

## **Alert | Brexit**



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### **Brexit: Can the Remainers Stop a No-Deal Brexit?**

Brexit has driven fault lines through British politics as seen at no time since the 1680s. Fervent ‘leavers’ and fervent ‘remainers’ can be found in both of the main political parties, although most favour various compromise options in between.

This is reflected in the composition of the UK Parliament and has resulted in an impasse, with Parliament rejecting both the transitional ‘deal’ to leave the EU negotiated by former Prime Minister Theresa May at the end of 2018 and the prospect of leaving the EU without a deal – a ‘no deal’ Brexit. The election of Boris Johnson as the new UK prime minister and his appointment of a government leaning firmly towards leaving the EU, with or without a deal on October 31, 2019, throws up some distinctive legal challenges: If a new deal cannot be struck with the EU, is a no-deal Brexit inevitable, or can the remainder MPs stop it?

Concluding a new deal with the EU by October 31 is challenging, not least given the limited time available for negotiating it and having it approved by the European and UK Parliaments. This is compounded by the complexity of the issues the UK government seeks to renegotiate, particularly the Irish backstop, and the EU’s no-renegotiation stance – although it has indicated willingness to revisit the nature of the future relationship between the EU and UK.

The legal position on a no-deal Brexit is set out in the European Union (Withdrawal) Act 2018, as amended in April 2019. This Act sets Brexit date at October 31, 2019. It also requires Parliament to approve any withdrawal agreement with the EU. What it does not require is that there should in fact be a withdrawal agreement. Consequently, the Act does not require parliamentary consent for a ‘no deal’

Brexit. Prime Minister Johnson does not, accordingly, need to secure any parliamentary majority for this. And since the Act will prevail over any parliamentary vote to reject a no-deal Brexit, he does not have to comply with any vote passed to the contrary.

The first legal route open to remainder MPs is to seek to amend the 2018 Act. The problem that they would have is timing. Parliament is in recess until September 3. There is usually a further recess from mid-September to the second week in October for the party conference season. Even if the second recess were to be abandoned, there is insufficient time for an amending bill to be passed before October 31 using normal parliamentary procedures. There is provision for emergency legislation to be passed very quickly, but this would require a consensus among all parties and the support of the government, both of which seem unlikely given the split between remainers and leavers within the main parties and the new government's express intention to achieve Brexit by October 31.

The second legal route open to remainder MPs is to force a general election. Under the terms of the UK Fixed-term Parliaments Act 2011, Leader of the Opposition Jeremy Corbyn would need to propose a motion of no confidence in Prime Minister Johnson's government. At present the Conservatives have a majority of one in Parliament, but only with the support of the Democratic Unionist Party from Northern Ireland. However, a number of Conservative MPs have indicated that they would be prepared to bring their own government down on this issue. An unknown factor is whether leaver MPs in the Labour Party are prepared to abstain or even vote against such a motion.

A motion of no confidence under the 2011 Act requires only a simple majority of MPs voting in favour. However, there are still timing issues. The earliest that such a motion can be proposed is September 3. If passed, it would trigger a cooling-off period of 14 days for an alternative government to be formed. At the end of this period, if, as he would be entitled to do, Mr Johnson were to remain prime minister, UK electoral law would require him to announce the date for a general election within a further 25 days. However, there is no requirement for the election actually to be held within a particular time. Although the Queen must be consulted about the date, this is a formality. Prime Minister Johnson would therefore be within his constitutional rights to call an election only after the October 31 Brexit deadline has passed and the UK has left the EU.

Remain supporters have indicated that their strategy, if they are able to force an election, would be to rely on the legal status of the 'standstill' or status quo convention to prevent a no-deal Brexit on October 31. When an election is called, the government immediately becomes a caretaker administration. By parliamentary convention ('convention' in the sense of accepted practice), this administration should not embark on any major new projects and may not use the UK civil service for such a purpose. Cabinet Secretary Sir Mark Sedwill, the head of the civil service, is reported as having expressed the view that the 'standstill' in this situation would be that the UK remains in the EU. However, government spokespersons have said that this would involve the civil service effectively acting in contravention of the 2018 Withdrawal Act.

It seems likely, if this scenario develops, that the matter will be referred to the UK Supreme Court. The British constitution is not written down and relies on many traditions and convention, some of considerable antiquity. However, there is precedent in a December 2018 Supreme Court case, which decided that the legislative consent motions passed by the Scottish Parliament under the Scotland Act 1998 could not be used to affect the validity of the 2018 Withdrawal Act. It had been argued that the convention requiring the Scottish government to be consulted on any UK legislation that involved matters devolved to Scotland was absolute. The Supreme Court disagreed, on the basis that a convention could not take precedence over a statute. On this basis, any reference to the Supreme Court seeking to block the operation of the 2018 Act through convention would likely fail.

It is often said ‘a week is a very long time in politics’. Prime Minister Johnson may be able to secure some last-minute concessions from the EU negotiators enabling a withdrawal agreement to be approved by Parliament, but this looks challenging. Legal routes to block Brexit are also likely to meet several hurdles. Consequently, at this stage, Britain’s exit from the EU on October 31 looks the more likely outcome. Whether that means an abrupt departure from the EU, or whether a managed ‘no-deal’ Brexit could be achieved through negotiation and agreement on key matters, remains to be seen.

For more on Brexit, click [here](#).

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