it.

A qualified majority shall be defined in accordance with Article 238(3)(b) of the Treaty on the Functioning of the European Union.

5. If a State which has withdrawn from the Union asks to rejoin, its request shall be subject to the procedure referred to in Article 49.

## **Annexe 2 – Press release of ECJ ruling on Article 50**

**Court of Justice of the European Union**  
**PRESS RELEASE No 191/18**  
**Luxembourg, 10 December 2018**

### **The United Kingdom is free to revoke unilaterally the notification of its intention to withdraw from the EU**

*Such a revocation, decided in accordance with its own national constitutional requirements, would have the effect that the United Kingdom remains in the EU under terms that are unchanged as regards its status as a Member State*

On 23 June 2016, a referendum of the United Kingdom electorate produced a majority in favour of that Member State's leaving the European Union. On 29 March 2017, the British Prime Minister notified the European Council of the UK's intention to withdraw from the European Union under Article 50 TEU. This article provides that following such a notification, the Member State concerned negotiates and concludes a withdrawal agreement with the EU. The EU Treaties then cease to apply to that Member State from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification of the intention to withdraw and any possible extension.

On 19 December 2017, a petition for judicial review was lodged in the Court of Session, Inner House, First Division (Scotland, United Kingdom) by members of the UK Parliament, the Scottish Parliament and the European Parliament to determine whether the notification referred to in Article 50 can be revoked unilaterally before the expiry of the two year period, with the effect that such revocation would result in the United Kingdom remaining in the EU. On 3 October 2018, the Court of Session referred this question to the Court of Justice for a preliminary ruling, pointing out that the response would allow members of the House of Commons to know, when exercising their vote on a withdrawal agreement, whether there are not two options, but three, namely withdrawal from the European Union without an agreement, withdrawal from the European Union with an agreement, or revocation of the notification of the intention to withdraw and the United Kingdom's remaining in the European Union.

Because of the urgency of its request with respect, notably, to the fact that the withdrawal agreement can only be ratified if that agreement, and the framework on the future relationship between the United Kingdom and the European Union are approved by the UK Parliament, the Court of Session asked the Court of Justice to apply the expedited procedure, which was granted by the President of that court. The expedited procedure enables the Court to give its rulings quickly in exceptionally urgent cases by reducing procedural time-limits and giving such cases absolute priority.

In today's judgment, the Full Court has ruled that, when a Member State has notified the European Council of its intention to withdraw from the European Union, as the UK has done, that Member State is free to revoke unilaterally that notification.

That possibility exists for as long as a withdrawal agreement concluded between the EU and that Member State has not entered into force or, if no such agreement has been concluded, for as long as the two-year period from the date of the notification of the intention to withdraw from the EU, and any possible extension, has not expired.

The revocation must be decided following a democratic process in accordance with national constitutional requirements. This unequivocal and unconditional decision must be communicated in writing to the European Council.

Such a revocation confirms the EU membership of the Member State concerned under terms that are unchanged as regards its status as a Member State and brings the withdrawal procedure to an end.

In its reasoning, the Court begins by observing that, according to the Court of Session, the case before that latter court raises a genuine issue giving rise to a dispute which it is required to resolve and that the judgment of the Court of Session will have the effect of clarifying the options open to MPs who must decide on the ratification of the agreement negotiated between the UK and the EU. Replying to the arguments as to the admissibility of the case brought by the UK government and the Commission, the Court finds that the question referred by the Court of Session, regarding the interpretation of Article 50 TEU, is relevant and not hypothetical, given that it is precisely the point at issue in the case pending before the Court of Session.

As to the substance of the question, the Court rules that Article 50 TEU does not explicitly address the subject of revocation. It neither expressly prohibits nor expressly authorises revocation.

That being so, the Court notes that Article 50 TEU pursues two objectives, namely, first, that of enshrining the sovereign right of a Member State to withdraw from the European Union and, secondly, that of establishing a procedure to enable such a withdrawal to take place in an orderly fashion. According to the Court, the sovereign nature of the right of withdrawal supports the conclusion that the Member State concerned has a right to revoke the notification of its intention to withdraw from the EU for as long as a withdrawal agreement has not entered into force or, if no such agreement has been concluded, for as long as the two-year period, and any possible extension, has not expired.

In the absence of an express provision governing revocation of the notification of the intention to withdraw, that revocation is subject to the rules laid down in Article 50(1) TEU for the withdrawal itself, with the result that it may be decided unilaterally, in accordance with the constitutional requirements of the Member State concerned.

The revocation by a Member State of the notification of its intention to withdraw reflects a sovereign decision to retain its status as a Member State of the European Union, a status which is neither suspended nor altered by that notification.

The Court considers that it would be inconsistent with the EU Treaties' purpose of creating an ever closer union among the peoples of Europe to force the withdrawal of a Member State which, having notified its intention to withdraw from the EU in accordance with its constitutional rules and following a democratic process, decides to revoke the notification of that intention through a democratic process.

To subject that right to revoke to the unanimous approval of the European Council as the Commission and Council proposed, would transform a unilateral sovereign right into a conditional right and would be incompatible with the principle that a Member State cannot be forced to leave the European Union against its will.



People's Vote