

Alert | International Trade/Brexit



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Brexit – Where Now?

At their summit on 25 November, the leaders of the EU27 states approved the draft agreement providing for the U.K.'s withdrawal from the EU. The EU and U.K. also issued a joint statement outlining the framework for the post-Brexit EU/U.K. relationship.

These developments, although much-awaited, give little legal certainty in the short term.

Draft Withdrawal Agreement – Brief Summary

The draft agreement addresses a large number of Brexit issues in its 585 pages. If ratified, it will establish four key principles.

- **The “Divorce Bill”:** The U.K. will be committed to make a €39 billion payment to the EU on exit. This is made up of the U.K.'s contribution to the EU's annual budgets up to the end of the transition period, and the U.K.'s outstanding commitments and share of liabilities towards the EU.
- **Right to reside:** The U.K. and EU will be committed to protecting the rights of EU citizens living in the U.K. and U.K. citizens living in the EU, to enable those citizens to continue working and studying where they presently live and to have their family members join them.
- **Irish border:** Both parties will also be committed to avoiding a “hard” (manned) border between Northern Ireland, which is part of the U.K. and so will exit the EU, and the Republic of Ireland, which will remain an EU member state. An invisible (unmanned) border is an important principle of the Ireland/U.K. Good Friday peace agreement of 1998, which brought peace to the island of Ireland. The draft provides a “backstop” intended to ensure that, whatever the nature of the future relationship between the EU and U.K., this principle is respected, and the peace arrangements are not disrupted.

- Transition period: Although the U.K. will leave the EU on 29 March 2019, there will be a transition period of 21 months until 31 December 2020. This is intended to allow time for the future EU/U.K. relationship to be agreed and for government and business to prepare for the new arrangements. During this period, which can be extended once (there is no cap on the duration of the extension), EU law will continue to apply in the U.K.

Joint Statement on the Future EU/U.K. Relationship – Brief Summary

The EU/U.K. joint statement on the future EU/U.K. relationship is not legally binding, is worded in very general terms, and sets out some high-level principles to be observed when negotiations of the new arrangements start after Brexit on 29 March 2019. It provides for a free trade area in goods, with zero tariffs and quotas, and “ambitious” customs arrangements. It also enables the U.K. to conclude its own trade deals with other countries. There will be an end to free movement between the EU and U.K., allowing the U.K. to control immigration into its territory, and the U.K. will no longer participate in the common agriculture and fisheries policies.

The timetable for negotiation and implementation of the new relationship is 21 months, to the end of December 2020. Most agreements of this type have taken considerably longer, although in this case the parties have had a closer relationship, which may assist in expediting the discussions. On the other hand, negotiations may well be slowed down where one or more of the EU27 states has a specific interest it wishes to leverage. If the draft withdrawal agreement is ratified, its provision for an extension of the transition period may be needed to ensure sufficient time for details of the EU/U.K. relationship to be negotiated, and to achieve a smooth transition.

Reaction to the Deal

Before the draft withdrawal agreement can come into force, it must be ratified by the U.K. parliament and then the European Parliament. The general view is that it would likely be ratified by the European Parliament, but it is far from clear that the U.K. parliament would deliver the ratification that is needed in advance of this. The vote is scheduled for 11 December, just before the start of the Christmas recess on 20 December.

The U.K. parliamentary mathematics are currently very much against the vote being passed. “Leave” MPs say that the deal does not deliver Brexit sufficiently clearly and quickly. “Remain” MPs say that it will put the U.K. in a worse position than remaining an EU member. Numerous MPs and other commentators criticise it as very likely to make the U.K. economy worse off.

The Irish backstop has proved particularly controversial. Many MPs oppose the agreement on the basis that, if no invisible border solution is identified as part of the new EU/U.K. arrangements, the ultimate backstop will be to keep Northern Ireland closely aligned to the EU customs union, with any alteration subject to the decision of the EU27 only – the U.K. will have no right to terminate the backstop unilaterally. As a result, the only way the U.K. could exit the EU would be to create a border in the Irish Sea, which is constitutionally unacceptable to the U.K. and means that the EU27 could prevent the whole U.K. from leaving the EU. Critics say that this does not respect the outcome of the referendum and makes the U.K. a rule-taker with no influence over EU lawmaking. Whether it would be possible to amend the arrangements by including the possibility of another sort of border in the Irish Sea, allowing the Irish Republic latitude within the market to align more with the U.K., is unclear. What is clearer is that, if Northern Ireland stays in the customs union and single market, this could prompt the Scottish government to demand the same for Scotland, and a second Scottish independence referendum could follow close behind.

The draft withdrawal agreement also requires the U.K. to disapply any domestic legislation which might conflict with implementation of the agreement. Although this may be a logical requirement on the part of the EU27, it may require disapplication of U.K. domestic legislation that devolves authority to the Scottish and Welsh governments in significant areas. It is difficult to conceive of any Scottish or Welsh MP, no matter from which party, who would concede such, and if this interpretation is correct and picked up, it might prove as intractable a problem as the much-publicised Irish Backstop.

Prime Minister Theresa May's position is that the deal, as the product of a negotiation, is inevitably a compromise, but that it is also the best deal for the U.K. economy and delivers the outcome of the referendum and much-needed certainty for U.K. citizens and businesses. She is now pressuring MPs to approve the deal by appealing directly to the U.K. public and business community, who she believes are suffering Brexit-fatigue and anxious for some certainty.

Next Steps

Under Article 50 of the EU Treaty and the U.K.'s 2018 EU Withdrawal Act (U.K. Act), the U.K. must leave the EU on 29 March 2019 at 23:00. This deadline can be extended, by unanimous agreement of the EU27 states and the U.K. in the case of Article 50, and by regulation in the case of the U.K. Act. Whilst the U.K. Act gives the government a short, defined deadline for reacting swiftly if the deal is rejected by parliament, any proposals it puts forward in the statement it must make to parliament within 21 days of rejection will take time to implement; and the parliamentary approval that would need to be sought within a further seven days would not be guaranteed.

The government's proposals could include:

- an approach to the EU to renegotiate some aspects of the draft agreement followed by a second U.K. parliamentary vote on it;
- a “no-deal” Brexit;
- agreement with the EU for a short extension of the U.K.'s EU membership so that alternatives can be considered; and
- withdrawal of the U.K.'s Brexit notice.

Rejection of the draft agreement could also bring about a further Brexit referendum, a general election leading to a change of government, or a change of leadership in the present government.

The EU27 have set their face against any amendment to the deal on offer, although in practice they might accept some minor tweaking of the agreement. If the government believes that this would carry a favourable second vote, it may propose this, although it is currently hard to see how MPs' concerns, for example regarding the Irish backstop, could be resolved in this way. A “no-deal” Brexit is unlikely to prove either the cliff-edge into chaos predicted by some or the free-trade utopia predicted by others. However, the Bank of England predicts that a no-deal Brexit, with no transition period, would have a worse effect on the value of sterling and the U.K. economy than any other form of Brexit. Rejection of the draft agreement is likely to prompt hasty, informal, and pragmatic discussions at civil-servant level between London and Brussels to mitigate the consequences of a no-deal scenario for both the EU and the U.K. and provide an emergency framework for Brexit.

Both the amended deal and the no-deal alternatives could be achieved within the current Brexit timetable. The remaining alternatives would require a delay to Brexit, which in turn would require agreement between the EU and U.K., as well as U.K. parliamentary approval. Commentators suggest that the EU

would not be averse to an extension of the U.K.'s membership, and the U.K. would have to pay to retain its membership for the period of the delay. However, any extension is unlikely to be favoured by "Leave" MPs, on the basis that it does not respect the referendum result. As regards a second referendum, this would take four months or more to arrange. A further obstacle is Prime Minister Theresa May's express rejection of this possibility, although if there is sufficient pressure from MPs, this could change. The likelihood of a second referendum would increase with a change of prime minister or of government, since the Labour, Liberal Democrat, and SNP parties have expressed support for it. A change of government could be brought about within approximately 25-30 days of a vote of two-thirds of U.K. MPs or of a majority vote of no-confidence in the government. A change of prime minister in the present government could be effected more quickly, particularly as several Conservative MPs have already expressed dissatisfaction with Theresa May.

The U.K.'s right to withdraw its Brexit notice unilaterally is currently the subject of a referral from the Scottish Court of Session to the European Court of Justice. The European Court has said that it will issue its decision quickly, and commentators indicate that it should be available this year. If the answer is that revocation must be with the agreement of the EU27, however, commentators also indicate that the EU may be inclined to consent, although it is not clear whether its consent would be conditional.

Conclusion

Whether the deal approved on 25 November survives or not is very hard to call. New views on its impact are emerging continually, and whether these will persuade MPs to vote in favour of the deal or against it will be clear only after the U.K.-parliament vote on 11 December.

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