



Voting on Brexit: Parliament's role before 31 October

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Summary

When MPs return to Parliament after the summer recess there will be less than two months until 31 October – the date the UK is set to leave the EU. Three years in, the options facing the UK are the same: leaving with a deal, leaving without a deal, seeking an extension or unilaterally revoking Article 50 to remain as a member of the EU. But Boris Johnson has said that if the UK is unable to leave with a renegotiated deal on 31 October then the UK will leave without a deal.

MPs looking to make their voices heard will have far fewer opportunities to do so this time around than they had in the run-up to the end of March this year, when the former prime minister was trying to pass her withdrawal agreement. Given the limited time available, this paper reaches the following conclusions about what is likely to happen over the next few months:

- **It is very unlikely the UK will be able to leave the EU with a deal on 31 October:** even if Johnson were able to renegotiate some part of the current deal, there would be very little time to pass the legislation needed to implement it. If Johnson gets a deal, he will probably need an extension to complete ratification.

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- **MPs can express opposition to no deal but that alone will not prevent it:** the government could ignore MPs' opposition to no deal. Simply voting against it in principle would not require the government to act, nor would it change the law – both domestic and international. There is very little legislation the government needs to pass before 31 October, and amending or voting it down would only limit the government's powers in the event of no deal, not prevent no deal itself.
 - **Backbenchers have very few opportunities to legislate to stop no deal:** MPs may want to repeat the process that led to the 'Cooper Act' in March, which forced the government to seek an extension (although it had already requested an extension before the Act came into law). But as the government controls most of the time in the Commons there are limited opportunities for MPs to initiate this process, even if the Speaker helps facilitate such a move. Cancelling the planned conference recess alone will not necessarily create new opportunities.
 - **A vote of no confidence would not necessarily stop no deal:** the process governing no confidence motions under the Fixed-term Parliaments Act 2011 has not been tested. If passed, it would trigger a 14-day period during which time MPs could try to form a 'government of national unity'. Failing this, there will be a general election – but it is unclear what would happen if Johnson refused to follow constitutional convention to resign if an alternative majority was possible. This could risk dragging the Queen into politics.
 - **There is little time to hold a general election before 31 October:** if either Boris Johnson – with the intention of securing a mandate for no deal – or the opposition push for a general election, they will need to act almost as soon as Parliament returns from recess. Otherwise this risks an election after 31 October. An election that runs over the Brexit deadline would cause major challenges for civil servants and ministers.
 - **A second referendum can only happen with government support:** other than a general election, some MPs view another referendum as the best way to break the parliamentary deadlock. But this requires legislation and government spending, both of which will need government support to achieve. There will also not be enough time to hold a referendum before 31 October, so the government would need to ask for an extension to Article 50.

MPs and the government are preparing for a Brexit showdown in September and October. But when Parliament overwhelmingly voted in favour of triggering Article 50, the legal default was set: if no deal is agreed, the UK leaves the EU without one.

With the prime minister defining the 31 October deadline as "do or die", and a simple choice between deal or no deal, it looks very difficult for MPs who are opposed to no deal to force a change of approach. Even if they can assemble a majority to do so, they may find few opportunities to make their move – and time is running out.

Introduction

Prime Minister Boris Johnson has made clear that his first priority is to deliver Brexit on 31 October. Not much has changed since Theresa May agreed an Article 50 extension with the EU in April, but the clock has continued to tick down: whether the new prime minister wants to pass a deal to allow for an orderly exit or leave without a deal, there are now less than three full months to go. Johnson will not be able to avoid Parliament completely between now and then – and MPs will want to have their say.

This paper sets out what role Parliament could play in the Brexit process in the weeks between returning from summer recess on 3 September and the Article 50 deadline on 31 October. Prime Minister Johnson has inherited a very small majority in the Commons – which relies on the support of the DUP – and Parliament remains extremely divided on Brexit. Theresa May failed to pass her withdrawal agreement three times, but earlier this year MPs voted against leaving the EU without a deal more than once, too.

The new government does not bring with it a new Parliament: Johnson has to deal with the same factions and the same demands as his predecessor – but now also more Conservative MPs who are strongly opposed to no deal sitting on the backbenches.

Johnson has made it clear that his first preference would be to pass a renegotiated withdrawal agreement. But he has consistently said that if this is not possible then he would take the UK out of the EU on 31 October without a deal. Given the challenging parliamentary arithmetic for the government, other Brexit options cannot be ruled out.

There are four possible Brexit outcomes this autumn, which are that the UK:

- leaves with a withdrawal agreement (or 'deal')
- leaves without a withdrawal agreement ('no deal')
- requests another extension to Article 50, or
- revokes its Article 50 letter, bringing the current Brexit process to an end.

It is also possible that the government could choose to hold, or that Parliament could find a way to force, another public vote – either a referendum or a general election – before the UK settles its Brexit policy.

The current legal default is that the UK leaves the EU, deal or no deal, on 31 October. That is the position in both international law and UK law. If the government – or Parliament – wants a new deal or more time, it will also need to persuade the EU to agree. Of the above four options, only leaving without a deal and revocation are decisions the UK can take on its own.

Outcome 1: the UK leaves the EU with a deal

Boris Johnson has said his preference is to leave the EU with a deal – although he wants to renegotiate elements of the Withdrawal Agreement, in particular ‘abolishing’ the Northern Irish backstop.¹ To do this, he will first need to convince the EU to reopen negotiations on the Withdrawal Agreement – which it has repeatedly ruled out – and get a new deal agreed by a ‘qualified majority’ of the European Council and a simple majority in the European Parliament.

If he succeeds, Johnson will also have to get the deal through the UK Parliament. The process, enshrined in Section 13 of the European Union (Withdrawal) Act 2018,^{*} involves three stages:

- Passing a motion approving the deal in principle – a ‘meaningful vote’
- Passing primary legislation – a ‘withdrawal agreement bill’ (WAB) – to implement the deal in domestic law
- Ratifying the deal as a treaty under the Constitutional Reform and Governance Act 2010 (CRAG), which gives MPs a delaying power – they have 21 days to vote against ratifying a treaty.

Theresa May’s government repeatedly fell at the first hurdle, failing to get Parliament to support her deal in a meaningful vote.

Even without a meaningful vote, the government still needs a majority for its deal

After May had failed several times to get a meaningful vote over the line, and the Speaker of the House of Commons had ruled that she could not bring the same deal back to Parliament again in the same parliamentary session, the government tried to skip the meaningful vote altogether. Had her party allowed her, May’s strategy was to move straight to the WAB stage in the hope that allowing MPs to get to grips with a draft bill might find a route to build a majority through adding safeguards.

Johnson could adopt the same tactic and include a provision in the WAB to amend the EU Withdrawal Act to remove the need for a meaningful vote. This would speed the process up – but passing the bill would not be straightforward. The legislation could become the first time Parliament formally debated the acceptability of the deal itself – rather than its use as a vehicle for translating an approved deal into UK law.

While the government may be able to sidestep the procedural need for a meaningful vote, there will be no way to sidestep the political need for a majority to vote in favour of the deal.

^{*} The EU Withdrawal Act repeals the 1972 European Communities Act, copies EU law into UK domestic law, and gives ministers powers to correct deficiencies in this ‘retained EU law’ after Brexit.

Even if a deal is reached, the WAB is likely to be a battleground for the future of Brexit

Once introduced, MPs could use the WAB to exert influence over not just the tabled withdrawal agreement, but also the next phase of Brexit. For instance, May's last attempt to pass her deal – her “bold, new offer” – included a greater role for Parliament in the next phase of Brexit negotiations and promises to legislate, in the WAB, to protect workers' rights and the environment regardless of the nature of the UK's future relationship with the EU.² These ideas are likely to resurface – either from government or opposition as amendments. More amendments could come forward as well, in particular ones that aims to tie the government to specific negotiating objectives.

These commitments would not threaten the ratification of the Withdrawal Agreement on the EU side. But other changes could. Anything that waters down the guarantees to Ireland contained in the backstop (for instance by giving Parliament a role in allowing it to come into force – or allowing a unilateral exit mechanism), or makes the financial settlement conditional on progress on future relationship negotiations, could put the UK in breach of its commitments in international law. In short, if the WAB does not adequately reflect the Withdrawal Agreement, the EU may refuse to ratify.

It is unlikely a new deal could be ratified by 31 October

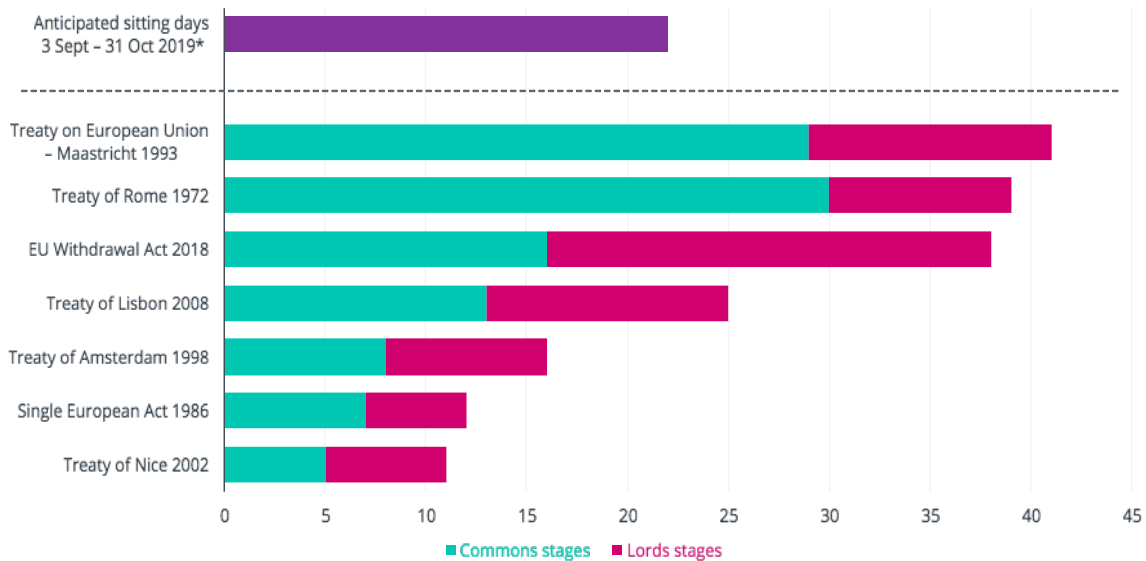
The soonest a WAB could be introduced is the very beginning of September, when Parliament returns from its summer recess. That would require the PM to conclude new talks over the traditional European summer holidays and draft any new provisions agreed for the WAB in less than a month. So far there has been no sign of movement on either side. But even if Johnson could conclude a new deal in August, it would still give little time for Parliament to pass the legislation required by 31 October.

If the WAB was introduced in early September, there would be, on a normal timetable, 22 parliamentary sitting days before 31 October, assuming MPs take the usual three-week recess for party conferences. Even if they cut that recess down to the minimum required for the Conservative and Labour conferences – with Parliament sitting during the Liberal Democrat conference – there still would only be 27 sitting days (adding in non-sitting Fridays would create another six days).*

Even so, MPs would have less time to pass this Act than they had for the pieces of legislation that implemented the Treaties of Lisbon, Maastricht or Rome (see Figure 1 overleaf). While the final step in the ratification process, CRAG, is unlikely to be an issue and could be done quickly (ministers can ratify treaties under the Act before the 21 days is up in 'exceptional cases'), the time needed for the passage of the WAB poses a real challenge if Johnson is intent on getting a deal through before the end of October. Remember that in November 2018, the government pushed for an extraordinary European Council to agree the Withdrawal Agreement due to fears that waiting until December would leave too little time to ratify before March.

* This assumes Parliament rises on 19 or 20 September and returns 8 October.

Figure 1: Active sitting days in each House on bills relating to EU treaties, compared to the number of anticipated sitting days 3 September – 31 October 2019



*This assumes Parliament's 2019 conference recess is the same length as it was in 2018 (anticipated dates: 12 September – 8 October 2019).

Source: Institute for Government analysis of House of Commons Library Briefing 'EU Treaty Change' and Hansard. The scheduled sitting days include scheduled sitting Fridays. Changes to programming legislation were made in 1998.

While Johnson could try to rush the WAB through this autumn, this would be at the expense of parliamentary scrutiny of a constitutionally significant piece of legislation. And he would need a majority that backed that approach. Even if the conference recess was curtailed – or even cancelled – the prime minister can only timetable the passage of a bill through the House of Commons; he has no such control over the timetable for the bill's passage through the House of Lords. Peers have already shown themselves willing to spend time over contentious Brexit legislation if they believe this is necessary to ensure sufficient scrutiny.

That said, the House of Lords is unlikely to want to take responsibility for the UK crashing out without a deal if the Commons has shown itself willing to pass one – it has to be conscious of its relative status as compared to the elected Commons. But the quick passage assumes that the prime minister feels obliged to stick to the timetable he has repeatedly reaffirmed. There is also a possibility that Johnson could ask for more time from the EU (a short, 'technical' extension) to allow the UK to step through the domestic process for ratification, and give the European Parliament time to ratify at their end also.

If he were prepared to ask for more time to ratify a deal agreed with the EU for which there was a secure or proven parliamentary majority, and to ensure an adequately scrutinised piece of implementing legislation, the EU27 is likely to agree. The EU Commission's president elect, Ursula von der Leyen, has already said she would be open to an extension – this is likely to represent a broader mood among EU leaders.³

Outcome 2: the UK leaves the EU with no deal

Johnson has emphasised he is willing to leave the EU without a deal if he cannot negotiate a deal that can pass in the Commons by 31 October. As a no-deal exit is the legal default under Article 50 of the Treaty on European Union, there is no legal requirement for Parliament to vote to approve this outcome.

However, votes in the Commons earlier this year demonstrated that a majority of MPs oppose no deal. Many of those MPs have already said they are willing to try to prevent it if this becomes Johnson's preferred outcome. Already, MPs have made attempts to prevent this from happening as the rhetoric around no deal was ramped up during the Conservative leadership contest. In July, MPs amended the Northern Ireland (Executive Formation etc) Act 2019 to try and prevent Johnson proroguing Parliament to achieve it.⁴

If attempts at renegotiation are unsuccessful, autumn will likely be dominated by a standoff between the government and Parliament.

MPs will need new tactics in September to stop no deal

Parliament's ability to influence the course of Brexit earlier this year depended on specific processes set out in Section 13 of the EU Withdrawal Act. Under this provision, the prime minister's deal needed the endorsement of Parliament before the government was legally able to ratify the agreement and, if the government decided it wanted to leave without a deal, then further votes were required.

However, Section 13's no-deal provisions were tied to a specific date – 21 January 2019 – which has long passed. It is now of no use to MPs who want to express their view on no deal; if Johnson is set on no deal he will not need to schedule any further meaningful votes.

Unlike May's government, therefore, Johnson's will be under no legally binding requirement to consult, inform or gain the agreement of the Commons. The government's control of the Commons order paper, coupled with its ability to bring motions and deploy delaying tactics, now mean that it has a great deal of control over what happens in the lower House. Its control over the Lords is weaker, but any initiative from the upper House could not bind the government without being endorsed in the Commons.

If MPs were attempting to stop no deal they would have to resort to different tactics from those used in the spring. There are four key ways they could attempt to stop a government seeking to leave the EU without a deal:

- make it clear they object to no deal
 - disrupt the government's programme
 - bring in legislation
 - bring down the government.
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MPs could express opposition to no deal, but the government could ignore them

A majority of MPs have already voted against the principle of a no-deal exit three times.* They could continue to reassert this position to the new government in two ways.

Pass backbench business or opposition day motions opposing no deal

Backbench business or opposition day motions would not have legal 'teeth', but they would be politically important. The Speaker has made clear his view that the government should respect the opinion of the House, and that if a motion is agreed that instructs the government then the government should follow those instructions.⁵ That expectation should be stronger still for a government that does not have a parliamentary majority.

However, the new Leader of the House, Jacob Rees Mogg, has previously expressed the view that government need not pay attention to "mere motions" of the Commons.⁶

In any case the opportunity may not arise, as the calling of such days is up to the government. Between November 2018 and April 2019 the government did not schedule any opposition days at all.⁷ Johnson could therefore avoid giving any time to the opposition ahead of the October deadline. If he wants to pursue no deal, he will be particularly wary, bearing in mind the attempt to take control of parliamentary time on an opposition day on 12 June.

The same is true of days allocated for backbench business: the time available for these is allotted in much the same way as opposition days – by the government.

Apply to the Speaker for emergency debates under Standing Order No. 24

If the government refuses to schedule any time, MPs will have to rely on the Speaker for the opportunity to debate no deal by applying for emergency debates under Standing Order No. 24. These are motions that say that the House has 'considered' an issue. The Speaker could grant a debate, but the government might still refuse to change its position if it lost such a vote.

There has been speculation about whether the Speaker might allow SO No. 24 debates to be used for more substantive purposes, such as taking control of the parliamentary agenda; a possibility we explore later in the paper.

MPs could disrupt the government's legislative programme, but this would not necessarily prevent no deal

If MPs think that the government is not listening to their views, they could try to disrupt its business in order to influence its decision making. In July, MPs tried to limit certain departmental spending in the event of no deal – by amending the motions approving four departments' 'estimates' – but were unsuccessful. No more estimates will be required this side of 31 October. There are, however, two main routes if they are tempted to try again after the recess.

* In 2019, MPs passed an amendment tabled by Caroline Spelman MP to the 29 January 'next steps' motion which rejected leaving the EU without a deal, an amended government motion ruling out no deal in any circumstance on 13 March, and rejected a no-deal Brexit on 12 April during the indicative votes which took place on 27 March.

Amend or vote against key pieces of government legislation

MPs can express their opposition to the government's policy by voting against critical pieces of government business. But if the government does not bring any major new bills before the House then there will be no opportunity to oppose them. There are five pieces of Brexit primary legislation currently outstanding – but the government has indicated it has 'workarounds' to allow for no deal if the bills are not in place by 31 October.

If the government does decide to go for no deal, it could hold off bringing back the bulk of the outstanding legislation until after 31 October. However, there are two pieces of legislation that it might need. First, given the possible impact of no deal on Northern Ireland, ministers under May made clear that, if the devolved government has not been restored, Westminster would need powers to direct Northern Ireland's departments – that is, to impose 'direct rule' – to cope with the consequences. That legislation should ideally be in place before exit day. Second, there has been suggestion of trying to pass an emergency budget in the autumn. If that budget were in September, the Finance Bill would need to pass its second reading before 31 October (an October budget would not have the same time restriction).⁸

MPs may not want to oppose legislation outright. Instead they could amend it to try and prevent a no-deal Brexit. The House of Lords has set an example with the Trade Bill – which it amended to prevent it coming into effect in a no-deal scenario without the explicit consent of MPs. The government's response was to delay the return of the bill to the Commons.

Similarly, the government could choose to simply halt the progress of another Northern Ireland Bill or not bring it into effect until after exit day. The government's decision to bring in any legislation – including an emergency budget – will inevitably be shaped by the chances of it being hijacked or defeated as well as the extent to which it is necessary to prepare for and mitigate against no deal.

But Parliament's voting down legislation or attaching conditions that prevent powers coming into force would not actually prevent no deal. It would simply limit the government's powers in such an outcome. MPs looking to force the government to change tack would just have to hope that restricting its ability to manage no deal would push Johnson to seek alternative options.

Amend or vote down the Queen's Speech at the start of the next session

This parliamentary session began in June 2017 and was expected to end in summer 2019. A new Conservative leader would normally be expected to end the session of Parliament and set out their legislative plans for the next session in a Queen's Speech. This would give MPs an opportunity to vote against the speech, or table amendments to address its more contentious points – in this case no deal. But Johnson has no obligation to end the session and could choose to drag this 'zombie session' on past the 31 October Brexit deadline.

MPs could try to take control of the Brexit process and force the government's hand

Parliament's most dramatic attempt to avoid no deal earlier this year was passing the Cooper Bill, which required the government to seek a one-off extension to avoid no deal on 12 April. MPs resorted to the legislation because it was the only way to impose legally enforceable obligations on the government. In the end, the bill was passed after the government had already asked for an extension.

If MPs were concerned that the prime minister wanted the UK to leave the EU without a deal against the will of a Commons majority, they might try to pass similar legislation again. Last time, MPs amended one of the EU Withdrawal Act 'next steps' motions to take control of the order paper. This time, there may be no such motions to amend. MPs would therefore need to seek other opportunities to seize control. There are three mechanisms they might try.

Emergency debates under Standing Order No. 24

If the government decided not to schedule any Opposition or Backbench Business Days, MPs could try to take control of the parliamentary agenda using an emergency debate held under SO No. 24. In March, the Speaker told Labour backbencher Helen Goodman that the "opportunities [were] fuller" for emergency debates than MPs usually realised.⁹

He may have been implying that MPs could use a motion under SO No. 24 not just to say that the House has 'considered' an issue, but to express a point of view. If that interpretation is correct, then MPs could either table a motion under SO No. 24 explicitly taking control of the Commons' agenda (hoping the Speaker would allow it), or try to amend a motion to achieve the same goal (hoping the Speaker would select the amendment).

If MPs were successful in taking control of parliamentary time, they could use that time to introduce legislation forcing the government's hand on Brexit. Using SO No. 24 motions in this way would, however, be a significant departure from current convention, which suggests that these motions cannot be amended in this way. But the most recent version of *Erskine May: Parliamentary Practice* – the guidebook to UK parliamentary practice – says only that these motions are "normally" expressed in a way that means they are unamendable, suggesting there may be some wiggle room.¹⁰

Neutral motions under the Northern Ireland (Executive Formation etc) Act 2019

MPs may try to use provisions in the recent Northern Ireland (Executive Formation etc) Act 2019 to take control of time. Under the Act, the government must publish a report on the steps taken to restore power-sharing in Stormont as well as a motion in 'neutral terms' before Parliament. The first report must be laid before Parliament by 4 September with a vote on a motion within five days of that date.

Although under parliamentary rules neutral motions are not amendable, before Christmas MPs voted to disapply those rules to neutral motions tabled under the EU Withdrawal Act. If given the opportunity, they could try to do so again, although amendments taking control of time would need to be ruled 'in scope'.

This last decision is ultimately up to the Chair (the Speaker or deputy Speakers). The recent passage of the Northern Ireland Act shows how subjective this can be – and how decisions can vary between the Commons and the Lords. One amendment that was thought to be in scope by the Commons – but not selected by the Chair – was judged to be out of scope entirely in the House of Lords.¹¹ So MPs have no guarantee that they would be able to rely on the Act as a route to influence Brexit.

Motions under the Fixed-term Parliaments Act

MPs could attempt to use the procedure for a vote of no confidence under the Fixed-term Parliaments Act 2011 as a route to securing control of the Commons order paper. By convention, when the official opposition puts down a motion of no confidence in the government, the government makes time for a debate. There are two potential opportunities within this process for MPs opposed to no deal to take control of parliamentary time in order to pass legislation.

First, if the government wanted the debate to last more than 90 minutes – which would be the default under the Standing Orders – it would need to pass a Business of the House Motion to provide for this. MPs could then amend that motion to take control of the order paper.

Second, MPs could try to amend the motion of no confidence itself, so that it gave MPs control of the order paper on designated days. If MPs took this approach, then the motion (as amended) if passed would, almost certainly, not be effective under the Act – although such an amendment would need to be ruled in scope.

This means that even if the government lost, that loss would not automatically trigger the 14-day period when other MPs could attempt to form a government, and which would result in a general election if none could. But it would still give control of the order paper to backbenchers.

Passing a bill will not be easy

If MPs do secure an opportunity to pass legislation, they still need a stable majority to get a bill through Parliament. The legislation they used last time was the fourth draft of a bill designed to stop no deal – and the Cooper Act was a very specific ‘one-off’ Act that forced a vote on extending Article 50 the day after Royal Assent. The Act did not create a continuing power to stop no deal. The constrained nature of that Act in part reflected the difficulty of securing a majority in the Commons.

During the debate on whether or not to introduce the Cooper Bill,¹² some MPs raised concerns about the precedent of allowing “unaccountable” backbenchers to legislate, an activity that is normally the (near) monopoly of government. None of the mechanisms for Parliament to examine and force ministers to account apply in the same way to backbenchers – and backbenchers cannot defend legislation as the government would in the Lords. There was also a concern about the speed with which the bill was passed and concerns in the Lords about how the legislation was drafted, even though a majority supported the intent of it.

These concerns were reflected in the results of the divisions on the Cooper Bill last time around. While 400 MPs voted against leaving the EU without a deal on 12 April during the first round of indicative votes in March, in April the Cooper Bill itself passed second reading with the support of only 315 MPs (a majority of five) and third reading with the support of 313 (a majority of only one).

If the same group of MPs try the tactic of passing legislation again in the autumn, the circumstances will be different. On the one hand, last time the government had already requested an extension to Article 50, meaning some MPs may not have felt the need to support the legislation; on the other, there could now be added pressure for Conservative unity under a new leader. Appetite for a general election may also influence the way MPs choose to vote, and some Labour MPs from Leave-voting constituencies will be especially conscious of their party's moves towards backing another referendum.

The 'nuclear' option: a vote of no confidence

The most drastic option for MPs uncomfortable with a no-deal exit would be to call a vote of 'no confidence' in the government in order to prompt an election. However, there are risks for MPs trying to stop no deal in this way.

MPs wanting to prompt a general election would first have to pass a motion of no confidence in Johnson's government. If such a motion is brought by the official opposition then the government is expected to make time for it at the earliest opportunity. To be successful, some Conservative (or DUP) MPs would need to vote against the government – provided that, as in January 2019, only one independent MP, Lady Sylvia Hermon, voted with the government. But the January 2019 vote took place in a very different political context, and Hermon is opposed to no deal.

The ranks of independents have also swelled since then, and five MPs are now sitting for The Independent Group for Change. Assuming that the DUP votes with the government, Johnson only has a formal working majority of one – although in practice it is three, given that the Conservative MP Charlie Elphicke is expected to continue to vote with the government despite having had the whip withdrawn.

There are also outstanding questions about what might happen in the 14-day period after a no confidence motion is passed. The Fixed-term Parliaments Act only rules that a second vote of confidence in the government is needed during that time to avoid a general election. It does not say whether the government that lost the first vote should stay in place, or if it ought to resign.

The explanatory notes for the Act indicate that the period is intended to enable an alternative government to be formed, if one can be. If it cannot, it allows the incumbent prime minister to choose whether to call an election. (However, it is also a longstanding constitutional convention that a government that has lost the confidence of the House cannot continue indefinitely in office.)

But for a new government to be formed in this time, both the support for an alternative government needs to be clear and the incumbent prime minister needs to be willing to resign in favour of this alternative government.

There is a chance that the incumbent prime minister might seek to build support to pass a second vote of confidence or wait out the 14-day period and let an election happen, regardless of whether an alternative government could be found. To do the latter in the face of a clear parliamentary majority for an alternative government would go against constitutional convention that a government only survives if it maintains the confidence of the House.

If no alternative government is formed after the government lost the confidence of the House, then the incumbent government has a duty to act only in a caretaker capacity until a successful government is formed. However, it would be responsible for facilitating a general election in the face of an extremely tight timetable. For a new government to attempt to win a general election and be in place before the 31 October deadline, the no confidence process leading up to a fall of the government would have to begin as soon as Parliament returns from summer recess on 3 September. Even then it could require some flexibility in when an election took place, for example breaking the convention of holding elections on Thursdays. The process could be sped up if Parliament legislated for a shorter campaign period, but this would require the support of the government.

As the incumbent prime minister advises the Queen on the date for the election, Johnson could try to set a date after 31 October, thereby ensuring that the UK left without a deal first. However, any attempt by a prime minister who has just lost a no confidence vote and so, by convention, is acting only in a caretaker capacity to use their powers in this way would be hugely controversial, both politically and constitutionally. It might also be open to legal challenge.

If a new government came into office during the 14-day period following the initial vote of no confidence and wanted to avoid no deal, the new prime minister would still need to go to the EU and secure a further extension before the 31 October deadline.

MPs could amend the Fixed-term Parliaments Act no confidence motion to try to form a new government

Before the Fixed-term Parliaments Act, many no confidence or censure motions would contain instructions to the government or make a wider political point beyond just whether the House had confidence in the government. Since the Act was introduced in 2011, although other confidence motions can still be brought forward, the government has indicated that only those tabled specifically under the Act would have statutory effect.¹³ The opposition, therefore, would likely only table a motion in close accordance to the wording of the Act to guarantee a vote at the 'earliest opportunity'.

But rather than amending this motion – as outlined above – to take control of the order paper to pass legislation, it is possible MPs could try and amend the no confidence

motion to guarantee the chance to install an alternative government. This might take the form of an amendment that recommends an alternative prime minister (guaranteeing an opportunity to demonstrate whether an alternative government can command a majority), or one that allows MPs to take control of the order paper on a separate day in order to ascertain whether an alternative government is possible (returning to a vote of no confidence, again made under the Act, if that failed).

However, even if this approach created the chance to vote on an alternative government, if an alternative prime minister cannot command a majority and a motion of no confidence under the Act followed, the incumbent PM would still have the chance to set the date for the election. This approach would also use up more sitting days in the Commons and therefore further reduce the possibility of an election before departure on the 31 October.

MPs have already voted to prevent the PM proroguing Parliament to get to no deal

During the Conservative leadership contest, Dominic Raab raised the prospect of a new PM proroguing Parliament to achieve no deal. Usually when Parliament is prorogued and one session ends, the government brings back MPs within a week to start a new session. Raab's suggestion was to prorogue Parliament in early September and wait until after 31 October to bring back MPs, to prevent them from stopping no deal. This would have been an extremely controversial move.

Concerned by Johnson's refusal to rule out this option, MPs amended the Northern Ireland (Executive Formation etc) Act 2019 to say that MPs must be recalled (if prorogued) to consider reports laid under the Act – for five days at a time. So while Johnson could in theory prorogue Parliament with the intention of waiting until after 31 October before bringing it back, MPs have now ensured that there will be some time in the autumn when Parliament has to sit and could try to use one of the mechanisms mentioned above to prevent no deal.

The threat of parliamentary rebellions may persuade the PM to change tack

MPs may not need to go through with any of these measures. The threat of voting down the government's legislative programme or passing a no-confidence motion could be enough to force a new prime minister to change tack and seek an extension to Article 50, rather than take the UK out of the EU without Parliament's approval.

This is because acting explicitly against the will of Parliament could make it extremely difficult for Johnson to govern in the aftermath of no deal, even if he manages to hold onto office. The prime minister could try to face down Parliament and trigger an election, but that prospect comes with a high risk of losing office, and he may decide it is too high a price to pay.

Option 3: extend Article 50

Despite the rapidly evaporating time available to renegotiate a deal and have it pass through Parliament, Johnson has repeatedly ruled out another extension to Article 50. But this remains a possible scenario. The prime minister may decide he has little alternative to requesting another extension, or he may be forced into it by Parliament. After all, May similarly ruled out requesting an extension, and then requested two.

Another possible scenario would be for Johnson to ask for a short extension to prepare fully for a no-deal exit, or to hold a general election – again, whether this is done by choice to secure a mandate for no deal or is forced on him by Parliament.

An extension would first require the agreement of the EU

If the UK government decided to seek a further extension, it would need the unanimous agreement of every EU member state. The EU27 is likely to agree to give more time to finalise the ratification of a deal that has already been agreed by Parliament, or to accommodate an election or referendum. It might also agree to a 'technical' extension to allow both sides to finalise preparations for no deal, possibly for a few months.

But securing more time from the EU to continue to negotiate if agreement is not close would be much harder. Any extension that is granted, would, as May found in both March and April, be determined by what works for the member states and the EU institutions, not by what the UK government requests.

An extension could be secured without any say from Parliament

The prime minister can request an extension without permission from Parliament. There is also no approval needed from Parliament once the PM has secured an extension. Once the European Council has determined the date UK membership ceases, UK legislation is needed to bring UK law back into line with international law.

As a result of a successful government amendment to the Cooper Bill passed earlier this year, the government can change the date of Brexit, in UK law, by passing a statutory instrument under the 'negative procedure' (which means that the regulation only gets debated if it is 'prayed against' by members). MPs could attempt to overturn the extension by attempting to annul the change in law – but that would require not only a majority but also for the government to schedule time for a debate and vote on it in the Commons, which it does not need to do.

And, if an extension were agreed with the EU, annulling the change in UK law would not change the fact the UK, under the terms of the EU treaties, remained an EU member state.

Option 4: revoke Article 50

One option Parliament debated – and rejected – in the indicative votes in the spring was for the UK to revoke its Article 50 notification altogether (which would mean the UK remained in the EU). This may be an option that gains greater currency among MPs who oppose the PM’s strategy as the Brexit deadline approaches.

The European Court of Justice (ECJ) confirmed in December 2018 that the UK can revoke Article 50 unilaterally;¹⁴ it would simply need to notify the EU27 of its intention to remain in the EU. That decision might be challenged in the ECJ if it looked as though it was merely a tactic to buy time – but unless the UK re-notified its intention to leave shortly afterwards it is hard to see how a successful challenge could be brought.

Parliament’s role in the revocation of Article 50 is uncertain

The ECJ has laid down some requirements for an Article 50 revocation. For instance, it has said that any decision to remain in the EU must be “unequivocal and unconditional”, and that any revocation must be in accordance with the UK’s “constitutional requirements”.¹⁵ However, the domestic constitutional process required for a revocation is a matter of UK, not EU, law and has never been litigated. That means that the exact legal position is still unclear.

Some experts have argued that an Act of Parliament would be required to allow the government to revoke.¹⁶ Others think that the government could do so without further parliamentary authorisation. If there were any disagreement about whether legislation was required, it would be a question for the UK courts, and would probably end up at the UK Supreme Court.

There is also no suggestion that a referendum would be legally required. However, it could be considered politically necessary: while the government could decide to revoke Article 50 – ending the Brexit process altogether – it would need to decide how to engage with Parliament (and would risk challenge in the courts if it avoided MPs). If MPs want to force the government to revoke Article 50 against its will, they would certainly need to pass legislation to do so.

Breaking the deadlock: a public vote

It may well be that this autumn, faced with such challenging parliamentary arithmetic, the only way to break the Brexit deadlock is to hold some form of public vote: either a general election or another referendum.

A snap election could secure a mandate for no deal

Although Johnson has so far ruled it out, if Parliament does find a way of avoiding no deal on 31 October, he may decide to take the decision to the country. This could be an opportunity to secure an incontrovertible mandate for leaving without a deal. If Johnson wanted to call a snap election he would likely take the same parliamentary route as May

did in 2017, seeking the required two-thirds Commons majority in favour of holding a general election under the Fixed-term Parliaments Act.

The government will be responsible for setting a date, but timing could be an issue. At least a five-week campaign period, and up to a week to finish any parliamentary business, would be needed between the vote in Parliament and an election being held, so unless Johnson makes the decision soon after Parliament returns from summer recess there will not be enough time before 31 October. He could ask for an extension to Article 50 to give sufficient time for an election to take place, but he would not be obliged to do so, unless MPs could find a way of making that a condition of voting for an early election.

MPs who oppose no deal could decide to oppose the general election itself – if they have not successfully prevented it and were concerned it would be held after the UK had already left without a deal.

A general election campaign ahead of an imminent no-deal exit would raise big questions for the civil service. Although it could continue to prepare for no deal, as it would be seen as being 'in the national interest', it would be restricted in how it communicated about it. It would also make it a more challenging choice for businesses considering investing in no-deal preparations as they may want to await the outcome of the election.

An election that runs over the date of exit would cause challenges for civil servants and ministers responding to no deal

If 31 October falls during the campaign period, when Parliament is dissolved, then further problems arise. The *Cabinet Manual* rules the government can carry on essential business during an election campaign, but cannot take or announce major policy decisions, or take any actions of a "long-term character".¹⁷

This poses the question of whether leaving the EU without a deal would count in this category, given this is the legal default, or if extending Article 50 represents a breach of the convention as a 'major policy decision'. The convention is to retain the status quo: but in this circumstance the legislative status quo would be exiting the EU without a deal, while in policy terms it points to an extension of the UK's current EU membership.

In a letter to Cabinet Secretary Mark Sedwill, Labour leader Jeremy Corbyn has questioned the constitutionality of such a move, stating that any attempt to take the UK out of the EU without a deal during an election would represent an "anti-democratic abuse of power".¹⁸

A campaign that continues in the days and weeks after a no-deal exit would also limit the government's ability to respond to its worst effects. Government no-deal contingency planning structures – collectively termed Operation Yellowhammer – involve crisis-management centres dealing with issues as they arise.¹⁹ Many of those issues will require ministerial decisions and would likely require ministers to attend emergency cabinet office meetings. Doing this during a campaign period would likely be highly contentious and test the conventions outlined above to their limit.

It would be difficult for Parliament to force a second referendum

It is much harder for Parliament to force a public vote in the form of another referendum. A referendum would need to be legislated for and planned by the government. Even if MPs tried to take control of time and bring in legislation calling on the government to hold one, the levels of required public spending would mean the bill would likely need a 'money resolution', which only a government minister can lay. In short, while MPs could put pressure on the government to hold a referendum, the government would ultimately need to be willing.

There are still big unanswered questions about another referendum. What should the question be? When should it be held? The Institute for Government calculated that at least 21 weeks would likely be needed to pass the necessary legislation, approve campaign groups and hold the campaign itself.²⁰ All of these stages could prove controversial – and the necessary legislation would be open to amendment, so still more time could be needed. Again, in this scenario the prime minister would need to ask the EU for an extension to Article 50.

Time constraints

In July, MPs rose for their six-week summer recess. If the September/October conference recess is scheduled as usual that leaves only 22 sitting days between the Commons' return on 3 September and 31 October. Although a shorter – or cancelled – conference recess is possible, that still leaves less than two months until the deadline.

This means that the government would have little time to renegotiate a deal, secure parliamentary approval for it, and then pass legislation for its implementation through both the Commons and the Lords before 31 October. And at this stage, Johnson does not appear to be meaningfully pursuing this option, which squeezes this timetable further.

The tight timetable also means that if MPs do want to force the PM into a different approach, there will be very little time for them to do so. When MPs tried to take control of the Commons order paper earlier this year, they needed multiple attempts. The first was on 29 January, but they were only successful on 25 March. As the no-deal deadline got closer, MPs were more willing to take more drastic steps. The same may happen again – but given the limited opportunities they now face, a delay of that magnitude would be likely to scupper their efforts.

Crucially, if MPs try and fail to force the government to abandon its no-deal plans, their fall-back option of voting down the government could come too late to make a difference. Unless the UK government requests, and the EU grants, a further extension, the UK automatically leaves on the 31 October.

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