

The background of the slide features a close-up, slightly blurred image of the European Union flag (blue with yellow stars) and the Union Jack (red, white, and blue stripes). A solid orange vertical bar is positioned on the left side of the slide, partially overlapping the flags.

MAYER | BROWN

7 August 2019

Brexit Update



I. OVERVIEW

What has just happened?

On the 24 July 2019, Boris Johnson became Prime Minister ("PM") of the United Kingdom ("UK"). Mr Johnson has said that if a withdrawal agreement is not concluded between the UK and the European Union ("EU") by 31 October 2019, the UK will leave the EU without a deal. Many people believe it is unlikely that a deal will be concluded by 31 October 2019.

What is a "no-deal" Brexit?

In this update, the term "no-deal Brexit" means a Brexit (i.e. the UK's exit from the EU) where there is no further agreement between the EU and the UK about the terms of the UK's departure. There would be no "mini" deals, transition period or an agreed continuation of the status quo. As a result, the UK and EU would fall back on the current default legal position.

What might the impact be?

The potential consequences of a no deal Brexit are discussed in more detail in this update. In very broad terms, the UK would cease to be part of the EU and would no longer be part of the European Single Market. The EU Single Market (sometimes called the Internal Market or Common Market) promotes the freedom of movement of goods, labour, capital and services. It covers all of the EU Member States and has been extended, with exceptions, to Iceland, Liechtenstein and Norway through the agreement on the European Economic Area (the "EEA"), and to Switzerland through bilateral treaties.

How did we get here?

The majority vote in the UK referendum on membership of the European Union, announced on 24 June 2016, favoured the departure by the United Kingdom from the European Union. The UK served notice of its departure under Article 50 of the Treaty on European Union ("TEU") on 29 March 2017. That triggered a two-year process whereby the UK would automatically leave the EU on 29 March 2019 unless:

- It agreed an extension under Article 50 TEU with the EU;
- It reached a different agreement with the EU (e.g. for an earlier exit); or
- The UK unilaterally revoked its Article 50 TEU notice, which would mean that it would cease to leave, until such time as it served another notice (thereby triggering a new two-year process).

So far, two extensions to the 29 March 2019 departure date have been agreed between the UK and the EU:

- On 22 March 2019 (seven days before the previous deadline), the UK and EU agreed an extension of the leaving date until 22 May 2019 if a withdrawal agreement was approved by the UK Parliament by 29 March 2019, or until 12 April 2019 otherwise.
- On 11 April 2019 (one day before the previous deadline), the UK and EU agreed a second extension until either 11:00 pm on the last day of the month in which the ratification procedures for the withdrawal agreement were concluded, or 11:00 pm on 31 October 2019 if no withdrawal agreement was concluded.

What is the timing now?

As things stand, the default legal position is that the UK will leave the EU at 11:00 pm on 31 October unless, as before:

- It agrees an extension with the EU before then;
- It reaches a different agreement with the EU; or
- It unilaterally revokes its Article 50 notice.

Any extension beyond 31 October will require the unanimous approval of the 27 remaining Member States, as discussed in more detail below. The EU may only be prepared to provide that approval if there is a good reason, e.g. if the EU and UK are close to concluding a deal, or if the UK decides to call a general election or hold a second Brexit referendum.

Negotiations with the EU may be affected by various factors, including the ongoing EU and UK Parliamentary summer recesses, which will end on 1 and 3 September 2019 respectively.

What are the chances of concluding a withdrawal agreement before the 31 October 2019 deadline?

The steps that will need to be taken to conclude a withdrawal agreement are summarised in the Appendix to this update.

Theresa May, the UK's previous PM, negotiated a draft withdrawal agreement with the EU, which is essentially a form of transitional arrangement, largely preserving the status quo and leaving the details of the UK's future relationship with the EU to be negotiated later.

The EU has said it will not now negotiate a different agreement before 31 October, and that in particular it will not renegotiate the "Northern Ireland Backstop" ("the Backstop") in the current agreement (see Section IV). The EU resisted several attempts by Theresa May to do that.

I. OVERVIEW

Mr Johnson campaigned to be the next PM on the basis that he would use the threat of a no deal Brexit to try to force the EU to accept a different withdrawal agreement. He has said (among other things) that any deal that is acceptable to him will need to remove the Backstop, and that he will not seek any form of extension to avoid a no deal Brexit, even if negotiations are very close to completion at 31 October 2019.

Many people believe it will not be possible to agree a new deal before 31 October, given these differences in position, the political environment, and the steps that will need to be taken before then.

What are the chances of securing an extension before 31 October?

The steps that will need to be taken to secure an extension are summarised in the Appendix to this update.

For the reasons in the Appendix, Parliament is expected to try and prevent Mr Johnson from exiting the EU without a deal. There seem to be two main ways to do that:

- A motion or legislation forcing the government to seek an extension, or authorising someone else to seek an extension; or
- A vote of no confidence, the formation of a new coalition government which will seek an extension, followed by a general election.

Although it appears that most members of Parliament would like to stop a no deal Brexit, timing may be an issue. The 31 October 2019 deadline might pass before Parliament can coordinate itself to complete one of the processes above or take some other action to stop a no deal Brexit.

What are the consequences of a no deal Brexit?

Sections II and III of this update provide more details on the possible consequences of a no deal Brexit in relation to financial services and customs and tariffs (and the related impact on trade in goods).

It is not possible in this update to discuss all of the other potential consequences of a no deal Brexit, but some additional general points are set out below.

Economic consequences

The consequences of Brexit will vary depending on the terms of departure as well as on the prevailing economic climate. A number of studies have predicted that the UK will be significantly worse off if there is a no deal Brexit. For example, in November 2018 a range of government departments, including the Treasury, produced a benchmark economic analysis. It modelled a number of scenarios across a period and concluded that, in a worst-case scenario, UK GDP could be 10.7% lower in 15 years' time than if the UK stayed in the EU.

Immigration and employment

Brexit will affect immigration and employment rights. Currently, the principle of freedom of movement, one of key pillars of the EEA Single Market, facilitates free trade in services by allowing workers to move freely, stay and remain in the territory of a Member State in which they are employed. If no agreement is reached before Brexit, freedom of movement will no longer apply.

The EU has stated that decisions in respect of UK citizens in the EU should be left up to the individual Member States, rather than a decision being taken at the EU level. The UK government has passed legislation to allow EEA and Swiss nationals and their family members living in the UK before it leaves the EU to apply to continue to stay and work in the UK in the event of a no deal Brexit. Switzerland and the EEA nations have agreed to offer similar rights to allow UK citizens to stay and work in their jurisdictions.

Professional Qualifications

As a member of the EU, UK professionals are able to practise in other EEA Member States on the basis of their home-state qualification based on the Mutual Recognition of Professional Qualifications Directive. If no withdrawal agreement is negotiated by the time the UK leaves the EU, UK professionals, including lawyers, accountants and architects, will no longer be able to access the EU legal services market in the same way on exit day. Instead, they will have to apply different local rules in each EEA Member State, for example on opening local offices, representing clients in court and re-qualification. The UK government has passed laws which are intended to recognise certain EEA and Swiss professional qualifications in the event of a no deal Brexit.



II. FINANCIAL SERVICES

How might a no-deal Brexit affect financial services?

The EEA operates a financial services passporting regime which is intended to facilitate the frictionless cross-border provision of regulated financial services throughout the EEA.

Broadly speaking, the regime allows regulated financial services firms that are authorised in one EEA State to rely on that authorisation to operate in other EEA jurisdictions.

If the UK leaves the EEA with no deal, the EEA passporting regime will cease to apply to the UK.

If, on the other hand, there is a withdrawal agreement, that might extend the passporting regime on a temporary or permanent basis. For example, the agreement negotiated by Theresa May included provisions that would continue the effect of the existing regime, at least temporarily.

II. FINANCIAL SERVICES

Will EU firms still be able to operate in the EU after Brexit if there is no deal?

The UK has implemented legislation and rules that are intended to enable firms authorised in the EEA which currently operate in the UK under the passporting regime to continue to do so following a no deal Brexit, if they seek permission, for a temporary period of up to three years, subject to powers of the UK government to extend this time frame.

Will UK firms still be able to operate in the EU after Brexit if there is no deal?

The EEA has not implemented an EEA-wide regime which will enable UK authorised firms to continue to temporarily operate throughout the EEA following Brexit (except in some very limited cases – e.g. for certain UK central counterparty clearers).

Some EEA states, such as Germany, Spain, Sweden and Finland, have implemented unilaterally temporary measures aimed at mitigating the impact of a no deal-Brexit by extending authorisations currently in place or creating exemptions from authorisation requirements. For instance, Germany has taken steps which are intended to enable UK banks and firms operating in Germany on the basis of passports to continue to do so for a period after the UK's departure. Other Member States, such as France, Netherlands and the Republic of Ireland have undertaken other contingency planning measures aimed at facilitating continuity of services and financial stability if there is no deal, including in the form of draft legislation that can be implemented quickly to respond to unforeseen consequences of Brexit.

However, the position across the EU is not consistent. This means that UK authorised firms currently operating in a number of EEA states can no longer rely on one consistent set of rules. Instead, unless they can establish an EEA authorised entity, they may need to meet a variety of different requirements in order to continue to operate as before.

What is an equivalence regime?

EU law contains mechanisms to allow firms authorised in countries outside the EEA to operate in the EEA on the basis of that authorisation, provided that the third country's regulator regime is recognised as "equivalent" to the EU.

Recognition of "equivalency" in this way requires a formal decision from the EU. An equivalence determination is made by the European Commission, usually on advice from the European supervisory authorities (EBA, ESMA or EIOPA), other relevant documentation, and consultations with one or more financial services regulators in the third country. Equivalency cannot be obtained unilaterally by the third country – e.g. by the third country meeting an objective equivalence test. Equivalence is granted at the sole discretion of the EU.

So can UK firms rely on equivalency if there is no deal?

Equivalency requires a determination from the EU. No determination has been made yet.

Immediately following a no-deal Brexit, the UK's financial services regime is expected to be very closely aligned with the EU's. However, the UK or the EU might adopt policies which change this. The EU has recently indicated in the context of Brexit that it will pay very close scrutiny to the regimes of countries wishing to apply for equivalence in the future.

As a result, an application for equivalency from the UK following a no deal Brexit will take time and might have an uncertain outcome. Many EU firms will not be able to wait, because they will need to conduct business in the meantime.



III. CUSTOMS AND TARIFFS

What is the current position on trade and tariffs?

As an EU Member State, the UK is not only a member of the Single Market, but also of the EU Customs Union. As a member of the EEA, goods can move freely without tariffs, provided they meet specially defined rules of origin. Within the Customs Union, no tariffs apply on goods traded between Member States – wherever the origin of the goods – and common tariffs apply for products traded with non-EU countries, whilst common customs rules apply. Together, the Customs Union and the Single Market largely remove the need for controls at national borders between EU Member States.

What will the position on trade and tariffs be if there is no deal?

In the absence of a withdrawal agreement, the UK will cease to be a member of the Customs Union and Single Market and will instead become a third country regarding imports and exports into and from the EU. There will be no trading agreement or transitional arrangements in place with the EU. The UK will not benefit from the favourable terms associated with membership of the Customs Union, or the terms of free trade agreements that other third countries have entered into with the EU. The UK will instead revert to trading on World Trade Organisation (“WTO”) rules. As regards non-EU countries of the EEA, the UK has nevertheless concluded continuity agreements with Norway, Iceland and Liechtenstein.

III. CUSTOMS AND TARIFFS

What are the WTO rules?

The WTO comprises 164 different states. As part of the WTO agreement, the General Agreement on Tariffs and Trade ("GATT") contains the obligations of WTO members for trade in goods. Under WTO rules, member countries are obliged to grant most favoured nation ("MFN") treatment to all developed member countries without discrimination, except where they have entered into a free trade agreement (including a customs union). Free trade agreements are only permitted by the GATT where they essentially cover all sectors of industry. Sector-specific free trade agreements are not allowed.

This means that WTO member countries need to confer equivalent treatment on all the other member countries with whom they do not have free trade agreements or that do not benefit from a generalised system of tariff preferences (i.e. developing countries), including by charging them all the same tariffs. This is intended to prevent differential treatment based on non-financial barriers to trade, e.g. through health and safety requirements or other trade standards. The General Agreement on Trade in Services ("GATS") also imposes MFN obligations on WTO member countries regarding market treatment and access, subject to exceptions.

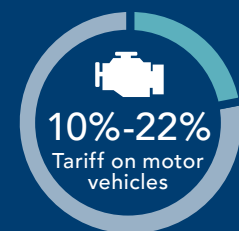
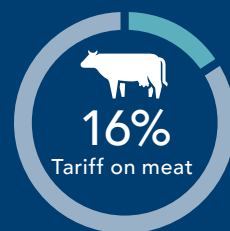
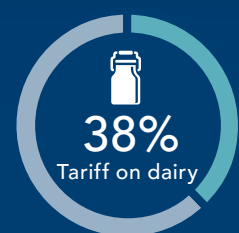
What would trade with the EU be like under WTO rules?

The MFN rules mean that the UK and the EU will apply to one another's goods their normal schedule of tariffs – as discussed above, the UK and EU could not grant each other more favourable trading terms than those they grant to other third countries. As a result, for example, some UK lamb and beef exports to the EU, which currently have no tariff applied, would become subject to tariffs in excess of 65% and, in certain cases, well in excess of 65%.

The UK would be able to set its own tariffs for exports from the UK to the EU, but would have to apply the same tariffs to all other WTO countries, unless it has free trade agreements with them.

What is the UK doing to prepare regarding trade and tariffs in the event of no deal?

The UK government has previously published temporary customs duties that would apply in the event of a no deal Brexit. These include tariff-free rates for 87% of goods imported into the UK, and would result in an average of 5% tariff on goods coming into the UK, with exceptions including dairy (38% average), meat (16% average) and motor vehicles (between 10% and 22% average).



In the longer term, the UK government has suggested that its objective would be to promote free trade and move towards a zero-tariff regime. This could have an impact on UK producers if there are lop-sided trade arrangements under which the UK has to pay tariffs on exports, but does not charge them on imports. For example, Welsh farmers may find it more difficult to compete within the UK and internationally if they have to pay tariffs on lamb they export but tariffs cease to be charged on New Zealand and Australian lamb imported into the UK.

III. CUSTOMS AND TARIFFS

Can the UK stay in the Customs Union with the EU and enter into trade agreements with other countries on its own terms?

This does not appear possible. The terms of the Customs Union prevent this and the EU has said it will not make an exception for the UK. The current UK government has said that one of the main reasons it wants to take the UK out of the EU is so that it can enter into free trade deals with other countries on its own terms.

What is the possible impact of checks at the EU border?

The EU is currently a very large trading partner of the UK. According to one estimate, 44% of all UK exports went to the EU in 2017, when no tariffs or border checks were in place. Aside from the potential economic impact that monetary tariffs might have on trade, there are concerns that checks at the UK border (for any reason – e.g. to collect tariffs or to check compliance with standards) could inhibit business operations, including businesses that rely on “just in time” delivery of manufacturing components, such as the automotive industry.

What about trade with other countries outside the EU?

If the UK leaves the EU it will need to trade on WTO terms with other WTO members, unless it agrees alternative free trade arrangements. So far, since triggering Article 50, the UK has agreed “continuity” deals with temporary arrangements with: Central America, Andean countries, Norway and Iceland, Caribbean countries, Pacific Islands, Liechtenstein, Israel, Palestinian Authority, Switzerland, the Faroe Islands, Eastern and Southern Africa and Chile. In addition, the UK has announced a deal in principle with South Korea which it says it expects to sign shortly. These agreements are aimed at replicating existing arrangements with the EU as far as possible

following Brexit, at least for a period. Even with free trade agreements with these trading partners, trade by the UK will be affected. As part of the Customs Union with the EU, UK origin goods can be cumulated with goods originating in the other EU Member States to attain EU origin status, granting the finished product the benefit of tariff preferences in the free trade agreement country of destination. However, the UK goods will, for the most part, have to meet the preferential rules of origin on their own without cumulation with the EU goods.

How easy will it be to negotiate a free trade agreement with the EU or other countries?

Many people believe that any deal agreed with the EU within the next several years (let alone before 31 October 2019) will take the form of a transitional arrangement, providing for temporary rules while the EU and the UK negotiate the terms of a longer term relationship and trade agreement.

Trade agreements can take many years to negotiate. For example, Canada’s recent trade agreement with the EU took approximately 7 years to agree. An EU-South American deal agreed in June took 20 years to negotiate.

The EU has said it will not simply replicate its current free trade arrangements with the UK, without also requiring the UK to meet the other requirements of membership of the EU, because that would be more beneficial than membership itself and would encourage other states to leave the EU.

Some countries (e.g. Japan) have indicated that they will not be prepared to enter into long term free trade arrangements that are as favourable as their arrangements with the EU, because of the EU’s larger size and negotiating power compared with the UK.

IV. THE IRISH BORDER

What is the issue with the Irish border?

In the event of a no-deal outcome, customs and other checks of some type for people and goods travelling between the Republic of Ireland (which is in the EU but not the UK) and Northern Ireland (which is part of the UK) will need to take place, e.g. to impose tariffs and trade standards and to carry out immigration checks.

Failing to impose tariffs only on that border would breach WTO rules, for the reasons above. Trading standards will also need to be policed in some way. Although the UK and EU's standards might be closely aligned to begin with, they could diverge significantly shortly after Brexit. For example, some Brexit supporting politicians in the UK have raised the prospect of departing from EU standards relating to agricultural products, to facilitate greater agricultural trade with the United States.

There are concerns that a "hard" physical border might compromise the peace process in Northern Ireland, including the Good Friday Agreement, which was entered into in 1998, and a power-sharing agreement between the British and Irish governments and groups in Northern Ireland.



IV. THE IRISH BORDER

What is the Northern Ireland Backstop?

In order to address the concerns above, the withdrawal agreement negotiated by Theresa May incorporated a proposal known as the “The Northern Ireland Backstop”. Among other things, this arrangement would keep the UK in a customs union with the EU indefinitely, until other (e.g. technological) solutions could be agreed upon which avoided the need for a hard border in Ireland. This would prevent the UK government from achieving its stated aim of agreeing alternative trade arrangements with third countries.

Can the issues be resolved by technology?

The UK, in particular has suggested that concerns about a hard border could be addressed by technological solutions. However, it has so far been unable to identify existing technological solutions which would work. As noted above, the current form of the Backstop allows for the possibility that such solutions might be developed in the future.

Why is the EU insisting that the Backstop be included in the withdrawal agreement?

Although in the past some UK politicians have suggested that the UK might not enforce its own hard border with Ireland in the event of a no deal Brexit, it is unclear how that could be done considering some of the points above, for example WTO requirements, the need to enforce trading standards, and the absence of any existing technological solutions.

The EU believes a hard border of some sort will be required, at least in the short term, and has said that it therefore requires the Backstop to help protect the peace process.

Does the Backstop need to be indefinite?

Theresa May tried unsuccessfully to negotiate a time limit to the Backstop. The EU insisted that the Backstop needed to be indefinite to operate a failsafe, until such time as technological or other solutions are available to enable a Brexit without compromising the peace process.

Mr Johnson has said that he wants full removal of the Backstop and that a time limit will not be enough to persuade him to enter into an agreement and avoid a hard border.

But won't there be a border if there is a no deal Brexit?

Yes, for the reasons above. Mr Johnson might try to use this in negotiations to try and force the EU into a deal.

APPENDIX

SUMMARY OF THE MECHANISMS FOR LEAVING THE EU

i. What does Article 50 TEU say?

Article 50 TEU states:

1. Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.
2. A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.
3. The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.
4. For the purposes of paragraphs 2 and 3, the member of the European Council or of the Council representing the withdrawing Member State shall not participate in the discussions of the European Council or Council or in decisions concerning it.

A qualified majority shall be defined in accordance with Article 238(3)(b) of the Treaty on the Functioning of the European Union.
5. If a State which has withdrawn from the Union asks to rejoin, its request shall be subject to the procedure referred to in Article 49.

ii. So how in practice do the EU and UK agree to an extension?

It follows from the Article 50 TEU that any extension will need to be agreed between:

- the European Council, by a unanimous decision of its representatives excluding the UK; and
- the UK acting in its capacity as an individual Member State (rather than as a member of the European Council).

The European Council is the body made up of the 28 Heads of State of each of the EU Members (but in this case excluding the UK), along with the President of the European Council and the President of the European Commission.

Under UK law, by royal prerogative (a type of customary power), the UK government can bind the UK to an agreement with other international states and bodies, including with the EU. Also by royal prerogative, the PM can act on behalf of the UK government, including when entering into international agreements. That is, Mr Johnson can represent the UK government and thereby bind the UK into an agreement with the EU, such as an agreement to extend Article 50. However, that is not necessarily the only way the UK can enter into agreements with the EU. See below.

iii. And how in practice do the EU and UK enter into another agreement, e.g. a transitional arrangement or other withdrawal agreement?

It follows from Article 50 TEU that the EU will be represented by the Council of the European Union (referred to as "the Council") in the negotiation of any withdrawal agreement. The Council has the power to conclude any agreement on behalf of the EU, acting on a qualified majority, after obtaining the consent of the European Parliament.

The Council is different from the European Council referred to in (ii). The Council can have different configurations for different purposes. A specially designated Article 50 General Affairs Council ("GAC") of the Council will be responsible for signing off on a withdrawal agreement on behalf of the Council. The membership comprises European affairs or foreign affairs ministers of each of the remaining 27 Member States (excluding the UK). The qualified majority necessary to conclude any agreement usually requires the consent of at least 72% of the members of the GAC.

Furthermore, the Member States they represent must comprise at least 65% of the total population of the EU excluding the UK.

The European Parliament is the legislative branch of the EU and comprises 751 elected members of Parliament. It makes decisions by a simple majority.

The UK can agree to a withdrawal agreement on the same basis as it can agree to an extension in (ii). As in (ii), that is normally done through the PM acting by royal prerogative, but that is not the only way. Recent case law and changes in UK legislation have confirmed that any withdrawal agreement would need to be ratified by the UK Parliament.

In summary, a transitional or other withdrawal agreement will require:

- approval by more than 50% of 751 members of the EU Parliament;
- agreement of the 27 EU states represented on the Council of the European Union; and
- the UK, normally (but not necessarily) represented by the PM

iv. Could the UK parliament force the government or PM to request an extension?

The UK Parliament has previously voted against a no deal Brexit and there have been various suggestions by politicians or in the media about ways it could force the government to seek an extension. Some of these suggestions are discussed below.

Passing a motion instructing Mr Johnson to seek an extension

In the UK, Parliament can legislate to override the powers of the Queen and the government (although in some cases this requires the consent of the Queen).

In theory therefore, Parliament might pass a motion instructing the PM to seek an extension from the EU. Failure to comply with such a motion would entitle the House of Commons to impose a sanction, which might include a reprimand, suspension, the withholding of salary or expulsion. It is uncertain what sort sanction would be imposed in practice in a case like this and whether the threat of a sanction would operate as a sufficient incentive on the PM to comply.

Holding a vote of no confidence, dismissing the current government and convening a new one within 14 days and/or holding a general election

The basic procedure for a motion of no confidence is set out in the Fixed-term Parliament Act 2011 and is broadly as follows:

- A member of Parliament, usually the Leader of the Opposition, requests Parliament to vote on a motion of no confidence;
- If the vote is passed (i.e. if more than 50% of voting Members of Parliament support the motion of no confidence), a 14 calendar day period follows in which either:

- The present government is confirmed in office by a vote of confidence; or
- A new government (e.g. a new coalition) is confirmed in office by a vote of confidence; or

- If no vote of confidence is passed within the 14 days then a general election is triggered.
- Parliament must be suspended 25 days before any election takes place.

A general election will take time to resolve. Even if a vote of no confidence is held and passes when MPs return from their summer break on 3 September, it is unlikely that an election could in practice be held before 31 October 2019, especially if the PM tries to delay the process.

However, it is possible that by using the above process a coalition government might be formed within the 14 period referred to in (b). That might possibly happen with the intention that the new government would then seek an extension from the EU before holding a general election later in the year.

Passing legislation

A fourth option might be for Parliament to pass legislation forcing the PM to seek an extension and providing for a sanction for failing to do so, or perhaps even authorising another individual or body to negotiate an extension. Because the UK would be negotiating in its capacity as a Member State, rather than as a member of the European Council (see (ii)), there is no European law requirement for it to be represented by a Head of State. And Parliament can, by majority vote, pass legislation which overrides the royal prerogative convention by which the government and the PM normally represent the UK in international negotiations.

v. What could Mr Johnson do to avoid the above measures?

Among other things, at least in theory, Mr Johnson might refuse to comply with an instruction from Parliament to seek an extension.

There has also been some discussion in the media about the possibility of him seeking to “prorogue” (suspend) Parliament to prevent it from taking any of the decisions above.

Prorogation is a royal prerogative exercisable by the Queen to end a Parliamentary session. Normally, proroguing Parliament would involve the PM and Cabinet advising the Queen to exercise her power to suspend Parliament. Mr Johnson has refused to rule this out as a possibility. It is unclear how the Queen would act if she were to be approached. The PM would speak in the capacity of an advisor. By longstanding constitutional convention, the Queen follows the advice of the government, and does not take any active role in politics. In this case however, the PM would be seeking to evade the sovereignty of Parliament. It may not even be clear that the PM has the support of the majority of the government. Those factors raise their own constitutional issues. The Queen would presumably take her own legal advice on how to act. That might, for example, include referring the question back to Parliament to decide (with the likely result that Parliament will decline to suspend itself).

In addition to the above, pre-emptive measures have recently been taken by Parliament to attempt to limit the extent to which the PM can prorogue Parliament, including through passing legislation which requires Parliament to continue sitting so that it may deal with the possibility of a no-deal Brexit. Further legislation with similar objectives may also be passed at a later date.

Finally, very recently, it has been suggested that if there is a vote of no confidence and an attempt to appoint a new government under the Fixed-term Parliament Act as set out above, Mr Johnson could simply refuse to resign and/or call a general election himself, to take place after Brexit on 31 October 2019.

The last option does not seem to be available, because the Fixed-term Parliament Act suggests that the only two ways to call an election are via the procedure above or if a majority of parliament votes in favour of doing so. The PM cannot call an early election by himself.

The first option also may not work. Traditionally, the Queen has the power to dismiss the PM, without waiting for a resignation. She might well choose to do so, if the procedure above has been followed and Parliament has passed a vote of confidence in a new government within the 14 day period, but the current PM refuses to resign. Although some have suggested that the Fixed-term Parliament Act prevents this, because it somehow implicitly removes the traditional power of the Queen to dismiss the PM, that requires a very wide reading of the Act.

vi. What about revoking Article 50?

Recent case law has established that the UK can unilaterally revoke its Article 50 TEU notice. It would then stay within the EU until it serves another Article 50 TEU notice, starting a new exit process. There does not appear to be any significant support for this possibility within Parliament at the moment.

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