

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

31 July 2019

#### Introduction

There are less than 100 days until 31 October 2019, when the UK will leave the European Union without a deal by default, unless between now and then the UK and EU27 are able to agree a deal or further extension to the Article 50 period (or the UK revokes its Article 50 notice). The new UK Prime Minister (**PM**), Boris Johnson, has announced that 31 October will be the UK's departure date "do or die, come what may", with or without a deal. He has also ruled out doing a deal with the EU which includes the current Northern Irish "backstop", and the EU has been equally clear that this is an essential component of any deal. Accordingly, the prospect of the UK leaving on 31 October without a deal has become more likely, despite the fact that a majority of Members of the UK Parliament (**MPs**) are opposed to this and the PM's claim that the chances of this are "a million-to-one against".

To assess the likelihood of a no-deal Brexit on 31 October, we consider below the options available to MPs to prevent this outcome. These include Parliamentary motions, amendments to existing legislation, passing new legislation and the "nuclear option" of a vote of no confidence (**VONC**). A significant difficulty is the potential lack of a procedural "hook" to get the necessary Parliamentary time to pass legislation. The statutory requirement for the Government to put a motion to Parliament setting out how it proposed to proceed following the rejection by Parliament of its proposed withdrawal deal has previously provided MPs with the opportunity to amend that motion in order to take control of Parliamentary business. However, as a no-deal Brexit is the default legal position and does not technically require any legislation to be passed to achieve it (albeit that legislation may well be desirable to mitigate its impacts), no further Parliamentary vote is required. MPs' room to manoeuvre may therefore be much more limited this time around.

The most significant difficulty facing MPs looking to prevent a no-deal Brexit will be timing. The UK Parliament is now in recess and will not return until 3 September, leaving only 59 calendar days until 31 October. Furthermore, Parliament will not be sitting on the majority of those days (particularly, if MPs take their usual party conference recess of up to four weeks during September and October). As detailed below, MPs wishing to take action to stop a no-deal Brexit will only have a short window in which to do so.

#### Could MPs pass a motion to stop a no-deal Brexit?

Under Standing Order No 24, MPs can apply for emergency debates on important matters that should have urgent consideration, and the Speaker may select motions for debate by MPs.<sup>1</sup> These motions are not legally binding however and, while they would carry some political force in a 'normal' political climate, in circumstances where the PM has refused to rule out proroguing Parliament in order to prevent it from blocking a no-deal Brexit, it is highly unlikely that a motion to this effect would have any influence. However, as discussed below, such a motion may provide an opportunity to take control of Parliamentary business in order to pass legislation which would be binding.<sup>2</sup>

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<sup>1</sup> Erskine May, *Parliamentary Practice* para 18.38

<sup>2</sup> Maddy Thimont Jack, 'The Speaker can't guarantee that MPs can stop a no deal Brexit', <https://www.instituteforgovernment.org.uk/blog/speaker-cant-guarantee-mps-can-stop-no-deal-brexite>

## Could MPs amend proposed legislation?

In theory, MPs could try and stop a no-deal Brexit by seeking to amend legislation proposed by the Government. However, amendments to legislation must be relevant to the subject matter and within the scope of the proposed legislation and the particular clause under consideration.<sup>3</sup> In practice, this means that an amendment that, for instance, requires the PM to seek a further Article 50 extension from the EU27 may only be admissible in relation to legislation that is directly related to Brexit. If no such legislation is proposed, MPs' ability to propose Brexit-related amendments may be limited.

The amendments to the Northern Ireland (Executive Formation) Act (**NIEFA**), which was passed just before the new PM was appointed, are an example of how MPs could seek to amend legislation. These amendments introduced a requirement that Parliament be recalled, if it is not sitting, to consider reports on the formation of an Executive in Northern Ireland and to allow motions to be put noting that consideration. The aim was to ensure that Parliament would be sitting in the run up to 31 October, even if it had been prorogued previously, in order to ensure that it had the ability to take steps to block a no-deal Brexit.

The Government may, however, be reluctant to bring legislation forward after Parliament returns on 3 September if it opens the door to MPs proposing amendments to seek to stop a no-deal Brexit. A Cabinet Minister has stated that the new UK Government will not seek to pass any new legislation in relation to the rights of EU citizens in the UK for this reason.<sup>4</sup> However, it may not be possible for the Government to avoid proposing legislation in the form of an emergency budget to prepare for the economic fallout of a no-deal Brexit and/or to restore direct rule to Northern Ireland in order to take control over no-deal planning there.<sup>5</sup>

## Could MPs pass primary legislation?

Theoretically, Parliament could pass a “Cooper-Letwin II” bill, following the “Cooper-Letwin I” bill passed earlier this year. This required Theresa May to seek an extension to the Article 50 period despite the Government’s opposition. Without Government support however, primary legislation may only be introduced in the form of Private Members’ Bills.<sup>6</sup> It is the Government that schedules the days on which such Bills can be proposed and it scheduled none between November 2018 and April 2019. For Cooper-Letwin I, MPs used the “procedural hook” of amending the ‘next steps’ motion required under section 13 of the European Union (Withdrawal) Act 2018 (**EUWA**) to take control of the Parliamentary order paper and get the Bill passed.<sup>7</sup> As noted above, however, that hook is no longer available.<sup>8</sup>

A possible alternative route could be to call an emergency debate as described above. Such a debate can take place on a motion proposed by an MP. Another idea would be to seek to amend the motion that the Government is required to put to Parliament under NIEFA. Both such motions would be expressed in neutral terms and, in theory, cannot be amended, but 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>9</sup> If either motion can be amended, this opens the door to MPs taking control of the order paper once again and allowing time to pass further legislation. However, even if a procedural route could be found to introduce Cooper-Letwin II, the time that is likely to be available for passing such a Bill is incredibly tight.<sup>10</sup>

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<sup>3</sup> Erskine May, para 28.105

<sup>4</sup> See <https://twitter.com/BethRigby/status/1154382048297127936>.

<sup>5</sup> Joe Owen et al., *Preparing Brexit: No Deal*, <https://www.instituteforgovernment.org.uk/sites/default/files/publications/preparing-brexit-no-deal-final.pdf>

<sup>6</sup> Erskine May para 26.3

<sup>7</sup> Graeme Cowie, House of Commons Library briefing paper, ‘European Union (Withdrawal)(No.5) Bill 2017-19’ <https://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-8541>, p.13

<sup>8</sup> Robert Craig et al., ‘Lost in Transition?: The Conservative leadership contest and the confidence of the Commons’, Policy Exchange (2019), <https://policyexchange.org.uk/wp-content/uploads/2019/07/Lost-in-Transition.pdf>, pp. 11-14

<sup>9</sup> HC Deb (18 March 2019) Vol 656 Col 788 <http://bit.ly/2OfXbcJ>

<sup>10</sup> Erskine May, para 19.22

## Vote of no confidence

As explained in our previous bulletin,<sup>11</sup> under the Fixed-term Parliaments Act 2011 (the **FTPA**), an election will be held if a VONC in the Government is passed and 14 days elapses without a further motion being passed expressing confidence in the Government. By convention Parliamentary time will be allocated for a VONC tabled by the Leader of the Opposition.<sup>12</sup> This means that the Leader of the Opposition, Jeremy Corbyn, could propose a VONC and ensure a debate as early as the next day.<sup>13</sup>

### What happens during the fourteen-day period?

If a VONC is passed, there is then a 14-day period during which the Government can seek a vote of confidence in the House of Commons. The FTPA is mostly silent on exactly what should happen during this period. In theory it could be used by the existing Government to try and regain the confidence of the House of Commons and/or by opposition parties to try and form an alternative government and seek a vote of confidence in that government.<sup>14</sup> But there is little clarity as to how a potential alternative government would actually go about establishing that it has the confidence of the House, thus forcing the PM to resign.<sup>15</sup> The prospect of MPs opposed to a no-deal Brexit succeeding in forming an alternative government faces a number of practical obstacles, as this would require them to coalesce around a new PM. While there may be a high degree of unity amongst those MPs on the subject of a no-deal Brexit, reaching a consensus on who should lead such an alternative government is likely to be significantly more difficult.

### When might a general election take place and what happens in the interim?

If neither the existing Government nor an alternative one can obtain the confidence of the House during the 14-day period, then a general election must take place. The polling day for this election “*is to be the day appointed by Her Majesty by proclamation on the recommendation of the Prime Minister*”.<sup>16</sup> Parliament will automatically dissolve 17 working days before the date of the general election.<sup>17</sup>

The so-called “caretaker convention” means an outgoing government is supposed to “*observe discretion in initiating any new action of a continuing or long-term character in the period immediately preceding an election*”.<sup>18</sup> Academics are divided as to how this convention would operate here. One school of thought is that the PM would have to ask for a further extension of the Article 50 period in order to maintain the status quo during the election period.<sup>19</sup> However, others consider that, as the UK leaving the EU on 31 October is the default position, delaying Brexit would itself constitute a governmental decision of a long-term character.<sup>20</sup> Certainly, there is no guarantee that Brexit would be put on hold to allow for a general election to take place.

This in turn leads to an acute issue with timing. There are conflicting views as to when a VONC must be proposed, debated and passed in order to ensure a general election can be held on a Thursday before 31 October – on one view, that date has already passed, whereas others consider the VONC could still be passed on 3 September, the first day back from recess. However, this timetable would depend on the PM proposing the

<sup>11</sup> <http://www.allenoverly.com/Brexit-Law/Documents/Its-Article-50-50-UK-Ratification.pdf>

<sup>12</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>13</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-brexit.html>

<sup>14</sup> Cabinet Office, The Cabinet Manual, 1st edition (October 2011), para. 219

<sup>15</sup> House of Commons Public Administration and Constitutional Affairs Committee, ‘The Role of Parliament in the UK Constitution Interim Report’ (11 December 2018), p. 13, <https://publications.parliament.uk/pa/cm201719/cmselect/cmpublicadm/1813/1813.pdf>

<sup>16</sup> Fixed-term Parliaments Act 2011, sections 2(3) and 2(7)

<sup>17</sup> Cabinet Office, The Cabinet Manual, para. 2.23

<sup>18</sup> Cabinet Office, The Cabinet Manual, para. 2.27

<sup>19</sup> Robert Hazell and Meg Russell, ‘Six constitutional questions raised by the election of the new Conservative leader’, Constitution Unit Blog, 30 June 2019

<sup>20</sup> Robert Craig et al., ‘Lost in Transition?’

earliest possible timing for a general election to the Queen: the Crown proclamation and dissolution would be required to happen on almost successive days.<sup>21</sup>

So it is unclear whether the PM could delay the date of a general election until after the 31 October deadline had passed and there is no certainty that a “caretaker” government would be required to extend the Article 50 deadline further – especially since the PM has stated categorically this is not something he will do.

## Could Parliament be prorogued?

Prorogation is the means by which a Parliamentary session is brought to an end by the Queen upon advice from Ministers. It is normally used to trigger a new session of Parliament to resolve procedural issues, including restrictions on the reintroduction during the same Parliamentary session of legislation rejected by the House of Lords. However, as Parliament does not sit and therefore cannot pass motions or legislation while prorogued, it has been mooted that it may be used to prevent the passing of a VONC and/or legislation blocking a no-deal Brexit. As noted above, the PM has refused to rule out taking such action.

As also noted above, the effect of any prorogation of Parliament may be somewhat neutered by the amendments to NIEFA. However, given the impending deadline, even a shortened prorogation could be enough to leave MPs with insufficient time to block a no-deal outcome. Accordingly, prominent individuals such as the former PM Sir John Major have stated that they will bring judicial review proceedings to challenge any advice to the Queen to prorogue. Whether or not such advice would be justiciable – that is, a decision that the courts are able to review – is likely to be the major hurdle that a claimant would have to overcome.

## Conclusion

A new Government intent on leaving the EU on 31 October come what may is now on a collision course with a MPs opposed to a no-deal Brexit. However, given the very real difficulties facing those MPs in preventing this outcome, businesses must now ramp up their no-deal preparations. The Confederation of British Industry has highlighted that SMEs in particular are less well prepared, and that businesses in general must have lines of communications into Government to identify areas which require urgent mitigation.

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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>21</sup> Graeme Cowie and Sandip Samra, House of Commons Library, ‘When might an early general election take place?’  
<https://commonslibrary.parliament.uk/parliament-and-elections/elections-elections/when-might-an-early-general-election-take-place/>