

### Updated: Can the UK Parliament stop a no-deal Brexit?

3 September 2019

#### Introduction

At the end of July we published a [paper](#) looking at the options available to Members of the UK Parliament (MPs) should they seek to prevent a no-deal Brexit on 31 October 2019.<sup>1</sup> We discussed the scope for Parliamentary motions, amendments to existing legislation, the passing of new legislation and the “nuclear option” of a vote of no confidence (VONC). In this paper, we provide an update on our analysis in light of developments in the last couple of weeks, in particular the UK Government’s announcement on 28 August that Parliament will be prorogued in the week commencing 9 September and will not reconvene until 14 October, and assess how likely it is that legal moves to prevent a no-deal Brexit will succeed. In particular we consider the proposed legislation seeking to force the Government into agreeing an extension of the deadline for the UK leaving the EU until 31 January 2020 and the Government’s threat to seek an early election if this legislation passes. Our conclusion is that both sides’ room to manoeuvre is constrained by existing legislation and procedural rules, and timing issues are now even more acute. As to the legal challenges brought against the UK Government concerning the prorogation of Parliament, these face a number of hurdles, in particular the court may be reluctant to rule on prerogative matters and the claimants may find it difficult evidentially to establish that such prerogative power was used for an improper purpose.

#### What is prorogation and why is it controversial?

Prorogation is the means by which a Parliamentary session is brought to an end by the Queen upon advice from Government Ministers in her Privy Council. On 28 August, Boris Johnson’s Government asked the Queen to prorogue Parliament on a day “*no earlier than Monday 9 September and no later than Thursday 12 September*” until 14 October 2019. Acting on the advice of the Privy Council, the Queen (from her castle in Balmoral, Scotland) ordered prorogation.

Prorogation is normally (and regularly) used to trigger a new session of Parliament to allow the Government to set a new legislative agenda and resolve procedural issues, including restrictions on the reintroduction during the same Parliamentary session of legislation rejected by the House of Lords. Indeed, the UK Prime Minister, Boris Johnson, has stated that the Government took the decision last week to prorogue Parliament precisely because of the need to set a new legislative agenda.

In ordinary circumstances, therefore, prorogation would be an entirely unremarkable occurrence. In the present circumstances, however, it is a controversial step, due both to the timing of the proposed prorogation and its length. Parliament does not sit during a prorogation and therefore cannot pass legislation. The UK is due to leave the EU automatically on 31 October 2019 (i.e., in less than eight weeks time) whether or not a withdrawal deal is in place. In order to achieve the Government’s stated purpose of triggering a new Parliamentary term, the period of prorogation could be as short as a few days (the average period is generally six days).

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<sup>1</sup> <http://www.allenoverly.com/Brexit-Law/Documents/Can%20the%20UK%20Parliament%20stop%20a%20no-deal%20Brexit.pdf>

Parliamentary researchers have established that Parliament has not been prorogued for as long as is currently proposed for over 40 years (or 90 years if post-election prorogation is discounted).<sup>2</sup> Therefore the decision to shut down Parliament in the week of 9 September for a period of more than five weeks has been characterised by some as an attempt to prevent any legislation blocking a no-deal Brexit, rather than a simple administrative act to allow a new Government to put forward its new legislative proposals. As discussed in our July paper, the most significant difficulty facing MPs looking to prevent a no-deal Brexit was always going to be timing. This step reduces the already limited time available for an effective Parliamentary intervention to a matter of days.

## Might a legal challenge in the courts prevent prorogation?

At the time of writing, it has been reported that three separate sets of court proceedings seeking to stop prorogation have been commenced, one in each of the three UK jurisdictions. On 30 August, the Scottish Court rejected the claimants' application for an interim injunction preventing prorogation, preferring instead to hear the substantive claim in full this week. The main argument in the Scottish proceedings is that the Government is using the prorogation power for an improper purpose, whereas the Northern Ireland claim asserts that a no-deal Brexit would be in breach of the Good Friday Agreement. The English proceedings, brought by Gina Miller, are the most recently-filed and so it is not yet clear what arguments will be made, but from press reports it appears that her legal team will make similar points to those advanced in the Scottish proceedings. Former Prime Minister John Major has indicated he will seek to intervene in the English proceedings and the Scottish Government will seek to intervene in both the Scottish and English proceedings.

It is difficult to predict the outcome of any of these proceedings, but the claimants are likely to face two main obstacles. The first is justiciability, namely whether this is a question that the courts can even decide. Traditionally, the courts have been reluctant to review the exercise of prerogative powers. Former UK Supreme Court Justice Lord Sumption has described the proceedings as "*a very long shot*", on the basis that the relationship between the Executive and Parliament is governed by constitutional convention, and the Supreme Court confirmed in earlier proceedings brought by Ms Miller in relation to triggering Article 50 that the courts could not enforce conventions.<sup>3</sup> However, the leading constitutional law expert, Professor Paul Craig, has argued that previous case law (including the previous *Miller* decision) demonstrates an over-arching, and legally enforceable, constitutional principle that prerogative powers such as the power to prorogue cannot be used to subvert Parliament's power to legislate.<sup>4</sup>

The second challenge for the claimants in the English and Scottish proceedings is likely to be an evidential one: how will they prove that the purpose was improper given the Prime Minister has stated expressly that the purpose of prorogation is to allow for a new legislative programme? The 'duty of candour' in judicial review proceedings will require the Government to give a full and accurate explanation of all facts relevant to the issue,<sup>5</sup> and any witness statement explaining the reasons for prorogation will need to be supported by a statement of truth, but the evidential hurdle will nevertheless be a difficult one for the claimants to overcome. The Scottish claimants have challenged the Prime Minister to swear an affidavit explaining the reasons for prorogation, but at the time of writing it is unclear whether any such affidavit will be provided.

## Could MPs pass primary legislation?

The option of passing primary legislation to prevent a no-deal Brexit (or potentially simply to prevent prorogation and buy time for proposing substantive legislation) remains open to MPs. But only just. As

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<sup>2</sup> Matthew Purvis, Research Services, House of Lords Library, Twitter 29 August 2019, <https://twitter.com/HLLibResearch/status/1167116668960722947>

<sup>3</sup> *R (Miller) v Secretary of State* [2017] UKSC 5, [2018] AC at 146

<sup>4</sup> Paul Craig, 'Prorogation: Constitutional Principle and Law, Fact and Causation', Oxford Human Rights Hub, 31 August 2018 <http://ohrh.law.ox.ac.uk/prorogation-constitutional-principle-and-law-fact-and-causation/>

<sup>5</sup> *R (Quark Fishing Limited) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1409 per Laws LJ at [50]

discussed in our previous bulletin, the two obstacles to passing such legislation are the lack of time and the need to gain control of Parliamentary business. Under Standing Order No 24, MPs can apply for emergency debates on important matters that should have urgent consideration, and the Speaker of the House of Commons may select such motions for debate by MPs. Whilst it remains the case that a motion will not on its own be sufficient to prevent a no-deal Brexit for the reasons we have previously discussed, a motion under Standing Order No 24 could be used as a vehicle to allow MPs to take control of Parliamentary business in order to pass binding legislation, notwithstanding the order to prorogue Parliament. They could alternatively seek to amend the motions that the Government is required to put to Parliament under the Northern Ireland (Executive Formation etc) Act 2019 (NIEFA) (which requires Parliament to consider reports on the formation of an Executive in Northern Ireland), as the debate on the first NIEFA reports is due to take place on 9 September.

A motion selected for an emergency debate and the motions required under NIEFA would usually be expressed in neutral terms and, in theory, could not be amended. However, as previously discussed, the Speaker of the House of Commons has demonstrated a significant degree of flexibility over procedural matters and, in particular, has indicated that the opportunities that the emergency debate procedure presents “...are fuller than has traditionally been acknowledged”.<sup>6</sup> However, now that the prorogation order has been made, the already small window of opportunity in which a Bill to prevent prorogation and/or a no-deal Brexit could be passed has become significantly smaller, as it is by no means certain that legislation can be passed ahead of prorogation (at which point any pending legislation will fall away unless the House passes a motion requiring it to be carried over into the next session), particularly given such legislation also needs to pass through the House of Lords, where it is likely to be more difficult to control attempts to filibuster (i.e., time out) that debate.

## General election

Under the Fixed-term Parliaments Act 2011 (the **FTPA**), an election will be held if (i) a motion for an early general election is agreed either by at least two-thirds (a supermajority) of the whole House, or (ii) a VONC in the Government is passed and 14 days elapse without a further motion being passed expressing confidence in the Government (or an alternative Government). By convention, Parliamentary time will be allocated for a VONC tabled by the Leader of the Opposition.<sup>7</sup> This means that the Leader of the Opposition, Jeremy Corbyn, could in theory propose a VONC following Parliament’s return from the summer recess and ensure a debate as early as the next day.<sup>8</sup>

However, the most significant obstacle for a VONC was always going to be timing and, once again, the prospect of prorogation means that timing issue has now become even more acute. Even if a VONC is held immediately after Parliament returns from its summer recess this week, Parliament will only be sitting for the first part of the statutory 14 day period during which an alternative Government might seek to establish that it has the confidence of the House of Commons. Assuming no alternative Government could establish the confidence of the House in that truncated period, a General Election would be required and there is no certainty that this would take place before the 31 October deadline. Given the lack of clarity as to whether a “caretaker” Government would be required to seek an extension to the Article 50 deadline pending such an election, MPs opposed to a no-deal Brexit could not be certain that a VONC would result in a Government opposed to no-deal being appointed ahead of exit day.

## The emerging plan

Reports in the UK press suggest that MPs intend to use an emergency debate under Standing Order No 24 as a vehicle to take control of the order paper and pass legislation requiring the Government to seek an extension of

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<sup>6</sup> HC Deb (18 March 2019) Vol 656 Col 788 <http://bit.ly/2OfXbcJ>

<sup>7</sup> Erskine May, para 18.44. There is no obligation to allocate time for a motion of no confidence tabled by any other MP, however, and so the motion tabled by the Liberal Democrat leader Jo Swinson on 25 July 2019 is yet to be debated

<sup>8</sup> Chris White, ‘What will the new Prime Minister’s Parliamentary options be on Brexit?’ <https://www.conservativehome.com/platform/2019/07/chris-white-what-will-the-new-prime-ministers-parliamentary-options-be-on-brexite.html>

the Article 50 period. Specifically, it appears that MPs will apply for the emergency debate today when Parliament returns, with the debate on the legislation itself taking place tomorrow with a view to the legislation being approved later that week or over the weekend, i.e. before Parliament is due to be prorogued.

The draft legislation itself has just been published.<sup>9</sup> It gives the Government until 19 October to either agree a deal with the EU and obtain Parliamentary approval for this, or obtain Parliamentary approval to leave without a deal. If not, then the Prime Minister is obliged to seek an extension until 31 January 2020. If the European Council agrees to this extension, then the Prime Minister must confirm the UK's agreement. If the European Council proposes a different extension, then the Prime Minister is required to accept that extension unless it is rejected by the House of Commons. The legislation is quite prescriptive, which will reduce the Government's ability to ignore or undermine it, but does raise the potential issue of Queen's Consent.<sup>10</sup> This is a procedural rule applying to legislation affecting the exercise of a royal prerogative requiring a minister to confirm during the Third Reading that the Bill should pass. Robert Craig has argued that constraining the Government in this way will affect the prerogative, allowing the Government to withhold Queen's Consent.<sup>11</sup> Others have argued that it is for the Speaker to decide whether Queen's Consent is required and that, as a procedural rule, it can be changed by Parliament. Either way, this adds a further level of complication to an already difficult process.

It has also been reported that if the Government loses the vote on the emergency debate, it will propose a motion under the FTPA for a general election to be held on 14 October, before the next European Council meeting on 17-18 October. However, in order to achieve the required super-majority, the Government will need support from the Opposition. Given that the election date would be for the Government to decide, it is not clear this support will be forthcoming without confirmation that the extension has been achieved.

## Conclusion

Whilst MPs seeking to prevent a no-deal Brexit retain some options, the prorogation of Parliament further reduces the time available. A potential path is open to them to pass legislation, but this would require them to circumvent procedural rules which seek to maintain Government control over the legislative process. The legal challenges launched against the Government concerning its prorogation of Parliament also face significant legal obstacles. Finally, the outcome of any election held before 31 October looks increasingly uncertain. These latest developments reinforce our original advice that businesses must ramp up their no-deal preparations.

## Your Allen & Overy contacts



**Andrew Denny**  
Partner  
Litigation & Investigations  
Head of UK Public Law Group  
+44 020 3088 1489  
andrew.denny@allenoverly.com



**Sarah Garvey**  
Counsel  
Litigation & Investigations  
+44 020 3088 3710  
sarah.garvey@allenoverly.com



**Karen Birch**  
Counsel  
Litigation Professional Support  
+44 020 3088 3737  
karen.birch@allenoverly.com



**Thomas Cusworth**  
Associate  
Litigation & Investigations  
+44 020 3088 2453  
thomas.cusworth@allenoverly.com

If you would like to discuss the issues raised in this paper in more detail, please contact any of the experts above or your usual Allen & Overy contact.

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<sup>9</sup> Hilary Benn MP, Twitter 2 September 2019, <https://twitter.com/hilarybennmp/status/1168560598650621953>

<sup>10</sup> Not to be confused with Royal Assent, the agreement of the Monarch that is required for all Bills to become law, which has not been refused since 1707.

<sup>11</sup> Robert Craig, <https://blogs.lse.ac.uk/brexit/2019/09/02/proponents-of-the-new-bill-to-stop-no-deal-face-a-significant-dilemma-over-queens-consent/>