



SCANNING THE BREXIT HORIZON: WHAT TO EXPECT IN THE NEXT NINE MONTHS

It's the political swirl rather than
the policy commitments that will
determine the shape of Brexit
between now and March 29th 2019

About the Repeal Bill Alliance

The Repeal Bill Alliance is an alliance of over 80 advocacy, campaign and civil society groups that has been working collectively following the publication of the European Union (Withdrawal) Bill- the landmark Brexit legislation that aims to transpose EU law into UK law. Organisations and sectors in human rights, the environment, consumer and workers rights, equality, democracy, food, farming, trade and further education are working together to ensure that rights, standards, environmental protections and devolution is protected as we make our exit from the European Union. Read more about the Alliance and our work here.

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The Repeal Bill Alliance is guided by a broad set of principles:

Open and accountable lawmaking

- Respect for democratic processes- there must be robust parliamentary scrutiny at all levels with appropriate levels of transparency
- There must be clear limits and safeguards on executive powers
- There must be robust parliamentary scrutiny at all levels with appropriate levels of transparency and debate before and during the conversion process

A high standards UK

- The preservation of existing rights and standards
- Parity of institutions: where governance arrangements are changes as a result of leaving the EU, there must be clear powers and procedures for ensuring the law is properly implemented and enforced on an ongoing basis
- Respect for the devolution settlements and the Good Friday Agreement

Introduction

So finally the EU (Withdrawal) Bill has Royal Assent. Time to move on and scope out what is left to resolve as we move towards March 29th 2019. And what is left is indeed quite a big list - with increasingly less time to resolve - the issue of how little road is left to settle fundamental Brexit questions is gathering pace.

Broadly there are three areas of activity. The first is the legislation needed to be in place to ensure a smooth transition as we exit the EU. The second is the ongoing negotiations between the EU and the UK and consideration of the final draft of the withdrawal agreement. The third is the political maelstrom both at home and abroad that could jeopardise a smooth passage, or possibly any type of passage, at any time (Italy, Ireland, May's survival as leader of the Conservatives, the delicate DUP arrangement plus the European Parliament's role).

Legislating for Brexit

On the first, the **EU (Withdrawal) Act** will gain Royal Assent in the next few days, which means the European Communities Act 1972 will be repealed, EU law is retained in UK law, and Ministers will have powers to modify retained EU law by delegated legislation.

What is left unclear is the actual interpretation of the Davis amendment on the meaningful vote, accepted by both Houses and now in the Act. Hugo Dixon, formerly of The Economist and Editor-in-Chief of In-Facts, thinks that it means the Speaker will decide whether the "meaningful vote" motion to approve what happens next is amendable; and it will provide parliamentary time for backbenchers to put forward their own motions. In his words "although there is some ambiguity about what the relevant passage of the House of Commons Standing Orders means (see [paragraph 24b](#)), there would be a riot if the Speaker denied MPs the chance to amend the relevant motion".

Not so, says Jacob Rees Mogg who made it very clear making it plain on Radio 4 Today on June 21st that there was no real concession offered - and that the Speaker's room for manoeuvre will be zero if the final Brexit motion is drafted so as to be neutral. "If the motion is not in neutral terms it doesn't meet the requirements of the Act....so if it is an

amendable non-neutral motion it is an expression of opinion by the House of Commons, it does not have any legal force under the Act". In other words according to Rees-Mogg there will be no meaningful vote.

This will no doubt run for days and it will be worth keeping an eye out for [Hansard Society](#), [the Constitution Unit](#) or [Institute for Government's](#) analysis on this. Currently the [Institute for Government](#) is saying "It is unlikely, though not technically impossible, that MPs would be able to amend a motion moved by the Government to comply with the EU Withdrawal Act in a 'no deal' scenario".

Now comes the flood of other pieces of **Brexit related legislation** that the Government has promised - and some of these will be coming into the Commons (allegedly) before Summer recess. In other words, in the next 4 weeks. Some of this, notably both the Trades and the Customs Bill, is likely to prove as difficult for May as getting the EU (Withdrawal) Bill through which explains why, at the time of writing, there has been no announcement of either coming back into the Commons. Indeed May will be minded not to have any difficult votes on that before the EU Council meeting at the end of June.

Ongoing negotiations with the EU and May's own cabinet

And whilst the Government may breathe a sigh of relief that the Withdrawal Bill is done and dusted it may be short lived. The **European Council meeting on June 28th and 29th** will see leaders of the 27 countries, who will take stock of the negotiations on the withdrawal agreement and on the political declaration on what the future relationship with the UK should look like. As reported by [Reuters](#), on June 19th a draft document outlining conclusions of their European Council meeting in Brussels singles out the lack of an operational arrangement for the Irish border, called by EU leaders a backstop solution. "The European Council expresses its concern that no substantial progress has yet been achieved on agreeing a backstop solution for Ireland/Northern Ireland," the draft conclusions, seen by Reuters, said.

This will also be an opportunity to talk about UK's future relationship with the EU, talks that started with the EU and senior UK officials on Wednesday 18th April. Topics included the basis for cooperation, economic partnership, security partnership and

cross-cutting and stand alone issues. However, as the most recent talks broke down the sense of frustration from EU about a lack of movement from the UK is palpable. It is still hoped that some progress can be made by the [June EU Council meeting](#) especially on Northern Ireland but Barnier's recent speech demonstrated how little progress has been made and the implications for that lack of progress:

“Because without an agreement on governance, and without an agreement on Ireland and Northern Ireland, there will be no Withdrawal Agreement, and therefore no transition period.”¹

At a speech in Vienna on June 20th, Barnier warned that the British government needed a dose of realism about what could be achieved in a deal between the EU and UK. Again came the message that there could be no cherry picking and that certain things would no longer be possible, such as access to EU-only criminal and security databases, European Arrest Warrant or to manage Europol.

That led to some reaction from [Scotland](#) who were quick to point out that their separate legal and judicial system needs to be taken into account during the negotiation process, including the importance of our law enforcement agencies maintaining direct links with their EU counterparts.

So it now appears that the June summit will not amount to much and the prospect of pushing **everything into the final October EU Council meeting** or even later is likely.

May has another imminent meeting that is likely to be even harder for her to square. The Cabinet meeting at Chequers, the week after the EU summit is where the promised “White Paper” will be finalised outlining future customs arrangements and UK /EU relations. This will be the real test of May's authority post EU Withdrawal Bill votes and has some reporting (Beth Rigby from Sky News for example) that it is being dubbed the “body bag” summit (the Cabinet either got to back May or quit). The mutterings of a leadership challenge intensify.

¹ http://europa.eu/rapid/press-release_SPEECH-18-3962_en.htm

Parliament's consideration of the Withdrawal Agreement

If May does make it through the summer then there is the party conference season to get through before the October EU meeting. Increasingly this is now where the attention is focused. Will there be an agreement acceptable to all parties on Northern Ireland that avoids a hard border - acceptable not just to the EU but to the DUP and to the Tory skeptics? May is looking increasingly hemmed in with this as she relies on both for her continuation as PM and for the Tories to remain in Government. Pressure is also coming from the EU who is saying that a deal must be agreed before the October Council meeting in order to give time for ratification and approval.

This then is where everything currently hinges. If an agreement is reached a vote can then be put to parliament and IF passed the government will proceed to progressing with the **Withdrawal and Implementation Bill (WAIB)**. This is an international treaty and is the agreed legal text for the implementation period, citizens' rights, and the financial settlement, as well as a significant number of other articles. It will also establish new relationships between Parliament and the governance of the devolved nations and the executive. It will also outline the backstop position on the economic issues surrounding Northern Ireland. A draft agreement was published in March showing what has been agreed and what is left to do².

The bill can be expected to have three main parts - domestic legal effect to whatever transition period is agreed; give effect to the agreement on citizens' rights; lay the legal groundwork for other separation provisions to be dealt with³. There will be **constraints on time** - it can't be done before withdrawal agreement negotiations have concluded but must receive Royal Assent by the 29th March 2019.

Alongside this is the **Future Framework for UK/EU Relations (FF)** which sets out the UK's long term relationship and partnership with the EU. Future EU and UK relations will be the subject of a separate agreement (or agreements) which will be concluded and enter into force only once the UK is a third party outside the EU⁴. Article 50 of the Treaty

² <https://www.gov.uk/government/publications/draft-withdrawal-agreement-19-march-2018>

³ See Swee Leng Harris's paper published by the Hansard Society 2018 [Legislating for transition/implementation: implications for the EU\(Withdrawal\) Bill](#) for more detail

⁴ <https://commonslibrary.parliament.uk/wp-content/uploads/2018/04/Brexit-new-guidelines-on-the-framework-for-future-EU-UK-relations.pdf>

of the EU provides that the Withdrawal Agreement should “take account of” the framework for the leaving state’s future relationship with the EU.

The vote put to parliament proceeding this is most likely to be asked to vote on a short motion, the so called **meaningful vote**, and will be tabled as soon as possible after negotiations have concluded - and is currently working towards October. The motion will be to **approve the Withdrawal Agreement (WA)** and the **Future Framework (FF)** agreed with the EU.

The Institute for Government has suggested this is the point of **maximum vulnerability for the government and maximum opportunity for the parliamentarians** as it’s at this stage where there is the ability to scrutinise. Whether it is amendable is still open to debate but parliament can certainly reject.

The Government claims that Parliament cannot force ministers to adopt a stance or can direct Government on this, arguing that ministers could take the UK out of the EU without a deal, even if that was not the will of Parliament. In reality, however, the politics of a 'no deal' scenario, or a scenario in which the Government could not get its deal through Parliament, would be extremely fraught.

Scenario One: What happens if at the motion stage parliament refuses to consent? May could come under political pressure to resign, or the government subject itself to a vote of no confidence in the House of Commons, or to move a motion for an early general election under the Fixed-term Parliaments Act 2011.

Scenario Two: What happens if custom and convention as assumed by Jacob Rees Mogg is not adhered to and that the Speaker rules on some form of amendments to the motion? Is it beyond the realms of possibility to see amendments on the motion seeking a renegotiation of the Withdrawal Agreement? Could there be an amendment to keep UK in the EU or take UK out of the EU without a deal or seek a new referendum? Impossible say some, possible say others.

But say the motion passes, the Government will then bring forward the **Withdrawal Agreement and Implementation Bill - (WAIB)** - that will need to be in place for March 29th 2019. This is quite possible and indeed is possible legislatively but even then the

legislative timetable will be tight as there will be other Brexit-related legislation to have in place by Exit Day.

To recap : everything in terms of parliamentary procedures must be completed by 29th March 2019

- pass a motion assenting WA and FF
- pass WAIB
- pass any secondary legislation needed to implement withdrawal agreement
- ratify WA as a treaty

BUT If there is any slippage in negotiations beyond October this timetable begins to look pretty impossible. If the Government fails to get the WAIB passed in time will they then have to get an extension to Article 50 (that will need the consent of the EU)? It has been made absolutely crystal clear that the EU needs three months from an agreement being reached to ratification. In other words, agreements must be signed, sealed and delivered by the end of December. This is when the **No Deal scenarios** emerge - and one that both the EU and some in Government are now preparing for.

Remember a scenario of a cliff edge/no deal will result in a huge legislative traffic to get everything in place for March 29th. A no Deal means no transition and means everything will have to be legislated for (and factor in potential hold ups in the Lords). See Appendix 2 for the list of Brexit-related Bills.

This week the Government caved in to pressure from Conservative rebels to allow a parliamentary vote in a '**no deal**' scenario. A 'no deal' scenario for the purposes of the legislation is carefully defined. There are three ways it could kick in:

1. If Parliament has decided not to pass the Government's motion to approve the withdrawal agreement and future framework
2. If, before 21 January 2019, the Government tells Parliament that no agreement can be reached
3. If after 21 January 2019, no agreement has been reached.

Scenario Three: A final agreement has not been successfully negotiated with the EU by the allotted time poses the biggest problem. Could the UK and EU agree to change the exit day (which require a Qualified Majority of European Council to agree) or could the

Government request a revocation of Article 50 notification and be successful in doing so? Or would it be taken a No Deal scenario and we live with the consequences?

Scenario Four: There is the added scenario of the European parliament failing to approve the deal or the final agreement is referred to the European Court of Justice. Whilst this last scenario is unlikely the EU may get more obstructive if negotiations are delayed. The closer that is to their May 2019 elections, the more likely that some MEPs and indeed governments may use it for political capital by raising for example, Poland losing out in new budget arrangements or Italy fighting Commission on economic policy.

There are other considerations. The **transition period** has yet to be really considered. The EU and UK have agreed words for a standstill transition. However the WAIB cannot give legal effect to transition in the UK without replication of the European Communities Act 1972 (ECA) for the duration of the transition period. How will various parliamentarians respond to any of the below outcomes:

1. Keep ECA in force with modifications (repeal Clause 1 of the EU (Withdrawal) Bill)
2. Replicate ECA with modifications
3. Do something different from ECA

Can we **unilaterally rescind** our intention to withdraw? This is not really an option being openly discussed except by most but is it possible? (The answer to this seems unclear despite the Miller case) . And what of the People's Vote, something that is gathering momentum as we appear to be getting nearer to a cliff edge and with no meaningful parliamentary vote. A **new referendum** is technically possible but it would take emergency legislation and agreement on the referendum question. But if it is a say on final deal then the final deal would have been completed and at a motion stage and before any vote in parliament BUT also Political Parties, Elections and Referendums Act 2000 states that referendum campaigns should last for 10 weeks.

The legal implications of any amendments to WAIB could be complex but one problem area will be **citizen's rights** especially as we have now lost the EU Charter of Fundamental Rights⁵.

⁵ House of Commons Library (2018) Brexit: Parliament's role in approving and implementing agreements with the European Union

The politics

As we approach the second anniversary of the referendum some are claiming there has been little done since then. The reality is that there has been a lot **attempted** and if you look at the draft withdrawal agreement with the EU nearly 70% has been drafted and accepted. The problem is that the 30% left is a highly charged 30% indeed. The Northern Irish border provides one of the greatest challenges to the Brexit negotiations. If there is no agreed solution what then? The Joint Report of December 8th 2017 committed the UK to maintain full alignment with those rules of the Internal Market and the Customs Union which, now or in the future, support North-South cooperation, the all-island economy and the protection of the 1998 Agreement. But in the last four weeks there has been significant back peddling on this from the UK government

The customs conundrum really has to be viewed through this Northern Ireland prism. A 'hard border' has been explicitly rejected by all sides but as yet no option has been found because no customs option can deliver an invisible border without solving the regulatory issues. "If the EU does not budge, the Government may ultimately be forced to choose between continued UK-wide alignment on goods regulation – or a Northern Ireland-specific solution".⁶ What then of the DUP confidence and supply arrangement with the Government? How long with this hold, especially with the added difficulties on whether Northern Ireland's abortion ban breaches the UK's global human rights obligation and all the attendant difficulties that will bring the DUP.

There are significant political risks for both main parties in how they vote, and respond to, Brexit legislation over the coming months. The lack of room for manoeuvre for May has always been limited, especially as a minority government, but she now looks like she is between a rock and a hard place. The Labour Party has to live with a less than united front and it this autumn's party conference will be key to how they handle what is increasingly a key issue for members.

The only thing that continues to be certain is the uncertainty - and its the political swirl rather than the policy commitments that will determine the shape of Brexit for us between now and March 29th 2019.

⁶ <https://www.instituteforgovernment.org.uk/sites/default/files/publications/irish-border-after-brexite-final.pdf>

Appendix 1: No deal would mean the following need to be legislated on by March 20th 2019:

- Nuclear Safeguards Bill
- Trade Bill
- Taxation (Cross Border Trade) Bill
- Agriculture Bill
- Migration Bill
- Fisheries Bill
- Withdrawal Agreement and Implementation Bill
- Animal Welfare (Sentencing and Recognition of Sentience) Bill
- Haulage Permits and Trailer Registration
- Environmental Principles and Governance Bill