

Parliament must act quickly to exert influence if it wishes to prevent a 'no deal' Brexit

In four months' time, the extension to the Article 50 period agreed in April will expire. The UK will have a new Prime Minister by then, although it remains unclear what position they will take if the Commons continues to refuse to approve the Withdrawal Agreement. Jack Simson Caird analyses the legal and political mechanisms available should parliament seek to prevent the next Prime Minister taking the UK out of the EU without a deal.

Boris Johnson has said that if he is the next Prime Minister the UK will leave the EU on 31 October with or without a deal. Theresa May, made the same pledge before the original Article 50 deadline on 29 March. However, after coming under significant pressure from MPs, she did not follow through and sought two extensions from the EU (resulting in the current exit day of 31 October).

Since Theresa May said that she would step down, there has been significant debate over whether the House of Commons could prompt Prime Minister Johnson to avoid 'no deal'. In this post, I argue that MPs could stop a Prime Minister determined to deliver 'no deal' by putting the new leader under extreme pressure to reveal his position on Brexit from the very beginning of his premiership. There is no guarantee that steps taken by parliament to prevent 'no deal' would be legally effective, but the events in the first half of 2019 have shown that parliamentary pressure can result in a shift in the government's position. It is constitutionally unsustainable for a government to pursue a policy which does not have the support of a majority of MPs. This fact will be front and centre from the very moment the new Prime Minister takes over.

Commanding the confidence of the Commons and 'no deal' Brexit

When the Conservative Party appoints a new leader, the next natural step is for Theresa May to go to the Queen and recommend that the MP chosen - likely to be Boris Johnson - is best placed to command the confidence of the Commons and should be appointed Prime Minister. This is usually a constitutional formality. However, unlike when Theresa May was appointed, the next Prime Minister will take over a minority administration. Furthermore, Theresa May resigned after it became clear that there was no prospect of her being able to get a majority for the Brexit deal in the Commons (and because she was not prepared to leave without a deal in the face of opposition from a majority of MPs). In fact, some Conservative MPs have already indicated their potential willingness to vote down a Johnson government if the new Prime Minister sought to pursue 'no deal'. Should such claims become louder in the coming weeks, Theresa May might struggle to give the necessary assurances to the Queen that the person she recommends can command the confidence of a majority of MPs. Even if she does, the new Prime Minister will clearly be in a delicate constitutional situation.

In strict legal and constitutional terms the current Prime Minister did not have to announce her departure, because she still commanded the confidence of the majority of MPs. On 16 January, a majority of MPs voted to reject the first ever statutory motion of no confidence (under the Fixed-term Parliaments Act 2011) the day after the Brexit deal was rejected by a historic margin. Despite the subsequent defeats of the government's main policy, there was never a sense that a statutory motion of no confidence would succeed. As a result it could be said that while Theresa May's government in a legal sense continued to

command the confidence of the Commons, in political reality it became clear that it could not in any real sense command a working majority anymore. This distinction will matter for the new Prime Minister.

Even if the Conservative MPs who are determined to block 'no deal' hold fire at the time of the new Prime Minister's appointment, they could well prove willing to vote for a statutory motion of no confidence at a later stage to stop him pursuing such an outcome on 31 October. The very threat of such a possibility could lead to a shift in the Prime Minister's position. If it didn't and the Commons passed a statutory vote of no confidence, this could force a request for an extension. However, there are some practical issues worth noting. The new Prime Minister would need to reveal in sufficient time whether or not he was absolutely determined to leave without a deal on 31 October if a general election were to be held by that date. This is because there would need to be time to fit in both the 14 day statutory period before a general election is triggered after a statutory motion of no confidence is passed and the 25 days that are needed between dissolution and polling day. Otherwise, the new Prime Minister would need to be willing to ask for (and accept) an extension from the EU so that the election could take place after 31 October, but still before the UK leaves the EU.

How can the House of Commons test the new Prime Minister's commitment to 'no deal'?

This delicate constitutional situation combined with the looming deadline of 31 October creates strong incentives for MPs to act fast if they want to shift the government's Brexit position. In pure legal terms, the odds are stacked against MPs. However, in terms of the actual political dynamics of our constitutional arrangements, sustained parliamentary pressure could be crucial. Whereas under Theresa May MPs were able to build pressure gradually over the course of the long parliamentary session, this time around they will have to act much more quickly.

The basic legal position is that neither the Commons nor the PM can unilaterally change the date on which the UK leaves the EU. The Prime Minister holds the prerogative power to request an extension from the EU, and crucially the prerogative also enables the Prime Minister to reject any extension granted by the EU. The Prime Minister is not under any legal obligation to consult parliament prior to requesting or rejecting an extension. But based on precedent under Theresa May, the expectation that he should do so would be strong. Parliament could, in theory, legislate in order to create a firmer legal obligation before 31 October. This possibility has led to speculation that the new Prime Minister might request a prorogation to facilitate a 'no deal' exit. However, the Prime Minister would not necessarily need to rely on upon prorogation to deliver 'no deal'.

First, the new Prime Minister will be able to control the House of Commons' timetable. The government of the day, whether or not it has a majority, retains the power to decide the vast majority of the Commons' business. The new Prime Minister would potentially be able to, as Theresa May did in December 2018, delay crucial votes in the Commons to increase the pressure on MPs and hence reduce the time available to avoid 'no deal'.

Second, the EU (Withdrawal) Act 2018 provides for EU law to be converted into domestic law in the event of a 'no deal' exit, and the new Prime Minister might argue that as a result there is no need for further primary legislation prior to 31 October. Further, the 2018 Act contains delegated powers which would enable further legislative changes to be made to prepare for 'no deal' without the risk of amendments.

Third, some avenues previously available to MPs might now be shut down. Notably the statutory debates on the Withdrawal Agreement were previously used to seize parliamentary control. But these might not be repeated, if the government does not seek to bring a Withdrawal Agreement back. The new Prime Minister would be able to use the government's control of the agenda to restrict other opportunities for MPs to express opposition to 'no deal', for example by refusing to bring forward amendable

Brexit legislation such as the Trade Bill and refusing to offer opposition days.

Nonetheless the parliamentary steps in the first half of 2019 which culminated in the Cooper Bill showed that despite government's control of the timetable there is room for innovation to provide opportunities for MPs to express opposition to 'no deal'. One which has been mooted is the use of an emergency (Standing Order no. 24) debate, which the Speaker could conceivably rule could be used for a substantive motion. MPs might seek to use such an opportunity to set aside time for debate on a further backbench bill.

If such opportunities arise and are taken, in strict constitutional terms it would be difficult (as Oliver Letwin admitted recently) to legally force the new Prime Minister to avoid a 'no deal' exit. The Cooper Bill provisions, which were cleverly drafted, were not legally watertight in terms of stopping 'no deal' - for example, they did not require the Prime Minister to accept the extension offered by the EU. In any event they were never put to the test, because the Prime Minister sought an extension voluntarily. It would be possible to impose more stringent legal obligations on the Prime Minister, for example to accept any extension offered by the EU. However, such a provision might go too far for many in the Commons, which is precisely why the Cooper Bill sought to empower MPs with the ability to decide, through a vote on an amendable motion, on both the length of any extension sought, and whether to accept an extension offered by the EU (if it was different in length from that which was asked for). If parliament followed this model again then parliamentary privilege, which precludes questioning in any court of debates or proceedings in parliament, could limit the scope for enforcement through judicial review.

However, it is important not to fall into the trap of letting legal risks obscure political reality. Securing a majority for a bill that demonstrated clear opposition to 'no deal' (as the Cooper Bill did) could have a profound political effect, even on Prime Minister Johnson. MPs should certainly not be discouraged from taking such steps to express opposition on the basis that they lack legal guarantees, and it is impossible to predict how Prime Minister Johnson would in practice react. For example, even if a majority passed a non-binding motion rejecting 'no deal' by a large margin shortly after the new Prime Minister took office, this could have a significant political and constitutional effect. Firstly, if the new Prime Minister was committed to 'no deal', such a motion would quickly bring into question whether the government could command the confidence of the Commons, and could lead to a no confidence motion. Secondly, any such motion would send a clear message to the EU that could be factored in in the event of any last minute negotiations over a potential extension. If the Prime Minister was plainly refusing to act on parliament's instruction, this would leave EU leaders in a difficult political position.

Conclusion

Attempts to deliver a 'no deal' Brexit in the face of opposition from a majority of MPs would raise serious questions about the government's commitment to parliamentary democracy and the rule of law. One of the principal functions of parliamentary scrutiny is to flush out the government of the day's policy intentions. In relation to 'no deal', it initially proved very difficult and time-consuming for MPs to establish the current government's position - this was tested through a number of innovative parliamentary measures that culminated in the enactment of the Cooper Bill. Eventually this revealed that Theresa May would not countenance a 'no deal' Brexit.

When the new Prime Minister takes over, there is risk of a significant delay before the position of his government on 'no deal' is made clear. MPs cannot deliver an extension on their own, but if they want to avoid 'no deal', they need to ensure that from the very moment the new Prime Minister takes over, he is placed under pressure to indicate whether or not he will be willing to listen to parliament, and to compromise where necessary.

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