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A “No-Deal” Brexit: What could it mean, and can it be prevented?

Britain has a new Prime Minister and a new cabinet. In spite of the change in the leadership of the Conservative Party, the dominant question remains: what of Brexit? The country faces the same options it did under Theresa May’s leadership: leave with a deal (her withdrawal agreement, or a new agreement), leave without a deal (the default scenario), request an extension of the Article 50 deadline (which needs the concurrence of the EU27), or revoke the Article 50 notice and remain in the EU.

For some months, a new election or a new referendum repeatedly have been floated as a means of clarifying what the country really wants. To date, no solution has commanded a majority in Parliament. In the midst of all of this, in the few weeks since Boris Johnson assumed the role of Prime Minister, the tone of the conversation has shifted dramatically. The Prime Minister and his cabinet urge Brexit at all costs, but politicians and the country at large are by no means united. The only certainty is that the divide over Brexit represents for the country a struggle of existential proportions.

Boris Johnson (Prime Minister on the basis of a vote of two-thirds of the 160,000 members of the Conservative Party) has vowed to take the UK out of the European Union on October 31, “do or die.” And while during the leadership campaign that led to his selection he said the chances of the UK departing without a withdrawal deal were “a million to one against,” he has since his elevation refused to negotiate with the EU unless they commit to drop what he calls the “undemocratic” backstop that protects an open border between the Republic of Ireland and Northern Ireland, something the EU is not willing to do. During his first “People’s PMQ” (prime ministers questions) that was live streamed, Johnson, after criticizing what he termed a “terrible collaboration” between the EU and MPs trying to block a no-deal exit, refused to rule out shutting down Parliament (prorogation) and conceded that the longer the standoff continues, the more likely a no-deal Brexit “was becoming.”

The UK, under Johnson’s leadership, is thus hurtling towards a “no-deal Brexit,” even though a majority in its Parliament has voted, albeit in nonbinding motions, against such a departure. There are an increasing number of reasons to believe that Johnson may pre-empt efforts to stop a no-deal exit by calling a snap election in the hope of augmenting his current working majority of one; during his People’s PMQ, he refused to rule out that the election could happen on October 31.

Although the UK has spent many months, and hundreds of millions of pounds, preparing for a no-deal Brexit and the Prime Minister has directed government ministries to make such preparation their top priority, an exit with no withdrawal agreement is still likely to cause significant economic damage, and

possibly short-term chaos. If the UK exits without a deal, it will, from November 1, trade with the EU on the same terms as any third country under World Trade Organization rules. As a result,

- The sale of goods and services between the UK and the EU, previously tariff-free, will become subject to tariffs. This is estimated to affect about 90% by value of all UK exports, with a total cost estimated at between £4.5 to £6.0 billion per year.
- Auto parts and automobiles, as well as the UK agricultural sector, are expected to be particularly hard hit. Longstanding auto part supply chains will be disrupted, both by the imposition of tariffs averaging about 10%, and by projected delivery delays caused by the imposition of border checks.
- The UK will also overnight lose the benefit of many of the free trade agreements that the EU has signed with non-EU countries.
- While most large multinationals have undertaken significant contingency planning in recent months, small- and medium-sized UK enterprises are less prepared. The Confederation of British Industry (CBI) estimates that 40% of UK “SMEs” that trade internationally are unprepared for a no-deal Brexit.
- The CBI estimates that, of the 27 key sectors of the economy that it analyzed, in spite of mitigating actions, a no-deal Brexit will lead to disruptions in 23 of them, including three where significant negative impacts are expected.
- The imposition of border controls is projected to lead to significant disruption to truck and ship transport. Aviation may also be disrupted, as the UK will cease to benefit from a number of important aviation treaties.

This is, unfortunately, only a very partial list. Against this backdrop, one would think that the UK government would seek another extension to the exit date, and use that time to try to hammer out a revised deal. But the Prime Minister has staked his reputation on “delivering” Brexit on October 31, and may no longer have the political flexibility to change direction.

Others, however, including many within the Conservative Party, have a different view. Some simply want to prevent a no-deal exit. Others want to call a second referendum, to present the British people with the opportunity to decide whether they still support an exit on the terms currently on offer. And others are angling to bring down the current Conservative government, hoping that a new government, led by their own party, would lead a change in direction.

But is it possible? There are, according to one of Britain’s leading constitutional scholars,¹ five ways that the House of Commons (which will reconvene on September 3) could act to stop a no-deal Brexit. It could:

¹ V. Bogdanor, <https://www.theguardian.com/commentisfree/2019/aug/06/mps-thwart-boris-johnson-no-deal>, *The Guardian* (August 6, 2019).

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- legislate to require the government to seek a further extension to the departure date, in order to give more time to negotiate a deal;
 - legislate to prohibit the government from leaving the EU without a deal;
 - legislate to require there to be a second referendum before any Brexit;
 - repeal the European Union (Notification of Withdrawal) Act and reinstate the European Communities Act, in which case the UK would remain in the EU; or
 - vote that it has no confidence in the government, in which case either an alternative government would need to be formed (if that is possible within the mandated 14-day window) or a new election would be called.

Each of these paths is strewn with obstacles.

All alternatives, but the last, would require Parliament to pass legislation that is not only sponsored, but is almost certainly resisted, by the current government. That would require the Commons to suspend the usual rule that gives priority to government business. And it would require a cross-party alliance to ram legislation through what are likely to be multiple delaying tactics.

Perhaps for this reason, in recent days attention has focused on the last alternative. If Labour, the Liberal Democrats, Scottish National Party, Plaid Cymru (Welsh party), Greens and a sufficient number of Conservative Party renegades could agree on a strategy, a no confidence motion might pass, and a “caretaker” government might be stitched together for the purpose of calling a second referendum and then a new election.

This too is a challenging path. As warned in a recent report by the Institute for Government,² a vote of no confidence would not necessarily stop a no-deal Brexit, in part because if a new election were deemed a necessary precursor to a second referendum, there may not be sufficient time to hold a general election before October 31.

In short, while there is a growing consensus among many in Parliament, and across a wide spectrum in the business community, that a “no-deal” Brexit would be economically disruptive, not only to the UK but to

² M. Thimont Jack, J. Owen & H. White, Institute for Government, *Voting on Brexit: Parliament’s role before 31 October*, <https://www.instituteforgovernment.org.uk/sites/default/files/publications/parliament-role-before-31-october-brexit-FINAL.pdf> (August 2019).

Europe and potentially the global economy, the risks of that outcome have increased substantially, and the ability of those in Parliament to avert this outcome are limited (although not nonexistent).

While it is still possible to hope for the best, it is time to plan for the worst.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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