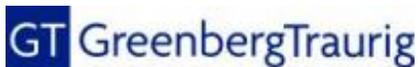


# Brexit: Political Impasse After UK Parliament Votes to Block October 31 No-Deal Departure From EU



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Our [last GT Alert on Brexit](#) quoted the saying, “a week is a long time in politics”. New Conservative Prime Minister Boris Johnson has found that a mere 72 hours is an eternity as he seeks to break the political impasse on the terms of the UK’s exit from the European Union – so far, unsuccessfully.

## Parliamentary Consent to the Draft EU Withdrawal Agreement Withheld

Although the 2016 referendum decision to leave the EU was carried with a low majority – 52% to 48% – and was ‘advisory’ in UK law, successive UK Governments have held that the vote must be treated as a commitment. In January 2017 the UK Supreme Court, responding to a claim brought by an individual (the ‘Miller Case’), ruled that Government could not withdraw the UK from the EU by exercising its executive powers but must seek the consent of Parliament by proposing legislation. This is the origin of the impasse Mr Johnson now faces.

The Supreme Court ruling led to the European Union (Withdrawal) Act 2018. Under the relevant provisions of this Act, the UK leaves the EU on October 31, 2019 and any withdrawal agreement with the EU must be approved by Parliament. On three separate occasions, Parliament rejected the draft withdrawal agreement negotiated

by former Prime Minister Theresa May. The issue triggering these rejections and finally former Prime Minister May's resignation was a refusal on the part of the EU negotiators to make any amendment to the draft agreement that would enable Parliament to approve it, leaving Mrs May 'between a rock and a hard place'. On taking over from her, Boris Johnson faces the same impasse.

## **Prorogation of Parliament**

Mr Johnson's strategy to break the impasse, developed with the aid of a new advisory team in No 10 Downing Street, reflected his recognition that the majority of the British electorate are impatient to resolve the Brexit issue, and that Conservative voters, in particular, want to move on to core issues such as the National Health Service, policing, social care, and national defence. He also recognised that the 2018 Withdrawal Act did not require parliamentary consent for the UK to leave the EU without a withdrawal agreement - a 'no deal' Brexit.

By using the proroguing procedure Mr Johnson aimed to limit Parliamentary discussion of Brexit, then present Brussels with a robust amendment to Mrs May's deal, making it clear that the UK was willing to face a disruptive 'no-deal' Brexit if the EU negotiators refused to budge.

The proroguing of Parliament is a normal procedure at the end of a Parliamentary session. All bills in progress automatically fall, all committee work ceases, and the decks are cleared for the new session. At the end of the prorogation, there is a State Opening of Parliament, the Queen reads out her government's new programme, and the next session begins. The current session of Parliament is the longest for over 300 years, so a prorogation and a new session has been overdue. However, it was clear that Prime Minister Johnson was using prorogation as a device to control and limit Brexit discussion before October 31. This prorogation would be for five weeks, whereas it would normally be for two to three weeks. In practice, as Parliament recesses in September for party conferences, the Government argues that only five parliamentary days will be lost.

The prorogation proposal was immediately challenged in court proceedings, which were expedited. Both the Scottish Court of Session and the English High Court ruled in favour of Mr Johnson, deciding that he had acted lawfully in proposing the prorogation. Both these cases and a third case in Northern Ireland likely will be joined for a reference to the UK Supreme Court for a hearing on September 17. As Parliament may well be prorogued by then, this is not good timing for Johnson's opponents. Although they have expressed anger and outrage over the prorogation, most commentators believe it unlikely that the Supreme Court will rule against the Government on this issue.

## **EU Refusal to Compromise**

The issue that created most parliamentary opposition to the withdrawal agreement was the 'Irish Backstop'. This provided for the UK to remain in a customs union and single market with the EU for an unlimited period after the end of the two-year transition period negotiated in the withdrawal agreement. The backstop was intended as an insurance policy for the EU if cross-border trade issues in Ireland

remained unresolved at that point. The alternative would have been to detach Northern Ireland, making it a separate economic regime from the rest of the UK – unacceptable to many MPs, particularly the Democratic Unionist Party in Northern Ireland, on whose 10 MPs the Government at the time was dependent to maintain a parliamentary majority.

Both the UK and the Republic of Ireland are pledged under the terms of the Good Friday Agreement intended to settle conflict between the two countries, not to introduce controls at their border with each other. Prime Minister Johnson has reiterated the UK position that, come what may, the UK will not introduce border controls on the UK side in Ireland. This leaves the Republic of Ireland in some difficulty. EU rules would require it to introduce controls on its side, resolving the EU negotiators' concern that goods could otherwise flow unregulated across the border and undermine the integrity of the EU single market. The UK takes the view that this concern is unfounded, on the basis that large-scale movement of goods can be controlled by electronic monitoring of consignments. The EU's response is that no system in the world can do this effectively; the UK's retort is that such a system has never been needed before – the situation in Ireland is unique, and the EU is creating a deal-breaker to resolve a problem now that might possibly be an issue only two years hence.

## **Threat of a No-Deal Brexit Eliminated?**

One striking element of the EU Withdrawal Act has been that that parliamentary consent would not be required for a no-deal Brexit. Prime Minister Johnson's strategy was to move the EU negotiators' position on the backstop by threatening an October 31 no-deal Brexit. Although the consequences of a no-deal exit would be economically damaging for the UK, they would also be damaging for the EU, particularly the withholding of some £39 billion in separation payments, not to mention the UK's huge stake in the European Central Bank that underpins the euro currency (although the UK is not in the Eurozone). For the strategy to work, the EU negotiators would have to believe three things: (1) that the UK Government could get the agreement ratified by Parliament without the Irish Backstop; (2) that the UK was serious about working to find a substitute for the Backstop; and (3) that the threat of a damaging 'no-deal' exit was real.

However, Mr Johnson's strategy has been derailed. Parliament took control of the agenda on September 4, voting to introduce emergency legislation precluding a 'no-deal' exit from the EU. Mr Johnson had counted on limited abstentions from voting on the legislation and only a few votes against from anti-Brexit MPs in his own party, which votes (he anticipated) would be balanced by pro-Brexit votes from opposition party MPs. However, one of his MPs defected to another party, and 21 voted against, including senior figures. These individuals were at once ejected from the Conservative Party, although they remain independent MPs. Only two opposition MPs voted with Johnson.

The emergency legislation not only precludes a 'no-deal' exit, but also requires the Government to seek an extension beyond October 31 if there is a risk of no deal. Ever the colourful speaker, Johnson said he "would rather be dead in a ditch" than do this.

## **Threat of a General Election - but Cannot be Called by Government Alone**

Elimination of Prime Minister Johnson's leverage to influence the EU negotiators by threatening a no-deal Brexit prompted him to propose a general election for October 15. The timing is critical because this is two days before the EU ministers' meeting in Brussels - the last chance to secure any changes to the draft withdrawal agreement. He is hoping that, with polls showing him with an 18-point lead over his Labour Party rival, he can secure a substantial popular victory if an election can be held.

Mr Johnson and his government cannot call a general election on their own. The process is governed by the 2011 Fixed Term Parliaments Act, which introduced fixed-term elections with a five-year gap between each election, meaning that in principle the next election can take place only in 2022. However, an earlier election can take place if two-thirds of MPs - of all MPs, not just those voting - approve. Prime Minister Johnson's proposal on September 4 was put to the vote on the same day, and although it was approved by a large parliamentary majority, that majority was less than two-thirds of all MPs, so it failed.

An earlier election can also be triggered by a parliamentary motion of 'no confidence' in the government, which requires a simple majority approval. However, the leader of the Labour Party opposition is currently declining to do this, despite the fact that he has been calling for a general election for the past year. And even an immediate 'no-confidence' vote might not leave enough time for such an election.

A deal was reported to have been struck between the Conservative and Labour business managers, that if the Government did not try to filibuster the 'no-deal' bill in the House of Lords (i.e., use up all the time allocated to the bill without concluding in a vote), the Labour party would agree to a general election. However, the Labour party is said to have reneged on that deal now that the emergency legislation has gone through, and is now requiring its agreement to be dependent on Mr Johnson actually seeking an extension to the Brexit deadline. All opposition parties have now agreed that a no-confidence motion to trigger an election will not be supported before October 31. Mr Johnson has, however, indicated that he will proceed with a no-confidence vote on Monday, September 9, resulting in the unusual position of a government proposing a motion of no-confidence in itself, with opposition parties essentially confirming that they do have confidence.

The parliamentary impasse could be broken by adoption of a one-line bill providing that a general election will take place on October 15 notwithstanding the provisions of the 2011 Fixed Term Parliaments Act. This would also require a simple majority of MPs voting but could well fail if the Labour opposition chose to vote against it and therefore in favour of maintaining a Conservative Government. Such a motion would have to be passed in the next few days, as Parliament is due to be prorogued next week and will not meet again until October.

Prime Minister Johnson would thus be trapped in office without any means of effecting his Government's key policies and without the traditional means to resolve the situation by calling an election. This, then, brings the Queen into the

constitutional morass. Were Boris Johnson to offer his Government's resignation to the Queen, she would be duty-bound to call upon whomever he recommended to form a new Government. This would normally be the Leader of the Opposition or anyone else who could form a stable majority. If the outgoing prime minister, acting in a caretaker capacity, could not so recommend anyone else, the only option open to the Queen would likely be to call a general election by exercising the Royal Prerogative. It is, officially, the Queen who issues a general election proclamation anyway, but it is unheard of for her to do this on her own initiative, although it might prove the only constitutional way to resolve the impasse.

Ultimately, even if Mr Johnson gets an election and wins as he wants, the EU negotiators may still refuse to amend the withdrawal terms and thus precipitate a harmful 'no-deal' Brexit. While Mr Johnson may want a deal, a minority in his party, perhaps some 30 MPs, actively want a 'no-deal' Brexit. There are reports that certain EU states are not happy with the intransigence of their own negotiators. German Chancellor Angela Merkel, for example, is said to be concerned that a 'no-deal' Brexit would start an economic cold war which would be exploited by those Merkel deems hostile to the EU, notably Donald Trump and Vladimir Putin. One firm, common attitude across the remaining 27 EU states is that whatever agreement is reached, they will pay not one cent more in fees to the EU as a result. As the EU is about to lose 12% of its budget contributions without any sign of Brussels cutting back on expenditure, this may prove another point of leverage for Mr Johnson.

Events over the last few days have certainly shown that nothing is guaranteed, and the Brexit issue is far from resolved.

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