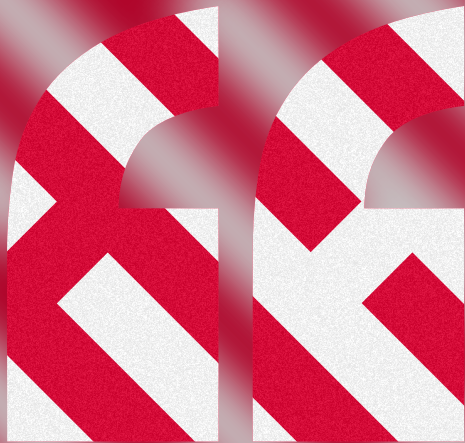


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C H A N C E



**THE UK
PARLIAMENT CAN
(PROBABLY) BLOCK
A NO-DEAL BREXIT**



— THOUGHT LEADERSHIP

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THE UK PARLIAMENT CAN (PROBABLY) BLOCK A NO-DEAL BREXIT

The Withdrawal Agreement seems dead in the water, and negotiations between the UK and EU have stalled. The UK Government is determined to leave the EU on 31 October, but could Parliament stop it?

The answer appears to be yes – probably. If a majority to prevent no-deal emerged in Parliament, there appear to be mechanisms that would allow them to achieve that objective.

This briefing examines how the Fixed-term Parliaments Act 2011 works, discusses how an alternative government may be formed following a vote of no confidence, and considers other ways Parliament could legislate to avoid no-deal.

Key issues

- Parliamentary time to oppose a no-deal exit is running out.
- A vote of no confidence would not force the Government to hold a general election before 31 October.
- Following such a vote it may be possible to assemble an alternative government.
- But the existing Government would have to stand down or the Queen would need to act.
- MPs opposing Brexit may seek to legislate to prevent Brexit, but there are procedural obstacles.
- If there is a no-deal Brexit, there is a risk of a Brexit ‘cold war’ with adverse impacts for business.

Constitutional theory doesn’t usually make front-page news. As the prospect of a no-deal Brexit grows, however, the finer points of the UK’s uncodified constitution have taken on an unusually prominent role in the debate. That debate is dominated by discussions of executive power, Parliamentary sovereignty, legislative intent and the proper role of the monarch. Indeed, a procedural law – the Fixed-term Parliaments Act 2011 (FTPA) – may determine whether Britain leaves the EU by the end of October and whether the UK will have a new Prime Minister before Brexit is due to take place.

At its heart, the legal argument is about whether the Government can proceed with a no-deal Brexit against the wishes of the legislature. Doing so would not require any action on the Government’s part; it remains the legal default. It is not enough for Parliament to pass resolutions opposing a no-deal Brexit. The UK will leave the EU on 31 October 2019 on WTO terms unless one of three conditions is met:

- a Withdrawal Agreement is ratified;
- the UK Government revokes its notification under Article 50 of the Treaty on European Union (TEU); or
- the UK Government requests, and the EU grants, another extension of Article 50.

Without meaningful changes to the Withdrawal Agreement, the current draft

– which has already been rejected three times by the House of Commons – is unlikely to receive Parliamentary approval. Prime Minister Boris Johnson has said that he will not discuss potential amendments until the EU agrees to drop the controversial Irish backstop in its entirety. Meanwhile, the EU insists that the backstop is an essential requirement that cannot be removed – indeed, the EU insists that the Withdrawal Agreement as a whole cannot be changed. Even if the Government could agree a new deal with the EU, the new or revised withdrawal agreement needs the approval of the European Parliament and the European Council and passage of a new – and itself likely highly controversial – UK Act of Parliament giving effect to the agreement as a matter of UK domestic law. In these circumstances, it is unlikely that the first option will be satisfied by 31 October 2019.

Similarly, given the Prime Minister’s “*do or die*” promise to leave the EU by the end of October, revocation of Article 50 by the Government can be ruled out, and it is unlikely that Parliament would wish to legislate for revocation (although that is possible in principle).

This leaves the third option: a further extension. To delay Brexit beyond 31 October 2019, the UK Government would have to ask the European Council, which, as far as Brexit is concerned, comprises the heads of state or government of the remaining 27 Member

States, to grant one. Mr Johnson, however, has been clear that he has no intention of making such a request. Fearing considerable economic harm and disruption in a no-deal scenario, a cross-party coalition of anti no-deal MPs is now exploring ways of forcing the Government's hand.

Time is running out

Any Parliamentary moves to take control of Brexit are made more difficult by the limited time available. MPs are scheduled to return to Westminster on 3 September 2019. With the party conference season beginning less than two weeks later, the number of Parliamentary sitting days for September is likely to be in single digits. Parliament is expected to go into conference recess on 13 September, and if previous practice is followed, the House will return on the last day of the SNP's party conference, i.e. 15 October.

While Parliamentary recess dates are not set in stone, having a recess for party conferences is a well-established practice. It would be highly unusual to recall the House early and cause MPs, arguably the most important conference attendees, to miss their parties' policy-setting events, particularly at such short notice. Planning for party conferences usually begins many months in advance, and the main events are attended by thousands of delegates.

Nevertheless, in light of the constitutional significance of the months ahead, some MPs have called for this year's conference break to be cancelled. John Bercow MP, the Speaker of the House of Commons, has also previously voiced his opposition to the idea of conference recess, arguing in 2017 that there was *"a certain incongruity about members disappearing for three weeks a year from their primary workplace in order to attend the conferences of voluntary organisations"*.

The time constraints identified above make it harder to prevent a no-deal Brexit. Equally, however, the limited number of Parliamentary sitting days threatens the Government's Brexit preparations. Many of the 'second wave' of statutory instruments (SIs) required for

the domestication of EU law are yet to be adopted (these mainly aim to deal with changes to EU law after the original scheduled exit day of 29 March 2019). Some of these require prior affirmative approval by both Houses of Parliament. Even those subject to the negative consent procedure must be laid before Parliament in draft for at least ten sitting days before they can be made, so that Parliament can decide whether to subject them to a requirement for affirmative approval. If the House rises for conference recess, the Government may struggle to adopt all its planned SIs by the end of October. Suspending this year's conference break may thus appeal to both sides of the no-deal debate.

However, for the reasons discussed below, the Government will likely now be reluctant to schedule further debate in this period on the remaining Brexit-related legislation currently before Parliament, in particular the trade, agriculture, immigration, social security and fisheries bills as well as the so-called 'in-flight files' bill (the Financial Services (Implementation of Legislation) Bill). It seems unlikely that these will now become law before the UK leaves the EU on 31 October, leaving elements of the Government's preparedness plans incomplete. For the same reasons, the Government might otherwise have wished to propose legislation on direct rule in Northern Ireland to enable the Government better to manage the consequences of a no-deal Brexit on that province. But it may now choose not to do so.

How does the Fixed-Term Parliaments Act 2011 work?

One way to seek to prevent a no-deal Brexit is to vote down the Government and call an early general election. The procedure for doing so is set out in the FTPA. As a first step, this course of action requires a vote of no confidence in the current administration. Convention is that the Government makes time available for the debate if it is initiated by the Leader of the Opposition, Labour's Jeremy Corbyn MP, but not necessarily if the motion is tabled by anyone else (though the Speaker may have other ideas). Section 2(4) of the FTPA prescribes that a vote of no confidence

must be in the form of a motion stating that *“this House has no confidence in Her Majesty’s Government”*, passed by a majority of MPs.

A successful vote of no confidence starts a 14-day period during which the House can express its confidence in the or a Government. This could be the case if, for example, the Prime Minister steps down and another member of his party takes over. If no such motion is passed within 14 days, the FTPA requires that an early general election take place.

A significant obstacle for opponents of a no-deal Brexit is that, under section 2(7) of the FTPA, the date of the election would be set by the current Government. There is nothing in the FTPA that requires a Prime Minister who has lost a vote of confidence to resign before an election takes place. Given Mr Johnson’s determination to see Brexit through by 31 October 2019, it is conceivable that he would schedule a general election for November, thus ensuring that the UK leaves the EU beforehand. Indeed, this is what Dominic Cummings, Mr Johnson’s most senior adviser, has said the Government would do.

In any event, even if the Government were prepared to hold an election before 31 October after a vote of no confidence, the election would have to be held shortly before that date, leaving any new Government (if one wins or can assemble a majority) little time to negotiate an extension of the Article 50 period with the EU. After the 14-day period elapses, the Government must set the date of the election but section 3(1) of the FTPA prescribes that Parliament is only dissolved 25 working days before polling day. Therefore, time will soon run out for an election before 31 October unless the opposition can schedule and win a vote of no confidence shortly after Parliament returns from recess and before the results of any negotiations with the EU are known.

Parliament could shorten the timetable for a general election by passing a resolution in the form prescribed by section 2(1) of the FTPA: *“That there shall be an early parliamentary general election”*. This would dispense with the

14- day period, but needs to be passed by a two-thirds majority of the House. In any event, the Government still retains the power to set the date of the election for a date after 31 October. This route is therefore only likely to be used if the Government itself seeks an election before that date (but the Government might still choose this option rather than facing the loss of a vote of no confidence that might lead to the formation of an alternative Government).

The Labour leader, Jeremy Corbyn, has written to the Cabinet Secretary asking him to confirm that, if the Government were to schedule an election after the UK is due to leave the EU, the Government should seek to preserve the *status quo* pending the outcome of the election by seeking a time-limited extension to the Article 50 period. Mr Corbyn cites the existing guidance that, during an election period, a sitting Government should postpone decisions on matters of policy on which a new Government might be expected to take a different view. Government supporters have responded by pointing out that the guidance aims to constrain Ministers from initiating new action of a continuing or long-term character. In this case, Government would not be taking any new decision by letting the Article 50 period expire. This would just be the consequence of the Article 50 notice, which was authorised by an Act of Parliament.

How could an alternative Government be formed during the 14-day period?

It therefore seems that MPs cannot rely on a general election alone to prevent a no-deal Brexit. To make sure the Government submits a request to extend Article 50 in time, MPs may instead try to install a new Prime Minister, tasked solely with stopping a no-deal Brexit and leading the Government until an early election takes place.

The FTPA is silent on how an alternative Government might emerge following a vote of no confidence, save for a reference in its Explanatory Notes that the Act is intended *“to provide an opportunity for an alternative Government to be formed without an election”*. By

long-standing convention, support by a majority of MPs is seen as the hallmark of a legitimately formed Government. As the Cabinet Manual makes clear, “[t]he ability of a government to command the confidence of the elected House of Commons is central to its authority to govern”. It should be noted that the Explanatory Notes are not legally binding.

MPs opposed to a no-deal Brexit are now looking to forge a cross-party alliance with the aim of securing the necessary majority for a short-lived Government whose sole aim would be to obtain a further extension to the Article 50 period. Who might lead such a coalition is currently unclear. Potential candidates include the Conservative Ken Clarke, Labour’s Yvette Cooper, the Liberal Democrats’ recently elected leader Jo Swinson or the Green Party’s only MP, Caroline Lucas. The choice of interim leader is likely to prove controversial. Senior Labour figures have ruled out supporting any coalition that would not be led by Jeremy Corbyn, while Conservative MPs would find it difficult to vote for the Leader of the Opposition.

If, despite these difficulties, a majority of MPs unite around a leader, Parliament would then have to formally express its support for their new figurehead. This could be done by signing a joint letter or other document, e.g. an Early Day Motion, to show that an alternative Government which would command a majority in the House of Commons is ready to be formed. At that point, a key question arises: does Mr Johnson have to resign if another MP has been shown to command the confidence of the House?

The Cabinet Manual, which sets out the main laws, rules and conventions affecting the conduct and operation of Government, states that it is “a matter for the Prime Minister, as the Sovereign’s principal adviser, to judge the appropriate time at which to resign”. Nevertheless, some constitutional experts have argued that in such highly unusual circumstances, the Queen would have a responsibility to dismiss Mr Johnson and appoint a new Prime Minister who enjoys the support of the House. Dominic Grieve, the former Attorney General who now spearheads the movement to prevent a no-deal Brexit, has emphasised

the monarch’s responsibility to safeguard the constitution: “*The Queen is not a decorative extra.*”

Dismissing the incumbent Prime Minister would be an extraordinary exercise of the Sovereign’s power. The last time this mechanism was used in the UK was in 1834, reflecting the firmly established convention that the monarch should stay out of party politics. A more recent but no less controversial example can be found in Australia. In 1975, the Governor General, acting as the Queen’s representative, dismissed the Australian Prime Minister and appointed the Leader of the Opposition as caretaker Prime Minister. The incident was widely seen as the culmination of a constitutional crisis, and the monarch would certainly be reluctant to follow this precedent in the UK. But in the unprecedented scenario outlined above, a decision *not* to act would arguably also be political. By refusing to recognise the individual able to command the support of the House, the Queen would disregard another, potentially more significant convention.

Could Parliament legislate to instruct the Government to request a delay?

An alternative route to prevent a no-deal Brexit is through primary legislation. There appears to be a majority in the House of Commons that would support an Act of Parliament instructing the Government to request an extension of Article 50. However, the difficulty lies in securing Parliamentary time to debate and pass legislation.

As the Government controls the business of the House, it has the power to allocate time for debates. The Government also decides what legislation, if any, is brought forward, leaving backbenchers and opposition MPs with limited options to introduce bills. Conscious of attempts to force another extension, the Government is not expected to schedule any new or existing proposed legislation for debate or to allow time for Private Members’ Bills, even though this would mean that some of the Government’s own proposed Brexit-related legislation would not be passed before exit day.

In these circumstances, perhaps the only means of securing Parliamentary time is by way of emergency debate under Standing Order 24 of the Rules of Procedure of the House of Commons. Under this procedural rule, MPs can request a debate on an urgent topic, usually resulting in a neutral motion that the House has “*considered*” the matter. Neutral motions cannot be amended and, as such, are of limited value to MPs seeking control of the order paper.

Critically, however, Standing Order 24 does not *require* motions to be expressed in neutral terms. Though extremely rare, the same procedure has been used to amend and vote on a substantive motion, which can be used to schedule Parliamentary time for primary legislation. By taking over the business of the House, a coalition of MPs trying to stop a no-deal Brexit could thus bring forward a suitable bill.

Deciding on the wording of any such bill would be the next hurdle. An instruction to revoke the UK’s notification of withdrawal under Article 50 would be the surest way to block a no-deal Brexit and is the only method by which the UK can do so unilaterally, but this is politically unrealistic. Even among opposition MPs, there is only a small minority openly advocating for revoking Article 50. A more realistic alternative would be an instruction to request a further extension under Article 50.

This is not as straightforward as it might seem. Any extension would have to be negotiated with the EU’s remaining 27 Member States and could be subject to conditions. Given the UK’s history of delaying Brexit, the EU is unlikely to grant another extension unless Britain commits to an early general election or a second referendum. Moreover, both sides would have to agree on a date, a point which proved controversial during extension negotiations in April 2019.

In light of the many variables at play, an Act of Parliament forcing an unwilling Prime Minister to request an extension would have to be carefully worded. Mark Elliott, Professor of Public Law at the University of Cambridge, has proposed a

bifurcated bill to ensure that the Government negotiates in good faith: if no extension is granted by, say, 30 October 2019, the Prime Minister would be required to revoke the UK’s notification under Article 50. While solutions to the above difficulties can arguably be found, the debate on how an instruction to extend should be phrased would certainly be controversial.

An additional challenge concerns the EU’s own procedural laws. The new European Commission is due to take office on 1 November 2019, and the European Parliament is likely to approve the next slate of Commissioners by 24 October 2019. In his first statement to the House of Commons, Mr Johnson confirmed that the UK will not nominate a candidate for the Commission. Currently, EU rules require there to be a number of Commissioners equal to the number of Member States, so that if the UK remains a Member State on 1 November there may be concerns as to whether the new Commission is validly constituted. There may be ways to work around this, but they are not straightforward and there will be little time to put them into effect if the UK only requests an extension at a late stage.

It has been suggested that if the UK leaves the EU on 31 October, despite the efforts of MPs to prevent this, a sovereign Parliament could, with the agreement of the EU, retroactively legislate to deem that the UK had not left the EU on that date. However, even if the UK Parliament could change UK law in this way, it is difficult to see how the EU could do the same under EU law (at least, without treaty change). As a matter of EU and international law, the UK would have left the EU on 31 October and Article 50 provides that, once a State has left the EU, it can only re-join the EU by following the procedure set out in the Treaty.

A Brexit “Cold War”?

If MPs’ efforts to prevent a no-deal Brexit fail, the UK will cease to be a member of the EU on 31 October 2019. This would lead to immediate economic disruption and risks plunging UK-EU relations into acrimony.

The core issues of citizens' rights, the financial settlement, the Irish border and the future trading relationship between the UK and the EU would remain unresolved. Any future negotiations on these issues – or even on short-term measures to mitigate the impact of the UK's exit – will take place in difficult circumstances. Both sides will be fatigued by years of fruitless negotiations and antagonised by any hardening of rhetoric. The difficulties will be exacerbated by the impact on businesses and communities – on both sides – of any border delays and other damage to cross-border trade, by any perceived unfair treatment of their citizens or businesses by the other side and, on the EU side, by the budgetary consequences of the UK withholding future payments. Statements of goodwill may not be enough. The risk is that if relations were to continue on an acrimonious path, both sides will be tempted to use unilateral measures as leverage for post-Brexit negotiations, even if there are adverse consequences for their own businesses or citizens or for third-country firms seeking to navigate a post-Brexit Europe.

For example, the European Commission sought to use time-limited equivalence decisions with respect to Swiss stock exchanges as pressure in the negotiations on the proposed new EU-Swiss framework agreement, although this only elicited Swiss counter-measures against EU trading venues. Similar issues are already emerging with respect to the Commission's withholding of advance recognition of UK trading venues, and the UK delaying any decision on EU venues until there is reciprocity. The European Commission's time-limited pre-Brexit equivalence decisions in respect of UK central counterparties and central securities depositories explicitly link any extension to progress on negotiations on UK access to the single market. Valdis Dombrovskis, the current EU commission vice-president in charge of financial regulation, recently stated that there are presently no plans to extend these decisions.

Both sides' obligations under WTO trade agreements will only impose limited constraints on this kind of behaviour.

Both the EU and the UK must accord each other 'most-favoured nation' treatment, i.e., no less favourable treatment than accorded to other states. But they retain their right to regulate in ways that can cause adverse consequences for the other party. For example, in financial services, the parties can rely on the 'prudential carve-out' to impose regulatory requirements, unless they use those measures to avoid their WTO commitments. If they grant regulatory recognition to other countries' prudential regimes, they must only afford the other party an adequate opportunity to negotiate comparable arrangements and to demonstrate that comparable equivalence exists. In any event, trade remedies are weak and slow.

Conclusion

As the end of October approaches, many MPs will intensify their efforts to block a no-deal Brexit. Their options are to try to effect a change of Government to secure a further extension of Article 50 or legislate to require an extension request.

An attempt to form a Government of national unity during the 14-day period after an effective vote of no confidence against the wishes of the current Government may well require the Queen to become involved in the process. This is unprecedented in the modern British Parliamentary era, and it is not clear how such a situation would resolve itself if it were to come about. A less radical approach would be for Parliament to vote to take control of business in the House of Commons. This would enable MPs to pass a bill requiring the Government to request an extension of the Article 50 period from the EU.

Whilst the current default is that the UK ceases to be a member of the EU on 31 October, it is clear that mechanisms exist to at least give parliamentarians the opportunity to attempt to prevent a no-deal Brexit. The question is whether the political will and unity exist to pursue those avenues, and whether they can be successful. If they fail, then the main objective of both the UK and the EU should be to ensure that the fall-out is managed in a way that does not lead to lasting damage to EU-UK relations.



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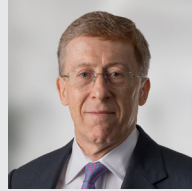
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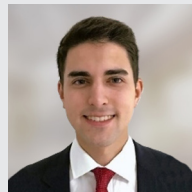
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