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**BREXIT –  
KEY QUESTIONS  
ANSWERED**



**– THOUGHT LEADERSHIP**

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## BREXIT – KEY QUESTIONS ANSWERED

Amidst a flurry of campaign promises, policy announcements and discussions of parliamentary procedure, Brexit continues to dominate the UK political agenda. This briefing looks at some of the key questions as the UK prepares to leave the EU.

To help businesses make sense of the months ahead, we look at the Withdrawal Agreement, the Political Declaration, and the Irish backstop. We also analyse key concepts of WTO law and trade policy, as well as the likelihood of an early election and what the concept of a ‘managed’ no-deal Brexit means in practice.

### Key issues

- Any amendments to the Withdrawal Agreement would require the agreement of the European Commission and the Council. The EU has said that it will not agree to any substantive changes.
- The Political Declaration is a non-binding statement of intentions. As such, it could be changed relatively easily if there is movement on the UK’s red lines.
- The Irish backstop remains the most controversial element of the Withdrawal Agreement. There are no obvious alternatives that preserve the integrity of the EU single market and ensure that there is no hard border on the island of Ireland or in the Irish Sea.
- In light of MPs’ opposition to the Irish backstop, and given parliamentary time constraints, it could be a challenge to ratify the Withdrawal Agreement before 31 October 2019.
- An early General Election may take place if (i) the Prime Minister loses the support of a majority of MPs or (ii) the Government supports an early-election motion.
- A no-deal Brexit would not preserve the transition period envisaged by the Withdrawal Agreement. The EU would also be unlikely to agree to an interim FTA under Article XXIV of GATT.

### Can the Withdrawal Agreement be changed before the 31 October deadline?

The Withdrawal Agreement sets out the terms on which the UK will leave the EU. The current draft of the treaty runs to 599 pages and took almost two years to negotiate. It covers the three principal areas of citizens’ rights, the financial settlement and the Irish backstop, as well as various other matters, such as the transition period, the dispute resolution mechanism, market access and security cooperation. Following agreement between the UK Government and the European Commission, the leaders of the remaining 27 Member States endorsed the text at a special European Council summit in November 2018.

In January and March 2019, ahead of key votes in the House of Commons, Prime Minister Theresa May secured additional assurances from Brussels in relation to the interpretation of the Irish backstop, which was proving controversial for many MPs. While the UK’s Attorney General has advised the Government that these additional provisions are legally binding, they are recorded in separate instruments and declarations. Crucially, the Attorney General considered that these assurances do not fundamentally alter the nature of the backstop. The text of the Withdrawal Agreement itself thus remains substantively unchanged.

Any amendments to the current draft would require the agreement of the European Commission and of the

Council. Eventually, they would also have to be approved by the European Parliament. The EU institutions and the remaining Member States have put forward a united front since the beginning of the Brexit negotiations and have all insisted that the negotiated text is the only available deal given the UK’s red lines. Ever since the current draft was agreed in November 2018, the EU has consistently stated that the Withdrawal Agreement will not be re-opened, and recent changes to the composition of the European Parliament and the European Commission are unlikely to affect this stance. Indeed, the EU negotiating team has been disbanded with Michel Barnier’s deputy, Sabine Weyand, having been appointed to a new role as Director General of DG Trade at the European Commission. On its face, it would appear to be a challenge to secure changes to the current draft beyond, perhaps, further interpretative declarations.

In addition to the EU’s objection in principle, the UK Government will be under significant time pressure in its attempt to renegotiate the agreement. Theresa May’s successor is expected to take office on 24 July 2019, leaving him with just over three months to conclude negotiations in Brussels and secure parliamentary approval for any deal he reaches. This may be difficult given the EU’s upcoming institutional changes. With a new team of European Commissioners to be announced this summer followed by confirmation hearings in the European Parliament in the autumn, Brexit will not be the EU’s sole priority over the coming months.

## What is the Political Declaration and how could it be amended?

The Political Declaration on the future relationship between the EU and the UK was published at the same time as the Withdrawal Agreement, but the two documents are fundamentally different. Whereas the Withdrawal Agreement is concerned with the separation process and its immediate aftermath (including the transition period and the Irish backstop), the Political Declaration looks further ahead.

Importantly, the Political Declaration is a non-binding text. As a statement of intentions rather than legal commitments, it is deliberately open-ended and much lighter on detail. In a mere 26 pages, the Political Declaration sets out a vision for an “*ambitious, broad, deep and flexible partnership across trade and economic co-operation, law enforcement and criminal justice, foreign policy, security and defence*”.

The EU has always insisted that detailed negotiations on the future relationship cannot commence until the UK has formally ceased to be a Member State. The Political Declaration is thus only intended as a starting point; a suggested framework for what the two sides may eventually agree. While the current draft notes Mrs May’s red lines of UK sovereignty, ending free movement and establishing an independent trade policy, the text could easily be changed to reflect different objectives.

For example, if a future Prime Minister were to opt for a softer Brexit, such as single market or customs union membership, the Political Declaration could be amended to record the UK’s changed priorities. The EU has signalled its openness to reconsidering the text in light of the UK’s red lines and appears ready to accommodate a closer relationship. If the UK binds itself to follow EU rules, the EU has indicated that it is willing to grant the UK increased access to its market. Therefore, while any changes to the Political Declaration would still require the agreement of the EU, this would be a lower hurdle than in the case of the Withdrawal Agreement and could be done relatively easily and quickly.

## What alternatives are there to the Irish backstop?

The Irish backstop is the most controversial element of the Withdrawal Agreement. In effect, it would temporarily include the UK in the EU customs union, and align many regulations in Northern Ireland with the EU internal market. The concern is that this temporary arrangement could, through a failure to reach a replacement agreement, default into permanence. Given widespread parliamentary opposition, especially from eurosceptic Conservatives and the Democratic Unionist Party (DUP), it is also the principal reason why the House of Commons has rejected the current draft three times. To secure Parliament’s approval for a Withdrawal Agreement, both Boris Johnson and Jeremy Hunt have promised to negotiate an alternative to the backstop.

While the two candidates to become Prime Minister are determined that a solution will be found, it is as yet unclear whether any practical alternatives exist. One proposal that has been put forward is to replace the backstop with technological solutions. The aim is to avoid physical checks at the border by using sophisticated computer systems that could, for instance, allow businesses to declare goods to the customs authorities before or after they cross the border. The best known example of a ‘low-friction’ border is that between Sweden and Norway. Norway is outside the EU customs union but a member of the EEA. Under the deferred duty payment regime, companies transporting goods across the border can submit customs declarations within a set period of time after the transportation took place. The Swedish and Norwegian customs authorities also rely on risk-management technology to identify which vehicles are selected for physical controls. Through automatic number plate recognition cameras and electronic scanners, checks at the border are kept to a minimum.

But not all of this can be applied to the Irish border. The Swedish-Norwegian arrangements depend on close cooperation between the two customs authorities and considerable overlap between product requirements. As an

EEA member state, Norway's regulatory standards are in close alignment with the EU. Since EEA membership is incompatible with the UK's red lines, border checks between the UK and the EU will necessarily be more extensive. Moreover, despite significant technological innovations at the Sweden-Norway border, approximately 1,300 physical checks still take place every day, each lasting about 20 minutes. In light of these limitations, the next Prime Minister may come to share a view expressed by Theresa May in July 2018: *"[N]o technology solution to address these issues has been designed yet, or implemented anywhere in the world, let alone in such a unique and highly sensitive context as the Northern Ireland border"*.

Other possible changes to the Irish backstop would include a time limit or a right of unilateral withdrawal. Both of these proposals have already been discussed and repeatedly rejected by the EU. To try to identify suitable solutions, the UK's Brexit Secretary recently launched the Technical Alternative Arrangements Advisory Group. The Group, which comprises customs experts and trade policy academics, had its first meeting on 20 June 2019 and is expected to produce a first report this summer.

A variation of the Irish backstop that remains a possibility, at least in theory, is limiting the backstop to Northern Ireland. This was what was originally proposed in the negotiations between the EU and UK. However, it would have meant erecting a customs and regulatory border in the Irish Sea, between Great Britain (England, Scotland and Wales) and Northern Ireland. At the UK Government's insistence, the backstop was extended to cover the whole of the UK, thus ensuring there would be no internal borders within the UK. A change to that position from a new Prime Minister is possible and may be acceptable to the EU, but it is currently hard to see how a Government could retain the DUP's support in such circumstances.

## **Can the UK Parliament pass the necessary legislation for a negotiated withdrawal before the 31 October deadline?**

Ratifying the Withdrawal Agreement by 31 October 2019 could be difficult. In addition to the challenges of negotiating changes to the current draft, there are procedural reasons why Parliament might struggle to meet the upcoming deadline unless it changes its normal practices for the summer and autumn.

Parliamentary time is scarce, particularly at this time of the year. Parliament's summer recess is due to begin on 25 July 2019, the day after the next Prime Minister is expected to take office, with MPs returning on 3 September 2019. August, when many officials in Brussels are on holiday, tends to be a quiet month in the EU, and any activity that does take place may focus on the new European Commission (see above). Against this background, it may be difficult to secure a breakthrough in negotiations over this period. Only a few weeks later, the House of Commons is due to rise again, allowing MPs to depart for the party conference season over the second half of September.

Moreover, because of the Withdrawal Agreement's constitutional significance, ratification is subject to particularly stringent conditions. The UK Government will need to secure the passage of primary legislation to implement the treaty domestically before it can give ratify it on the international plane. This is expressly required by s 13 of the European Union (Withdrawal) Act 2018. The UK Government intends to satisfy this requirement by passing the European Union (Withdrawal Agreement) Bill (the "EUWAB"). The EUWAB will require the approval of both Houses of Parliament. Since the members of the House of Lords are not elected, they may be reluctant to vote against a bill of immense constitutional importance that has been supported by a majority of MPs. Nevertheless, the enactment process can take time.



An additional hurdle for the timely passage of the bill is the Constitutional Reform and Governance Act 2010 (the “**CRAG**”), which prescribes that a treaty cannot be ratified unless Parliament has had 21 sitting days to consider the text. Given the limited time available in the autumn, it is questionable whether this criterion can be met. However, the Government could dispense with this requirement by including a provision to that effect in the EUWAB. Alternatively, a Minister could invoke s 22 of the CRAG to argue that the treaty should, exceptionally, be ratified without following the usual process.

These time constraints and the precarious parliamentary arithmetic in Westminster present challenges to the 31 October deadline, although a determined Government and Parliament may find a way around them.

### **What is the significance of Article XXIV of the General Agreement on Tariffs and Trade (GATT)?**

The GATT is a multilateral agreement from 1986 that sets out some of the rules that govern the relationships between members of the World Trade Organisation (WTO). A previously obscure provision of the GATT, Article XXIV, has recently taken on an unexpectedly prominent role in the Brexit debate. Proponents of a no-deal Brexit have pointed to Article XXIV as a mechanism to ensure continued tariff-free trade with the EU even if the UK leaves without a Withdrawal Agreement. On this view, tariffs can be kept at zero for up to 10 years while a free trade agreement (FTA) is being finalised. In relation to services, a similar provision to Article XXIV of the GATT is at Article V of the General Agreement on Trade in Services (GATS).

Article XXIV does indeed leave open the possibility of continued tariff-free access pending ratification of a fully-fledged FTA. However, no such FTA is presently being discussed, let alone pending ratification, so it is not clear on how Article XXIV could be applicable. Moreover, as the WTO’s Director General, Roberto Azevêdo, recently confirmed, the EU

would have to agree to an interim arrangement under Article XXIV, and there are no signs that it would be willing to do so. The EU’s chief Brexit negotiator, Michel Barnier, has repeatedly emphasised that no trade deal will be struck with the UK until three main issues are resolved: citizens’ rights, the UK’s financial settlement with the EU, and the Irish border. From the EU’s perspective, the Withdrawal Agreement provides the only adequate answer to these questions.

In a no-deal scenario, it is therefore difficult to see how the EU would negotiate a “provisional” FTA, whether for goods or for services.

### **What could be the triggers for an early general election?**

The next General Election is scheduled for 5 May 2022, but there is no guarantee that the current Parliament will run its full five-year term. Boris Johnson and Jeremy Hunt have both ruled out an early election while the UK is still a member of the EU, arguing that it would present too great a risk for the Conservative Party. Nevertheless, opposition in Parliament could force the next Prime Minister’s hand, potentially even before Brexit has been delivered.

There are two ways in which an early election could take place. The first one, which was used by Theresa May to call the 2017 snap election, requires the House of Commons to approve an early-election motion by a two-thirds majority. Since opposition parties will seize any chance to form the next Government, an early-election motion supported by the governing party is almost certain to succeed. The second option is for the Government to lose a vote of no confidence in the House of Commons. If, following this initial defeat, the Government does not then win a subsequent confidence vote within 14 days, an early election is automatically triggered.

The next Prime Minister may want to call an early election in a bid to secure a Conservative majority in Parliament. Once Brexit has taken place, Mr Johnson or

### **Article XXIV(5) GATT:**

*Accordingly, the provisions of this Agreement shall not prevent, as between the territories of contracting parties, the formation of a customs union or of a free-trade area or the adoption of an interim agreement necessary for the formation of a customs union or of a free-trade area; Provided that ...*

*(b) with respect to a free-trade area, or an interim agreement leading to the formation of a free-trade area, the duties and other regulations of commerce maintained in each of the constituent territories and applicable at the formation of such free-trade area or the adoption of such interim agreement to the trade of contracting parties not included in such area or not parties to such agreement shall not be higher or more restrictive than the corresponding duties and other regulations of commerce existing in the same constituent territories prior to the formation of the free-trade area, or interim agreement as the case may be ...*

Mr Hunt could attempt to win over the 30.5% of voters who supported the Brexit Party at the European Parliament elections in May. Alternatively, the Government might want to pursue a no-deal Brexit but, given the stalemate in the House of Commons, may find itself unable to do so. In those circumstances, a vote of no confidence in the Government cannot be ruled out. Indeed, some Conservative MPs have indicated their willingness to vote against their own party in these circumstances. On some estimates, just five Tory rebel MPs would be enough to defeat the Government and trigger a snap election.

If an election were to be called before 31 October but not held until after that date, the UK may have no choice but to request another extension to Article 50, which would need to be agreed unanimously by the EU Member States. A positive response from EU leaders, who will be in the middle of managing a change of leadership at the top EU institutions, cannot be guaranteed.

For more details on the process of calling an early General Election, please see our briefing: [Brexit and a General Election in the UK – The Rules and the Likelihood](#)

### **What would a ‘managed’ no-deal Brexit look like?**

As many economists and political commentators warn against “*crashing out*” of the EU, proponents of leaving without a deal increasingly make the case for a ‘managed’ no-deal Brexit – an orderly withdrawal without a Withdrawal Agreement. While there have been few detailed proposals for a managed no-deal Brexit, in UK political circles the term generally refers to unilateral or bilateral measures designed to mitigate the effects of a sudden departure from the EU.

Supporters of the concept, such as former House of Commons leader Andrea Leadsom, have argued that the UK and the EU should protect the rights of their respective citizens living abroad and that the UK should negotiate bilateral deals with Member States to keep goods

moving and ensure continued security cooperation. As David Davis, the UK’s former Brexit Secretary, has said: “*Leaving without a withdrawal agreement is not the same as leaving without agreements.*”

However, it is doubtful that any Member State could enter into bilateral deals of this sort as they would almost certainly be incompatible with EU law. Michel Barnier, the EU’s chief Brexit negotiator, has emphasised that there can be no “*mini-deals*” to make up for an unratified Withdrawal Agreement. While the EU has prepared “*unilateral contingency measures*” across a range of sectors for the possibility of a no-deal scenario, these would be temporary, immediately revocable and aimed exclusively at protecting the EU’s interests. For more details on the EU contingency measures, please see our briefing: [Brexit Update – EU ‘No Deal’ contingency planning](#)

Most importantly, as things stand, a managed no-deal Brexit would not preserve the transition period envisaged by the Withdrawal Agreement. The EU has made it clear that it would not agree to suspend tariffs in a no-deal scenario. 31 October 2019 would therefore mark the unequivocal end of the UK’s EU membership, and businesses would have to start trading with their EU counterparts on WTO terms overnight.

Predictions as to the likely consequences of this kind of departure from the EU vary, but some degree of disruption seems inevitable. According to the UK’s Transport Secretary, an abrupt change in the trading relationship with the EU could cause lorry queues in Dover and Calais, while retailers have warned about reduced supermarket stocks across the UK. The Department of Health, which has issued guidance on the impact on supply chains in the medical sector, has launched a Medicines Supply Contingency Planning Programme. Brexit Secretary Stephen Barclay recently admitted that a no-deal Brexit may well trigger a recession. This view has been echoed by Philip Rycroft, the civil servant in charge of the UK’s Department for Exiting the EU until

earlier this year, who has argued that “everybody should be worried about what happens in a no-deal situation”.

Perhaps the biggest unresolved issue is the Irish question. At present, it is unclear what will happen in relation to the Irish border if the UK leaves the EU without a Withdrawal Agreement. New physical infrastructure at the border between Northern Ireland and the Republic of Ireland could reignite nationalist tensions and threaten the Good Friday Agreement. On the other hand, erecting a border in the Irish Sea between Great Britain and the island of Ireland would threaten the DUP’s support for the Government.

### **How would a no-deal Brexit affect the UK’s negotiating position for future free trade agreements?**

An independent trade policy is often cited as one of the primary benefits of Brexit, and in particular a no-deal Brexit. Outside of the EU’s customs union, and having regained complete regulatory autonomy, the UK would be able to position itself as a worldwide champion of free trade. Severing ties with the EU would mean that the UK could immediately begin FTA negotiations with important markets such as the US, whose insistence on opening up the agriculture sector has been a major obstacle to a trade deal with the EU.

However, a no-deal Brexit also has considerable drawbacks in relation to trade policy. First, the deadline for the UK rolling over existing EU trade agreements will be tight. At present, the UK is party to approximately 40 FTAs which the EU has entered into on behalf of its 28 Member States. In the event of no-deal, these EU trade agreements will cease to apply to the UK on 31 October 2019. To maintain these preferential trading terms, the UK Government has sought to replicate the EU’s current trade deals and sign continuity agreements with the relevant third countries. So far, only 12 trade deals are ready to be rolled over in a no-deal scenario. Some of them

cover significant economies (South Korea, for example), while others, such as the continuity agreements with the Palestinian Authority or the Faroe Islands, are of limited economic value to the UK.

Secondly, by leaving the EU’s Common Commercial Policy, the UK loses the benefit of future FTAs negotiated by the bloc. In a climate of growing protectionism, the EU has been a vocal supporter of free trade. Importantly, the EU’s drive to liberalise international trade has produced tangible results. Recent trade deals agreed by the EU include agreements with Japan, Vietnam and the Mercosur countries (Argentina, Brazil, Paraguay and Uruguay).

To compensate for these losses, the UK will seek to enter into new FTAs of its own, but this is not an easy task. Trade negotiations often take years – and in some cases, decades. The EU-Mercosur deal, for instance, has been 20 years in the making. Moreover, since goods sold to the UK would no longer have frictionless access to the EU’s market, a trade deal will be less attractive to third countries. As a single country of 67 million inhabitants, rather than as member of a group speaking for a combined population of over 500 million (some 22% of the global economy), the UK may also have more limited bargaining power.

Thirdly, the UK’s published no-deal tariffs have made a trade agreement less of a priority for some third countries. The UK will effectively grant unilateral access to its market for certain goods to all WTO members, giving third countries less to gain from negotiating an FTA with the UK. This appears to be the case with Canada, for example. The UK and Canada were discussing a continuity agreement, but negotiations ended shortly after the publication of the UK’s no-deal tariff schedule. Canada argued that the UK’s low tariffs undermined the benefits that Canada had acquired via its own deal with the EU because the UK was granting near-equivalent market access to all WTO members.



The most significant downside of a no-deal trade policy is the absence of an FTA with the EU, which has ruled out a trade deal unless a Withdrawal Agreement is ratified. Since the EU is the UK's most important trading partner, attempts to find a solution are expected to continue. But once Brexit has taken place, the EU may focus its attention on other projects. In that case, the UK's negotiating position is unlikely to improve.

### **Conclusion**

The next few months promise to be an eventful period, and developments in Westminster and Brussels are likely to have a significant impact on businesses across Europe. For now, political uncertainty continues, but as the 31 October deadline approaches, we can expect more clarity on the prospects of a negotiated withdrawal, the likelihood of a no-deal Brexit and the chances of an early General Election.

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As political forces reshape the complex rules of international trade, our Trade and Investment Policy Unit offers unparalleled insights into how policy developments affect cross-border business. The Unit brings together Clifford Chance experts from across our global network. Together, we advise states and companies on all aspects of trade and investment law and policy, including free trade agreements, WTO law, export controls, customs rules, FCPA and Bribery Act issues, sanctions, national security review and investment protection. Our specialists have extensive experience handling a wide range of trade and investment disputes, including investment arbitrations, sanctions matters and anti-corruption cases.



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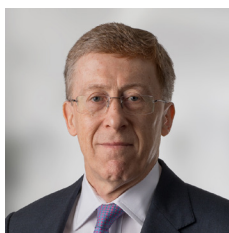
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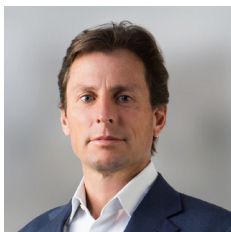
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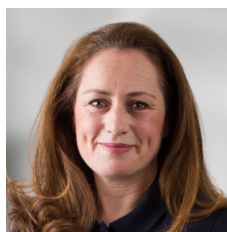
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