

# Deal or No Deal (or no Brexit)?

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On Wednesday evening, Theresa May confirmed that the Cabinet had agreed on the Withdrawal Agreement concluded with the EU negotiators. However, the following morning, the likelihood of this agreement passing Parliament's scrutiny was diminished by a number of resignations from the government, all of whom stated that they were unable to support the deal that had been negotiated.

This therefore leads to questions about what is the most likely outcome at this stage. Whereas Theresa May could have thought that the chances of the deal agreed being approved and passed by the UK Parliament had increased after Wednesday night's Cabinet meeting, some remain supporters might have also thought that the chances of 'no Brexit' had increased the morning after with the ministerial resignations.

The potential outcomes of this situation appear at this stage to be: (1) the deal as agreed with the EU negotiators, (2) exiting the EU with no deal, and (3) not exiting the EU. Previously only 'deal' or 'no deal' had been countenanced as outcomes by the UK Government, but the 'third way' appears to have been confirmed to the press for the first time on the steps of 10 Downing Street by the Prime Minister, who confirmed that the only alternatives to the deal, as she saw it, were no deal, or no Brexit.

## **The deal**

Agreement of Cabinet has been secured. The resignations that have occurred since then do not in any legal sense affect this, as resignations are as a result of the convention of Ministerial Responsibility – the idea that a member of the Government is collectively responsible for Government policy (which the Withdrawal Agreement now is since the Cabinet Meeting) – and therefore you cannot be a member of the Government if you disagree with it. It is more of a political issue for the Prime Minister. The next stage is approval at the summit due on 25<sup>th</sup> November, with the governments of the EU27, and then it will need to go to the UK Parliament for a

vote and the passing of the relevant bill to put it into effect. It then ultimately must be approved by the European Parliament and then by the EU Council by Qualified Majority Vote. Providing all of these things occur, then the UK will leave on the 29<sup>th</sup> of March 2019 in line with the European Union (Withdrawal) Act. The point that may cause an issue here is, after the statements by politicians of all the different parties since publication of the Withdrawal Agreement, whether the deal will pass in the UK Parliament. All other steps appear to be straightforward, particularly as the EU and the EU27 seem to have adopted a 'sad to see you go, but let's make this as painless as possible for us all' approach to the Withdrawal Agreement. As long as the EU's stated objectives on Northern Ireland, EU Citizens and the monetary settlement have been met, it is likely to be approved.

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## **No deal**

The preferred approach of Conservative MPs who are members of the European Research Group (ERG), this is the only outcome which, in the absence of any other actions, will definitely happen. The triggering of the Article 50 TEU notice period means that by default of operation of law, the UK will cease to be a Member State of the EU after the 29<sup>th</sup> of March 2019. This will therefore only be avoided if some form of positive action is taken by the UK Parliament to implement some other outcome, whether that be to approve the Government's deal, or to carry out actions which would withdraw the notification of Article 50 TEU. This is accepted by the Government's own studies to be the most economically damaging of the outcomes available. MPs will be concerned about their own responsibility for allowing this to happen, and many have spoken out against it. However, its position as the default makes it a very real possibility.

## **No Brexit**

This was mentioned for the first time by Theresa May in her statement to the press after the Cabinet agreement on Wednesday night. It is the other possible alternative outcome to the 'deal', whether it is by action of the Government, Parliament, or a public vote on the Government's deal. This is where statements made by politicians and others have been a little misleading about the possibility of this outcome. When Theresa May, or Jeremy Corbyn, have stated that 'no

Brexit' is not possible, they have of course been talking in political terms, and not legal ones. The sovereignty of Parliament means that it has the unfettered ability to make law in the UK, and therefore it is entirely legally possible for it to take action to attempt to withdraw Article 50 TEU notification and remain a Member of the EU, as long as this is before 11pm on the 29<sup>th</sup> March 2019. Time is therefore the main obstacle here. Politically it may not be possible due to the stated policy of the Government, or the willingness of MPs to vote for it, but sometimes the way that this has been implied in some quarters as a legal impossibility is somewhat misleading. Whether the UK can withdraw Article 50 TEU notification unilaterally is a question currently pending in the CJEU, and will be answered by the Court in the case of *Wightman and others v Secretary of State for Exiting the EU* Case 621/18 on the 27<sup>th</sup> of November, (it was approved for the expedited procedure under Article 267 TFEU last month). If it cannot, then notification can still be withdrawn with the approval of the EU27, and statements by Heads of Government of the EU27 have indicated that they would be open to this possibility, albeit most likely with some concessions in return.

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So where does this leave us? The crucial point, as mentioned above, is the vote in the UK Parliament and the EU Withdrawal Agreement Bill. If it passes, then the UK will exit the EU 'in an orderly fashion', and it will then lead to the opening of negotiations post-March 2019 on the agreement on a future relationship between the UK and EU. This must be completed in time to come into effect at the end of the transition period. The Withdrawal Agreement does not make it 100% certain as to when this will be, due to the mechanism for extension in Article 132 of the agreement not yet having an agreed end date. (Article 132 says "up to [31 December 20XX].")

The interesting issue here is that supporters of 'no deal' and 'no Brexit' each have to face the fact that in order to advance their own causes, they would also each have to make the outcome that they desire least, more likely. Both of these outcomes require the rejection of the deal by the UK Parliament, in order for the other possibilities to come into play. If Parliament rejects the deal, then it would have to decide what to do next. If it does nothing, then the UK leaves with no deal. However due to the lack of a majority in Parliament in favour of this outcome, and the potential damage to the UK's interests, this

reduces the likelihood that Parliament would just 'sit on its hands' until 29<sup>th</sup> March 2019. However, if the 48 letters to the 1922 Committee are delivered, then a possible Conservative Party leadership contest could provide enough of a diversion to de-rail the programme of approval that the Withdrawal Agreement needs to go through.

This does not make 'no Brexit' more likely though, as there is also not the required majority for unilaterally revoking the Article 50 TEU notification either. Although the majority of MPs at the time of the referendum were declared as Remain supporters, many have subsequently pledged to respect the referendum vote against their own personal views. Parliament could instead decide to seek the view of the public through another referendum vote, this time on the deal as agreed by the Government. This could be done either as a condition of approval of the Government's deal (i.e. Parliament makes approval conditional upon the public vote) or as a 'what do we do next?' question as a result of a stalemate in Parliament that rejects the deal. Received wisdom states that to run a referendum including formulating the question, running campaigns, etc would require a period of 6 months, and therefore an extension of the Article 50 TEU period would be required. The approval of the EU27 is required in order for this to happen, although there appears to be a prevailing opinion that this would be granted for a referendum. (This would be thrown into doubt if 'no deal' was an option, mainly because it would be against the economic interests of the EU27). However, legally, it is an option – whether it is politically an option is a matter for the parties in Westminster to decide.