

What Has Happened?

The House of Commons voted back in late January to amend a neutrally worded government motion on the status of negotiations between the UK and the EU by passing both:

- The Brady amendment, calling on the government to replace the Northern Ireland Protocol (the backstop) to the Withdrawal Agreement with “alternative arrangements” (stating, subject to this change, the Withdrawal Agreement would be accepted)
- The (non-binding) Spelman amendment rejecting a “no-deal” Brexit

On that date, an initiative to give Parliament more influence over the process, through an amendment tabled by Labour’s Yvette Cooper, together with Conservative MP Nick Boles, that would have created a legal obligation on government to extend the Article 50 timetable (i.e. delay Brexit) unless a deal is approved by Parliament, was defeated.

Since then, the government has taken the amended motion as a mandate from the UK Parliament to negotiate changes to the Withdrawal Agreement, with a view to obtaining a stable majority in the House of Commons. There remains a distinct lack of clarity over what the “alternative arrangements” would be acceptable to the EU, if they even exist.

To stave off the dual threat of ministerial resignations and the risk of various other amendments that would have provided a mechanism for Parliament to take control of the Brexit process, the Prime Minister had promised to hold a second “meaningful vote” on her deal, as renegotiated to address Parliament’s concerns on the backstop, during the week of February 11.

During February, the EU has outwardly maintained its robust, unanimous insistence that it will not reopen the Withdrawal Agreement and that it will not consider replacing the backstop. However, the EU has also reiterated its willingness to help find a way of providing the UK with the assurances Parliament needs to ensure the Withdrawal Agreement will pass.

Unsurprisingly, those negotiations saw no significant progress during the first two weeks of February and, in a statement to the House of Commons on February 12, the Prime Minister, in a further demonstration of can kicking, delayed the second “meaningful vote” until February 27. In her February 12 statement, the Prime Minister interpreted her mandate as being to obtain **legally binding changes** to the backstop, not necessarily the **replacement of** the backstop. In her view, a legally binding time limit, or a legally binding unilateral exit clause, in the existing backstop would be equally sufficient.

Under any interpretation, the Prime Minister has been successful in one thing: narrowing the scope of opposition to her deal to the single issue of the backstop. The Brexit-supporting Attorney General, Geoffrey Cox QC, whose legal opinion seemed to support the Brexiteers’ interpretation of the Withdrawal Agreement that the backstop could keep the UK permanently in customs and regulatory alignment with the EU, has, since the end of January, been heavily involved in negotiations with Brussels to secure the legally binding changes the government needs.

The second half of February did not see a breakthrough in the negotiations. In the absence of a revised deal, and amid rumblings of discontent among some hitherto loyal Conservative MPs and the threat of resignations by government ministers, the Prime Minister delivered a further statement to the House of Commons on February 26, delaying even further the second “meaningful vote” on her deal. She made three very significant commitments that together represent a change in the government’s approach:

- First, the second “meaningful vote” will be held by Tuesday, March 12 at the latest
- Second, if the Prime Minister’s deal is rejected, a motion, asking if Parliament supports leaving the EU without a Withdrawal Agreement and a framework for a future relationship on 29 March, will be voted on by Wednesday, March 13 at the latest – meaning that there will only be a no-deal Brexit, on March 29, if Parliament explicitly consents to it
- Third, if Parliament rejects the Prime Minister’s deal and a no-deal Brexit (on March 29), a motion asking whether Parliament wants to seek a “short limited extension to Article 50”, and, if so, seek to agree that extension with the EU, who may refuse or impose conditions

The February 26 statement (principally designed, once again, to maintain the fragile unity of the government and the Conservative Party) is significant for two main reasons:

- First, the Prime Minister has effectively adopted the Cooper amendment as government policy
- Second, the Prime Minister has, despite her repeated insistence to the contrary, and personal opposition, for the first time acknowledged the possibility of a delay to Brexit

On Wednesday February 27, the House of Commons considered five amendments to yet another (neutrally worded) government motion:

1	Labour Party's amendment asking the government negotiate changes to the political declaration on the framework for the future relationship to seek a permanent customs union with the EU, close alignment with the single market and "dynamic" alignment on rights and protections	Defeated 323 votes to 240
2	Scottish National Party's amendment to remove the possibility of "no-deal", regardless of any exit date	Defeated 324 votes to 288
3	Conservative's Caroline Spelman amendment asking the House of Commons be given an opportunity to express views on different options for the future relationship between the UK and EU	Not moved (and so not voted on)
4	Conservative's Alberto Costa amendment asking for a joint UK-EU commitment to adopt part two of the Withdrawal Agreement on Citizens' Rights (whatever the outcome of the negotiations)	Passed without division (and so not voted on)
5	Labour's Yvette Cooper amendment "noting" the Prime Minister's commitments to hold another meaningful vote (by March 12); and, if the deal is rejected, hold a vote on a "short limited extension" to Article 50 (on March 14), provided the House has rejected leaving the EU without a deal	Passed 502 votes to 20

The fifth amendment, tabled by Labour's Yvette Cooper, was designed to ensure the Prime Minister abides by her commitments. Although unopposed by the government, and passed with a very comfortable majority, it is noteworthy (for reasons touched on below) that 20 hard-line Brexiteer, Conservative MPs voted against it and another 88 MPs abstained.

What Happens Next?

On March 12 at the latest, Parliament will vote again on the Withdrawal Agreement, including any improvements the government has been able to secure from the EU. What will be imperative is that whatever does emerge meets two key criteria:

- First, the Attorney General is able to give a legal opinion that he is now satisfied that certain legally binding changes he has obtained mean that the backstop is no longer a "trap" for the UK
- Second, from the EU's perspective, there is a stable majority of support in Westminster for the Withdrawal Agreement as amended and no possibility that the UK will return to Brussels seeking further changes

There are still three short-term scenarios:

- The UK Parliament ratifies a Withdrawal Agreement, in which case, the UK leaves the EU (on March 29, or shortly thereafter) and enters a transition period that will last until at least 31 December 2020.
- The UK Parliament rejects a Withdrawal Agreement, in which case it must then expressly decide whether:
 - To leave the EU on March 29, 2019, without a deal and without any formal transition period
 - If not, to request an extension of Article 50 (in which case, the UK re-enters Brexit no man's land, where the full spectrum of possibilities, from a slightly delayed "no-deal" to the unilateral revocation of the Article 50 notification, will be back in play)

Meanwhile, eight Labour Party MPs, and three Conservative MPs, resigned from their respective parties to establish "The Independent Group" (TIG 11). Although the motivations of the TIG 11, particularly of the Labour Party MPs, were not purely Brexit related, all members support a second EU referendum.

A New Deal

Ratification of a Withdrawal Agreement will likely depend on it being sufficiently different from the Prime Minister's original version. Any legally binding changes the Attorney General is able to elicit from Brussels are likely to consist of:

- A legally worded addendum to the Withdrawal Agreement that restates, clarifies and emphasises what the EU has already said (and what the Withdrawal Agreement already contains) in relation to the Irish border backstop; together with
- The addition of more specific language in the political declaration on the framework for the future relationship about exploring "alternative arrangements" for the Irish border during the future relationship negotiations.

They are very unlikely to entail any fundamental shift in the legal text of the Withdrawal Agreement itself, such as a time limit to the backstop, or a right of unilateral withdrawal.

The key then, if the Prime Minister's current deal is to pass, is that whatever the Attorney General presents is just enough to provide MPs from both sides of the House, worried that Brexit could be delayed or abandoned altogether, with a ladder to climb back down to supporting the Withdrawal Agreement.

That, together with the mind-concentrating effect of the sequencing of the votes in the House of Commons set for March 12-14, should not only win the Prime Minister votes in Parliament but also give the EU comfort that there will be no further attempts at renegotiation. Delaying the point of revealing a final agreement as late as possible also helps narrow the window of opportunity for calls for further changes.

Deal Accepted

If both criteria set out above are met, the Withdrawal Agreement, with some form of **legally binding changes** relating to the backstop, may yet be approved by the House of Commons on March 12.

Critically, the position of the pro-Brexit Conservative European Research Group (ERG) and DUP, primarily responsible for defeating the Prime Minister's deal during the first meaningful vote on January 15, appears to have softened. Its vote was materially split for the first time in the Parliamentary vote on the Cooper-Letwin amendment. In addition, the language of leading ERG and DUP spokespersons (including Jacob Rees-Mogg and Sammy Wilson) about what they would like to see emerge from the current negotiations has moderated considerably. Gone, critically, is the insistence on the removal of the backstop from the Withdrawal Agreement.

Although the rhetoric has not yet dialled down to a level that reflects a realistic outcome for the negotiations, the direction of travel appears a little clearer. On March 12, the ERG (and DUP) will face a choice between voting in favour of an amended deal (to ensure that Brexit happens) or rejecting it, with the near certain consequence that Brexit will be delayed, the likelihood of a softer Brexit and the (still remote but growing) possibility that it will not happen.

If the Withdrawal Agreement is ratified, it is probable that a short, technical delay to Brexit will be necessary to enable the UK and the EU to pass the necessary implementing legislation.

Deal (And "No-Deal") Rejected

However, if either criteria is not met, it is likely Parliament will reject the Prime Minister's deal for a second time on March 12. The Brexiteers and DUP will vote against the Northern Irish backstop. Once rejected, based on the current parliamentary arithmetic (clearly illustrated by the Cooper-Letwin amendment), it is virtually certain that Parliament will then vote to reject a "no-deal" Brexit on March 29, and (slightly less certain) vote to delay Brexit.

On balance, although the EU will have to agree to any delay, the risk of a "no-deal" Brexit has been substantially reduced. The parliamentary arithmetic appears to be inexorable. While the Prime Minister has stressed that a delay does not remove no deal altogether, it is doubtful the risk of no deal was putting enough pressure on the EU in the negotiations. It would seem, therefore, that her assertion was a political micro-tactic intended to keep as many as possible of the pro-Brexit wing of her Party onside.

Deal Delayed

Considerable uncertainty in the process arises if there is a vote to seek an extension to Article 50 other than for technical reasons of needing time to pass legislation.

The Prime Minister has claimed any delay would be short and limited. A three-month delay, to the end of June (the latest date possible without the UK having to participate in the European Parliament elections in May), is probably the longest delay the Prime Minister has in mind because, in her view, it would keep a "no-deal" Brexit at the end of June on the negotiating table.

The EU member states will need to unanimously agree to any extension and, while it is likely to accede to a reasonable request, will demand to know what the purpose of an extension is. It is hard to see the EU agreeing to a short, three-month extension if it will simply prolong the current stalemate. French President Emmanuel Macron has been notably forceful in insisting that France may veto an extension "without a clear understanding of the aim that's being pursued".

A vote to delay Brexit is, therefore, likely to lead to both intensive negotiations between the UK and the EU on what purpose it is for and a change in the UK's Brexit policy. Two possibilities suggest themselves:

- First, a short, three-month delay (so as not to jeopardise the integrity of the European Parliament elections) to allow the UK Parliament an opportunity to conduct a series of indicative votes in attempt to find a cross-party majority in support of a different model for Brexit. The risk, of course, is that Parliament is unable to coalesce around **any** model of Brexit. Given the fractured nature British politics, characterised by resignations from both main political parties in recent weeks, that risk must be rated as being high.
- Second, a much longer delay, perhaps to the end of the Withdrawal Agreement's implementation period, in December 2020 (or a simple period of two years). A lengthy delay would allow time for a proper re-think of the way forward but also effectively signify starting negotiations from scratch and presents significant political and constitutional problems for the UK and EU.

Again, the UK Parliament would need to attempt to find a majority for a way to proceed. In the event that it is unable to do so, a mechanism capable of breaking the impasse may necessitate:

- Electing a new Parliament, or
- Returning the question to the British electorate.

A longer delay would also mean UK participation in the European Parliament elections. Finally, the EU is likely to impose a price (i.e. continued UK contributions to the EU Budget) for granting any such extension.

The decision on whether to grant an extension is unlikely before the meeting of the European Council on March 21-22.

In all of this, it is important to reiterate that the default position is **still** that the UK will leave the EU, with or without a deal, on March 29, 2019 (just one week after the March European Council).

Where Are We Now?

- On balance, a Withdrawal Agreement (with the addition of legal assurances), accompanied by government promises on workers' rights and relaxing restrictions on Trade Unions (and maybe even a promise by the Prime Minister to step aside after ratification) **might** just be enough to see it pass in Parliament. This is (marginally) the most likely outcome.
- At the same time, a delay (whether technical, short or lengthy) to Brexit and a general election have also both become more likely.
- A second referendum and a revocation of Article 50 (i.e. no Brexit at all) remain unlikely.
- A "no-deal" Brexit has become more unlikely, particularly in March.

How We Can Help?

We can help you understand and plan for the various permutations of Brexit in 2019 and beyond.

With fewer than 30 days before the UK leaves the EU as a matter of law, it is essential for businesses with financiers, operations, suppliers or customers in the UK or EU to ensure that they are satisfactorily prepared in the short- and medium-term.

We have been providing legal, strategic and policy advice to clients in the US, as well as the UK, the EU and around the globe, since immediately after the Brexit referendum result in June 2016. The analysis continues to be extraordinarily complex and evolving, often on a daily basis. As the date of the UK's departure from the EU draws closer, we are assisting numerous of clients every day across the globe in ensuring that they are as well prepared for every outcome as they can be, including in areas that may not be readily apparent from the headlines.

We can help you take advantage of the opportunities posed by Brexit and its impact on global trade.

Whether the UK leaves the EU having ratified a Withdrawal Agreement and enters into a transition period, or whether it leaves without having done so, the UK aspires to concluding its own Free Trade Agreements (FTAs) with trading partners around the world, including with the US, as soon as it is able to do so.

The UK Department for International Trade has just published a new command paper (Processes for making free trade agreements once the United Kingdom has left the European Union (February 2019)) setting out details of how the UK will develop its independent trade policy. Its key focus, other than the EU, will initially be on potential new FTAs with the US, Australia, New Zealand (all of which it has signed Mutual Recognition Agreements with) and accession to the Comprehensive and Progressive Trans-Pacific Partnership (CPTPP). We can help you understand how EU and UK trade policy will be initiated and how it will evolve, what roadblocks may arise and how these can be successfully negotiated.

Although the UK will be able to negotiate, sign and ratify new FTAs during the transition period, the earliest a new FTA could come into effect is January 1, 2021 (i.e. the day after the end of the transitional period). It is also worth noting that, during any transition period, the EU will need to request its trade partners to treat the UK as if it were still a Member State for the purposes of the relevant FTA. Although the EU has committed to make such requests, there is no formal process in place for doing so and no guarantee a counterparty jurisdiction will accept it.

If Parliament does not ratify a Withdrawal Agreement, and the UK leaves the EU without a deal (now unlikely), then (in theory at least) a new FTA could come into effect at any point after 29 March 2019.

Nearly half of the UK's current trade is with the EU. A further 11% is covered by existing EU FTAs. Official UK policy is to conclude trade continuity agreements with the countries covered by existing EU FTAs (and economic partnership agreements and association agreements) by Brexit day (or as soon as possible thereafter) to limit the inevitable disruption caused by a "no-deal" Brexit. The aim is to "roll-over" the protections of existing EU FTAs into new UK FTAs. This is not a straightforward or guaranteed process. To date, of the approximately 40 EU agreements in place, the UK has only signed new agreements with Switzerland, Chile, the Faroe Islands, Eastern and Southern Africa, Israel and the Palestinian Authority. Other jurisdictions (including, in particular, Japan) have been reluctant to replicate their trading agreements with the EU in a new relationship with the UK preferring instead to start negotiations from scratch. A new UK-Japan FTA will not be in place on 30 March 2019.

However, the UK and other non-EU governments (including the US) have initiated actions to take the preliminary steps necessary to lay the groundwork for the formal negotiation of new bilateral trade agreements. For example, in the US, the Office of the US Trade Representative formally notified Congress on 16 October 2018 of the Trump Administration's intent to negotiate new FTAs with the UK (as well as with the EU and Japan). Under US law, this formal notification to Congress must precede the start of any actual negotiations, which by law, was able to begin on 14 January 2019.

In addition to the US, Australia and New Zealand (and work on accession to CPTPP), the UK has established working groups and high-level dialogues with China, the Gulf Cooperation Council and India.

The US and the UK have also confirmed the launch of a US-UK trade and investment working group. In his 16 October 2018 notification letter to Congress, US Trade Representative (USTR) Robert Lighthizer stated, "...we will consult regularly with Congress in developing our negotiating positions to ensure they are consistent with congressional priorities and objectives." While the procedures for UK approval of post-Brexit FTAs remain uncertain at this point, US law requires congressional approval of any such agreement, and one can anticipate that congressional representatives will play an active consultative role as the negotiations approach and get underway.

On Tuesday 29 January, the Office of the US Trade Representative held a hearing on the US-UK Free Trade Agreement. Witnesses included the US-UK Business Council, AFL-CIO, the American Apparel and Footwear Association, the Semiconductor Association, the US Grains Council, the National Milk Producers, the Securities Industry and Financial Market Association (SIFMA), the Pharmaceutical Research and Manufacturers of America (PhRMA) and several other groups [full witness list]. The public comment period for the US-UK negotiating objectives closed on 15 January 2019. The Office of the US Trade Representative received 135 comments in the public docket. Then, on Thursday 31 January, the US International Trade Commission (ITC) was scheduled to hold its own hearing, focusing on the potential economic effects of the US-UK Free Trade Agreement. However, citing the government shutdown, the ITC cancelled the hearing, which was subsequently held on February 6, 2019.

Following these hearings, on February 28, USTR published its official “negotiating objectives” for the US-UK FTA, a key step toward formally initiating trade negotiations. By law, USTR is required to publish negotiating objectives at least 30 days before beginning talks.

USTR’s lists of goals largely track those it published recently for proposed trade talks with the European Union and Japan, and reflect US interests in new export opportunities for agricultural goods, manufactured products, and services.

USTR’s report specifically addresses issues like sanitary and phytosanitary measures (SPS), customs and trade facilitation, rules of origin and technical barriers to trade.

The report also addresses trade in services, including telecommunications and financial services, as well as digital trade in goods and services, and cross-border data flows.

In this environment, which has been made all the more fluid by the Trump Administration’s unilateral tariff initiatives (see our Squire Patton Boggs Tariff Book), private sector businesses, associations and other groups, wherever headquartered, conducting operations or investing in any sector of the UK and/or the EU economies, will find it strategically important to get involved now. At a minimum, involvement should include monitoring the current situation, identifying emerging trends and issues critical to business activities, and then factoring them into planning. It should also include determining whether (and if so how) to engage with policy makers and negotiators in an effective manner.

Even if the UK wishes to prioritise the conclusion of an FTA with the US, it is unlikely that significant progress will be made until the form and scope of a future UK-EU FTA has been settled during phase two of the Brexit process. That, in turn, is likely to be dictated in large part by agreement on the long-term status of the Irish border. In other words, a US business or sector looking to ensure that it benefits under a UK-US FTA will first need to ensure that the UK-EU FTA enables that agreement.

Our dedicated and multidisciplinary team can provide a full range of timely advice and assistance based on decades of relevant, pragmatic experience, attuned to the relevant context and tailored to the specific needs of each client. We can help clients adapt to, and where appropriate, participates in, the process by which the new era of UK trade relationships with the EU and non-EU countries is created.

As a global firm that actively engages in both a traditional law practice and has a long history of active representations in public policy matters, including US Congress approvals of proposed trade agreements, we understand and can work effectively with both the technical and policy issues and processes relevant to the negotiation of FTAs. Moreover, our work in a broad range of matters for clients headquartered outside the UK, along with our global footprint, provides us with an understanding of the “home country” perspectives and constraints actually faced by clients headquartered outside the UK. Finally, we have lived with, and have a deep understanding of, the Brexit process that enables us to assist clients effectively in identifying and capitalising on opportunities that may be available to them, as well as the adjustments they will need to make to adapt to the new environment.

The impact of Brexit on businesses headquartered outside the UK, but conducting operations or otherwise investing in the UK, will by no means be limited to the new network of UK bilateral trade agreements. For example, following Brexit, the UK will have the opportunity to set its own tax policy in a number of areas now governed by EU law, such as VAT and customs duties (except where addressed in a future UK-EU trade agreement). In addition, the UK will no doubt exercise its expanded post-Brexit tax policy powers in other areas, as is evidenced by its recent digital tax initiative. Moreover, the UK may consider the use of new tax and regulatory incentives to induce businesses to locate or remain in the UK. Other areas in which the UK may decide to act include matters related to employment, pensions and immigration; competition law; environmental protection; investor protection; data localisation and transfer; dispute resolution; and supervision of regulated industries such as chemicals and financial services.

We are uniquely situated and qualified to assist clients with all Brexit-related policy and legal matters. We can assist in navigating the complex web of changing conditions for inbound investment into the UK and the new domestic and international frameworks that govern that activity.

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