

The Withdrawal Agreement was due to be voted on in the House of Commons on 11 December 2018, in accordance with sections 11 and 13 of the European Union (Withdrawal) Act 2018. Just a day before the proposed vote, the European Court of Justice held in C-621/18 *Wightman and Others v Secretary of State for Exiting the European Union* that Article 50 TEU allows the unilateral revocation of the notification of the intention to withdraw from the EU. A revocation will be possible until such time as a withdrawal agreement has entered into force, provided that the revocation has been decided upon in accordance with the Member State's constitutional requirements and is formally notified to the European Council. This must however also be done within the two-year time frame stipulated in that Article, unless this period is extended. Back in Westminster the current political situation indicated that the Withdrawal Agreement was not likely to receive the requisite number of votes to pass by a majority of the House. The vote has therefore been postponed, whilst the Prime Minister seeks 'additional reassurances' from the EU on the question of the Northern Irish backstop. Although a vote is required under sections 11 and 13 of the European Union (Withdrawal) Act 2018 at some point in the future, likely January 2019, there is currently no sign of abatement of the political impasse in the House of Commons. It is suggested that one way to breach the political logjam in Parliament would be to hold another referendum.

A UK 'constitutional requirement': the question(s)

The question(s) to be posed in a second referendum are entirely to be decided by the UK. This is not an EU competence. By analogy, Article 48 TEU provides that any Treaty revision (except those adopted through a simplified procedure) 'shall enter into force after being ratified by all Member States in accordance with their respective constitutional requirements' and of course Article 50 TEU reiterates that the Member States' decision to withdraw is in accordance with those requirements which are internal to the constitution of the Member State in question.

In a second referendum scenario, what is essentially proposed is either a replication of the question posed in the first referendum, held in June 2016, or a three-way ballot between: no deal; the Withdrawal Agreement; and remaining a member of the EU. This idea of a "preferendum" has been mooted, in which voters could choose from these three options in order of voter preference. The three-way ballot would work on the basis that each voter receives two votes, so if their first-choice option gets the fewest number of votes and is unsuccessful, then they would still have a vote on which of the other two remaining options they would prefer. This proposal is said to be based on the voting system for regional mayoral elections.

The issues here are twofold. First, the "preferendum" option may fall foul of the so-called Condorcet paradox, whereby the reliance upon the voter second preference means that the electorate ends up voting for something that they did not really want. Arguably, in order to avoid this, a two-stage referendum procedure could be utilised, such as that held in New Zealand in 1992 on electoral reforms. Following this procedure, the first stage would ask voters whether they still wished to leave the European Union. If they did not, no second stage would be necessary. If they did, they could be offered a choice of whether to leave without a deal, or whether to leave on the basis of the Withdrawal Agreement. This second

stage could perhaps be held a week later than the first, and would provide an outcome which would give Parliament an indication of how to proceed. However, central to holding another referendum is the matter of legitimacy. Is it crucial that any further referendums on the matter of the UK's withdrawal from the EU are seen to be legitimate by the public in the UK, as well as in the EU, our negotiating partners, and internationally, by our potential future trading partners. Another referendum would, therefore, need to be run on the basis of the franchise, campaign rules, etc as the first. This raises the second issue of whether to put the 'no deal' option on the ballot paper.

The House of Commons displays no majority for a 'no-deal' scenario, and would presumably, therefore, prefer for this not to be an option. Were this option to be excluded however, the outstanding options would presumably be the proposed Withdrawal Agreement or remain, because the EU has already said that it will not negotiate an alternative deal. There would, therefore, be a real risk of a portion of the electorate feeling that they did not have a real choice if only the deal and remain options were on the ballot paper. If, however, this transpired and these were the choices put to the people and they voted to accept the Withdrawal Agreement in a referendum prompted by the House of Commons voting against the adoption of the very same Agreement, this would again appear to put the people in direct conflict with their representatives. This has the potential to cause further issues of legitimacy and trust in the political system by precipitating a clash between direct and representative democracy. The only real precedent for this is Parliament voting for triggering Article 50 following the last EU referendum, where the majority in Parliament was known to be for 'remain' but the majority in the country was for 'leave'.

As for the time implications of setting the question, Justine Greening MP stated in the House of Commons on 5 December that a 'referendum can be held in 22 weeks. We could hold one on 30 May'. A further referendum on the UK's membership of the EU would require a new Act of Parliament in order to provide for both the practicalities and the legal authority to conduct it, and under the Political Parties, Elections and Referendums Act 2000, the Electoral Commission is required to comment on the intelligibility of referendum questions as soon as reasonably practicable after the introduction of a Bill containing a question. The 2015 legislation providing legal authority for the 2016 EU referendum took from its first reading in the House of Commons on 28 May 2015, until it received Royal Assent on 17 December 2015, to enact. It is possible that utilising this Act as a template for another referendum would save Parliamentary time, although amendments would inevitably have to be made. It is widely acknowledged that the 2016 Brexit referendum was advisory because the 2015 Referendum Act did not make provision for what would happen in the event of either a majority vote to leave or a majority vote to remain. In contrast, the legislation providing for the 2011 referendum on the voting system did make provision for the possible outcomes of the vote, and is considered binding as a result. Legislation enacted to provide the legal authority for a second Brexit referendum could be made binding through the inclusion of clauses specifying the steps to be taken in the event of the differing resulting scenarios, and could even provide for a majority threshold of a certain percentage. Therefore, enacting the legislation required to provide legal authority for a second Brexit referendum could foreseeably elongate the timescale suggested by using the 2015 Act as a template. As discussed above, the question posed in any such second Brexit referendum

may well be different to the first, and consequently also take Parliamentary time to draft and enact. The issue of time will be addressed further below.

Europe and 'second time arounds'

The history of the process of European integration is a history of second referenda. Examples of second referendums being held include the referendum conducted by Denmark on the Maastricht Treaty on 2 June 1992 and then again on 18 May 1993. Ireland held a referendum on the Nice Treaty on 7 June 2001 and the second vote was held on 19 October 2002, Ireland again held a referendum on the Lisbon Treaty on 12 June 2008, in which 53.4 per cent of Irish voters rejected the Lisbon Treaty, against 46.6 per cent who supported it. The second referendum was held on 2 October 2009, which provided a positive result of 67.1 per cent. The second rounds are generally conducted in a relatively short period of time. The exception to this is Norway, this time on accession to the EU, which held the first referendum in 1972 and the second in 1994. Of course, these votes related either to Treaty ratification or to EU accession, and therefore integration within the European Union. They do not relate to withdrawal. The difference between the purpose of these referendums and any second Brexit referendum means that their value as precedent is uncertain, their consequences still lingering, but they at least show the evidence of potential flexibility in the EU system and some endorsement of differentiated integration.

Timing and the EU Side

Article 50 (3) TEU provides that 'The Treaties shall cease to apply to the [withdrawing] State in question from ... two years after the notification [to withdraw] ... unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period'; therefore the UK will leave the EU on 29 March 2019. Therefore, the only exception is if unanimous agreement is reached in the European Council to extend this two year period. If this is not achieved, the UK will leave the EU and cease to be a Member State on 29 March 2019 by operation of law. Consequently, if any referendum resulting in a vote for remaining in the EU were conducted in excess of this timescale without an extension being provided, the UK would be required to seek to re-join the EU in accordance with Article 49 TEU.

As to the legal possibility of an extension, notably, Article 50 TEU does not specify a connection between the constitutional requirements of the withdrawing Member State and the two-year time limit contained in that Article. There is no express term(s) providing that an extension to the two-year time period will be granted in order for the constitutional requirements of the withdrawing Member State to be performed. This would include a postponed vote on a withdrawal agreement under sections 11 and 13 of the European Union (Withdrawal) Act 2018. There is also nothing in the recent Advocate General's Opinion in *Wightman* to suggest otherwise. In fact, paragraph 147 of that Opinion states 'A temporal limit on the revocation of notifications of the intention to withdraw may be inferred from Article 50(3) TEU: it is possible only within the two-year negotiation period that begins when the intention to withdraw is notified to the European Council' unless this period is extended in accordance with Article 50 TEU. This has been confirmed by the Court. It seems to us that such an extension could be considered by the EU as *rebus sic stantibus* if

the mechanism to set up a referendum were at least in place, as it seems unlikely that EU would simply agree to an extension if this is perceived as a device by which to acquire additional negotiating time.

What should also be considered is that the European Parliament elections will be held on 23 to 26 May 2019, following which a new Commission President is to be elected with the input of the newly formed European Parliament, potentially as early as July 2019. A second referendum would presumably require the EU to grant not only an extension to the Article 50 TEU period but also to readjust its electoral calendar for 2019 to provide not just for the UK to vote in another referendum but also for the result to be ascertained and communicated with sufficient time for the MEP elections to be held, potentially in the UK as well, should such a referendum produce a vote to remain.

When direct universal suffrage for (the then) Assembly was first introduced back in 1976, the Act of 20 September OJ L 278, 8.10.1976, p. 5 in Article 11 stated that 'Should it prove impossible to hold the elections [...] the Council acting unanimously shall, after consulting the European Parliament, determine, at least one year before the end of the five-year term referred to in Article 5, another electoral period which shall not be more than two months before or one month after the period fixed pursuant to the preceding subparagraph.' Accordingly, the 2019 elections will take place from 23 to 26 May and it is therefore too late to readjust this date because it is too late to comply with the one-year notice stipulation. Furthermore, if another referendum in the UK yielded a vote to remain, Article 3a of Council Decision (EU, EURATOM 2018/994 of 13 July 2018 amending the Act concerning the election of the members of the European Parliament by direct universal suffrage, annexed to Council Decision 76/787/ECSC, Euratom of 20 September 1976) would apply, which states 'Where national provisions set a deadline for the submission of candidacies for election to the European Parliament, that deadline shall be at least three weeks before the date fixed by the relevant Member State [...] for holding the elections to the European Parliament'. Unless the UK political parties have already complied with this three-week time period, by operation of EU law the latest date the EU could extend the Article 50 Period to is the end of April 2019. In fact, it has been suggested that for a post-referendum decision to decide whether the UK is to participate in these elections, the referendum would have to take place by 11 April 2019 at the latest. The only viable alternative would be to suspend the voting rights of UK citizens for the duration of an Article 50 TEU extension, which would exceed the current date set for the European Parliament elections.

As almost all Member States allow for the possibility of voting from abroad in European elections, European citizens can still be offered the option either to vote in their country of origin or 'wait' for any election that may be run in the UK. However, the European Council has already approved new rules regarding the redistribution of British MEP seats. It established that 27 of the UK's 73 seats would be redistributed to other countries, while the remaining 46 seats will be kept for future enlargements. Therefore, the EU would have to agree to suspend the redistribution of seats as well as the European Parliament elections in the UK. One could argue that if the referendum vote was to remain, by-elections could be organised quickly in the guise of those set up in instances of accession of a new Member State, as in the case of Croatia. However, this would not necessarily be the preferred option, in light of the European Commission President's elections due to follow shortly after, and

with such an extension needed to be granted in order to hold the vote, the potential outcome would not be known, and so the incentive for the EU to grant such an extension to permit the UK to 'remain' would be based on speculation as to the outcome.

Conclusion

The timescales surrounding the UK's withdrawal from the EU have always been tight. The postponement of the vote on a withdrawal deal tightens the timescales even further. It also appears that the suggested way of resolving the political logjam in the House of Commons over accepting the Withdrawal Agreement through another referendum, does nothing to alleviate this. Furthermore, a second referendum invokes issues of legitimacy. Another referendum cannot be seen to be rushed through with a shorter campaign period than with the first Brexit referendum, of at least ten weeks, as it would otherwise be perceived as undermining basic principles of democracy. Postponing one vote in the House of Commons consequently postpones any opportunity for another vote in the country. As a result, the possibility of there being a second referendum reduces along with it.