The EU Withdrawal Act, the cornerstone of the Government’s programme of Brexit legislation, became law in June 2018. After weeks of intense negotiations between the Government and a group of pro-EU Conservative MPs, led by Dominic Grieve, the Act included some important changes to the procedures the Government originally proposed for Parliament’s consideration of the Brexit deal. We first set these out in our report Voting on Brexit.

In October 2018, the Department for Exiting the EU (DExEU) sent a memorandum to the Procedure Committee setting out how it understood the EU Withdrawal Act as regards Parliament’s role in the Brexit process.

The Government cannot now ratify the deal until Parliament has approved it.

The Government has been saying since October 2016 that Parliament will have a vote on a Brexit deal it negotiates with the EU. However, for a long time this was no more than a stated intention. When ministers first brought forward the EU Withdrawal Bill, the bill contained no legally-binding commitment to such a vote.

In December 2017, the House of Commons amended the bill to say that any secondary legislation to implement the withdrawal agreement could not be brought into force until Parliament had passed a statute approving the deal. However, this was a relatively weak requirement for parliamentary approval, as it would not have required ministers to consult Parliament before signing and ratifying the deal – that is, giving the UK’s formal consent to be bound by the treaty.

The bill was further amended during its passage. Section 13 now says the Government will not be able to ratify the withdrawal agreement unless four conditions have been met:

1. the documents and an associated statement have been published
2. “the negotiated withdrawal agreement and the framework for the future relationship have been approved by a resolution of the House of Commons on a motion moved by a Minister of the Crown”
3. a subsequent debate has taken place in the House of Lords
4. Parliament has passed legislation to implement the withdrawal agreement.

Amendments to the Government’s approval motion could lead to legal disputes.

In Voting on Brexit, we explained that under the existing Standing Orders of the House of Commons, any motion to approve the Government’s deal would be a ‘substantive motion’ and therefore amendable by MPs. MPs could seek to amend the motion, for instance, to put conditions on their approval of the deal. This is still the case.

If Parliament does amend the motion to approve the deal, the Government will not be legally obliged to do what it asks. However, the Government’s ability to ratify the deal could be constrained if Parliament amends the motion to such an extent that it no longer expresses approval of the negotiated deal. It is likely that the Government would take legal advice on whether any amendments before the Commons would stop the UK from ratifying a deal, if they were passed. The Government could make this advice available to the Commons if it chose to do so, although this would not stop MPs obtaining conflicting advice, as happened in 1993 when MPs considered amendments to legislation approving the Maastricht Treaty.

If the motion were amended and someone did believe that this stopped the Government from ratifying under the terms of Section 13, then they could challenge the Government’s decision to ratify the withdrawal agreement before the High Court. (This would be the same for amendments to the legislation the Government brings forward to implement the withdrawal agreement, after the vote on the motion.)

The Government therefore wants to make sure the Commons votes on its motion as originally tabled.

The possibility of a legal challenge is a key concern raised in the DExEU memorandum. In a letter to the Procedure Committee, Dominic Raab, the Secretary of State for Exiting the EU, argued that the process for Parliament’s approval of the deal needed to “allow for an unequivocal decision”. He said that “anything other than a straightforward approval of the deal will bring with it huge uncertainty for business, consumers and citizens.”

Not all amendments would necessarily have that effect. The EU Withdrawal Act does not constrain the motion for approval to a particular wording. This is different to other legislation, for instance the Fixed-term Parliaments Act 2011, which specifies the precise words that Parliament must use to trigger an early general election. The Government could therefore still be able to ratify a final deal, without a successful challenge, even if the motion had been amended.

The Government would need a special parliamentary procedure to guarantee a ‘yes or no’ vote.

The memorandum shows how the Government might ensure that the Commons expresses an “unequivocal decision” on its motion.

Under existing Commons procedure, debate on a motion of this kind would be limited to 90 minutes. This would be followed by a vote on any amendments that had been moved (or just on a single amendment if the time limit on the debate had been reached), followed by a vote on the motion (amended or unamended). Ninety minutes is clearly not long enough for a motion of this importance (the debate on the motion approving the Government’s decision to join the EU lasted five days before voting) – so there would have to be a business motion to allow a longer debate. The Government is suggesting that this business motion could also provide for the unamended motion to be voted on first, rather than the usual practice of taking the amendments before voting on the substantive motion. If the motion passed, no amendments would then be called.

The Government cites as a precedent the House procedure on Opposition Day motions. This gives the Commons a chance to vote on an unamended Opposition motion first, ahead of any amendment moved by ministers to leave out words and insert others.
However, there are two key reasons why the Opposition Day model does not seem an appropriate precedent to draw upon.

First, the Opposition Day motion procedure is designed for a scenario where there is only one amendment selected and debated – the Government’s – to replace the entire wording of the original motion. It is not designed for a situation where there are likely to be multiple amendments, which may seek to add caveats either before or after the original wording (either ‘That subject to x and y this House approves’ or ‘That, this House approves… provided that’).

Second, the opposition motion is designed for a different set of political circumstances. Because the Government normally has a majority, it normally carries its amendment to an opposition motion, effectively replacing the Opposition’s motion with its own. That means that, if the House followed the ordinary procedure of voting on amendments at the outset, it would vote on the same question twice – the Government’s amendment, and then the identical motion-as-amended. That would violate the principle that the House should not decide the same question twice, and would deprive the Opposition of a vote on its own formulation.

Therefore, in the case of opposition motions, asking MPs to decide on an unamended motion first and on amendments afterwards is the best way of ensuring that the range of views in the House is properly tested and reflected. In the Brexit case, the opposite could be true.

If the House did agree to a restrictive business motion, and then passed the motion as tabled approving the withdrawal agreement and political declaration, there would be no further votes on amendments. This would remove any opportunity to test the opinion of the House on ways in which the Government’s motion might be amended. This would be problematic in one of two ways:

- It could prevent a vote on an amendment on which there would have been a majority (it not being impossible that there could be a majority for the Government’s motion AND for an amendment to that motion).
- It could prevent a vote on an amendment on which there would be no majority. This would contravene one of the principles of Commons procedure: the right of minorities to express their views in Parliament.

Although the Government suggests the business motion would allow amendments to be voted on if the motion was rejected, this would require MPs to feel confident voting against the motion first and risk the Government’s motion being rejected altogether in the event there proved to be no majority for any amendment.

Ultimately, if the motion was amended in such a way that the Government felt it would not allow it to ratify the withdrawal agreement, it could subsequently table another motion asking a slightly different question as a means of enabling Parliament to reconsider. The EU Withdrawal Act does not prevent the Government from tabling more than one motion.

The House is ultimately in charge of its own procedure. It could amend or reject a government business motion if there was a majority to do so. If the business motion was rejected altogether, the Government could try again with a different business motion. Otherwise the default procedure (90-minute debate with one or more amendments decided first) would apply.

In response to the memorandum and Dominic Raab’s letter, the Procedure Committee has announced an inquiry into what these proposals mean for the House’s usual procedures for amendable motions.

Conservative backbenchers Dominic Grieve and Oliver Letwin have now set out an alternative way forward. They propose following a similar procedure to the one used when the Commons voted on House of Lords reform in 2007: the Commons could hold a general debate on the deal before voting on a series of freestanding resolutions which could cover a range of both the substantive or procedural issues members might be concerned by. Only once the opinion of the House has been tested on these issues would MPs then vote on the Government’s ‘clean’ motion, with a clear knowledge of where majorities do or don’t lie.

This ‘menu of resolutions’ would allow the House to express its views as well as, if the Commons voted to approve the Government’s motion, remove any ambiguity around whether the Government could ratify the withdrawal agreement. While each resolution would not be legally binding, if a majority in favour of an issue were found (whether a customs union or a Canada-style free trade agreement), it would have political significance. It could also impact how the House approached the EU Withdrawal Agreement Bill (another step on the path to ratification).

But the Government does not need to pass the motion before it brings forward the EU Withdrawal Agreement Bill

Section 13 of the EU Withdrawal Act says that the motions need to be approved by the Commons and the EU Withdrawal Agreement Bill needs to pass through Parliament before the Government can to ratify the withdrawal agreement. But it does not specify that the motion has to be passed before the bill can be introduced. This was highlighted by Sir David Natzler, Clerk of the House of Commons, in evidence to the Exiting the EU Committee.

It would be possible, therefore, for the bill to provide a way to ensure the Government is able to ratify, even if the motion has not passed or has been significantly amended in the House. Sir David suggested the EU Withdrawal Agreement Bill could include a retrospective provision to say that the passage of the bill would be sufficient in meeting the conditions set out in Section 13 of the EU Withdrawal Act. Another possibility would be to include a provision which repeals the relevant parts of Section 13 of the Act, or which explicitly gives the Government permission to ratify the agreement.

Of course, in either of these cases, the clause would have to be accepted by Parliament as the bill completes its passage.

Parliament will have a vote in a ‘no deal’ scenario, but no formal power to direct the Government

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:

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.

In any of these instances, the Government would have to make a statement to Parliament setting out what it intended to do next.

Parliament would then have an opportunity to vote on those plans, but only on a motion expressed “in neutral terms”. The motion could be “that this House has considered the Government’s plans to leave the European Union without a withdrawal agreement”, for example. That would generally be considered “neutral”, as it does not express an opinion about those plans, one way or another.

There has been some debate about whether such a motion would be amendable. This is because the Standing Orders of the Commons say that where, in the opinion of the Speaker, a motion is expressed “in neutral terms”, no amendments to it may be tabled (SO 24(b)).

As the Government has reminded MPs, the judgement on whether a motion is in fact in neutral terms, and therefore amendable, falls to the chair and cannot be prejudged. But if, as far as the Speaker is concerned, the phrase “neutral terms” in the Standing Orders has the same meaning as the phrase “neutral terms” in the EU Withdrawal Act, and the Standing Orders are not changed or disapplied, then the Government’s motion could not both comply with the requirements of the Act, and be amendable.
Parliamentary procedure, including Standing Orders, is flexible and designed to allow the House to achieve what it wants. If the Government did want the motion to be amendable (for instance if there was severe political pressure for the Commons to express its view), it could disapply Standing Order 24(b). Alternatively, even if the Government did not want to disapply that rule, the Speaker could choose to do so. The current Speaker has a history of interpreting procedure flexibly: in 2013 he allowed [19] a vote on an additional amendment to the Queen’s Speech.

It is therefore 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.

The procedural niceties of ‘no deal’ only matter if the Government survives them [20]

The Government claims that Parliament cannot force ministers to adopt a particular stance in the negotiations. In particular, the Government has argued 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.

The Government would probably come under political pressure to resign, to subject itself to a vote of no confidence [21] in the Commons, or to move a motion for an early general election under the Fixed-term Parliaments Act 2011. What happened next would depend not on the precise terms of the EU Withdrawal Act, but on the UK’s Brexit policy, as it then stood, and on how the EU27 responded to it.

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