

Negotiating a Brexit deal has proved hard enough, but the ratification process could be just as challenging

Blog post by Practice Lead Adam Terry and Senior Associate Joe Armitage, 13 November 2018

With British prime minister, Theresa May, stating that the Brexit talks are in their endgame, it is worth looking ahead at where the risks for the government will be most acute in the process required to ratify an agreement under the Article 50 framework.

First, the UK cabinet and the European Council of 27 member states would need to agree that the text negotiated by the commission and the UK government negotiating teams is satisfactory to them. That text would then need to be formally ratified by three institutions: the UK Parliament, the European Parliament and the European Council. It is the first of these that looks by far the most challenging.

In Westminster, the UK government is required to lay a statement before parliament alongside a copy of the withdrawal agreement and political declaration on the future relationship. After several days' worth of debating the government's negotiated deal, MPs in the House of Commons will then vote on a motion to either accept or reject it. The Procedure Committee of the Commons is currently considering the extent to which this vote should be a 'take it or leave it' one. It is probable that MPs will be able to amend the motion, but the amendments could be voted on separately to the Brexit deal in its original form, something that has been dubbed the smorgasbord approach. There is a risk that many MPs may not believe such a method will provide them with the 'meaningful vote' the government promised them.

Should Theresa May manage to secure support from a majority of MPs for her deal - in a vote that is likely to be tight - this would set in train a series of ratification procedures. First, under the Constitutional Reform and Governance Act 2010 (CRAG), parliament would have 21 days in which it could choose to "resolve against" the Brexit deal (this is standard practice for legally binding international agreements). The government can effectively ignore any resolution against the withdrawal agreement from the House of Lords, but a majority of the Commons resolving against the deal could thwart the whole Brexit process. It is unlikely that the Commons would do this, unless a majority of MPs felt the 'meaningful vote' motion had been unfairly handled.

Alongside the CRAG process, the government must draft a new primary piece of legislation - the Withdrawal Agreement Bill - to give legal effect to elements of the withdrawal agreement, such as citizens' rights, the transition period and the financial settlement. Downing Street is said to be braced for protracted battles over this bill, as primary legislation involves several stages - including the possibility of amendments - in both Houses of Parliament. However, the government could fast

track it by having the committee and report stages of the bill in the main chamber. This might see it clear parliament before Christmas, assuming a Brexit deal is secured by next week.

Logic might dictate that the Withdrawal Agreement Bill should pass if the withdrawal agreement itself has already been successfully voted through. However, as we have seen elsewhere in the Brexit process - notably with the Withdrawal Act and the legislation required for trade and customs - parliament might well amend the legislation to introduce measures going above and beyond the original text of the withdrawal agreement, especially on contentious issues like the financial settlement and the Irish backstop. An ambiguous political declaration on the future relationship might also provoke some MPs to amend the Withdrawal Agreement Bill so that it reflects their desired long-term Brexit outcome. The passage of this legislation represents a significantly more vulnerable moment for the government than the CRAG process.

The European Parliament will also have to ratify the deal, most likely after the hurdles in the UK Parliament have been cleared. MEPs can only vote on the text as agreed and will not be able to propose amendments. It seems likely that a text which has the blessing of EU Brexit negotiator Michel Barnier and the EU27 would also pass the European Parliament, which would be under significant pressure not to play a wrecking role. Nothing in the Brexit process can be taken for granted, but the route to ratification in Strasbourg looks considerably easier than that in London.

Should a simple majority of MEPs approve the deal, it will then be passed back to EU27 leaders at the European Council. Here, a “qualified majority” vote - i.e. the support of 20 member states representing 65% of the EU27’s population - would be needed to ratify the deal. However, leaders have been clear throughout the process that they are aiming for a withdrawal agreement that can command unanimous support.

Only after all of this will the UK government and European Council be legally empowered to deposit an “instrument of ratification” with the Secretary General of the council, meaning the withdrawal agreement can formally enter into force at 23:00 GMT on March 29th, 2019. That is a lot to achieve, and with significant potential for problems. An agreement between the two negotiating teams is just the first step.