

## “Confusion now hath made his masterpiece”

Shakespeare, *Macbeth*, Act II, Scene 3

### Summary

- Government strategy thrown into disarray by Speaker John Bercow’s ruling that UK Parliament cannot vote on the May withdrawal deal again
- The threat of a “no-deal” Brexit on 29 March has been reduced, but not entirely removed
- The threat of a no-deal Brexit at some point in the future is still there, but remains small
- Brexit will almost certainly be delayed, at least until May/June, but more likely for longer
- Longer delay would be likely to lead to a “softer” Brexit with closer alignment to the EU
- Determining the future EU-UK trade relationship remains heavily dependent on arrangements over the Irish border
- These will form the baseline for all other UK trade relationships, including the UK-US Free Trade Agreement (FTA)

### What Has Happened?

**Monday 11 March** – Prime Minister Theresa May made a late night dash to Strasbourg to meet European Commission President Jean-Claude Juncker, and returned with what she said was a legal improvement to the Irish border backstop, making it easier for the UK to withdraw.

**Tuesday 12 March** – Early hopes that momentum could build towards the vote on the Prime Minister’s withdrawal deal were dashed when her colleague the Attorney General published his advice: while the Prime Minister had secured stronger exit rights in the event of demonstrable bad faith by the EU, the improvement secured by the Prime Minister did not change his core legal advice on the risk of the UK being “trapped” in the backstop.

Parliament voted by 391 votes to 242 (a majority of 149) to reject the Prime Minister’s withdrawal deal – a significant improvement on the historic 230 majority against on 15 January (39 MPs switched sides, including some prominent Brexiters), but still one of the largest majorities against a government proposal.

**Wednesday 13 March** – Parliament debated a government motion to rule out a no-deal Brexit, but also noted that no deal remains the default in the absence of a deal. This was then amended (by a majority of four votes) to rule out no deal in any circumstances, turning the government against it. The amended motion passed by a majority of 43 (321 to 278) with a number of ministers abstaining rather than voting against. The motion has no legal force, but is a strong expression of Parliamentary opinion, which the government cannot simply ignore.

At the beginning of the day, the government published its tariff plan for a no-deal Brexit (87% of imports to be tariff free) – produced with minimal consultation of business – and its plan for the Irish border (which could be characterised as a combination of smugglers’ free-for-all and an honesty box so unobtrusive and far from the border as to give no offence)

**Thursday 14 March** – Parliament debated a government motion to request an extension to the Article 50 timetable until the end of June (so long as Parliament has approved the Brexit deal) or a longer extension (if Parliament has not approved the Brexit deal) thus requiring the UK to participate in the European Parliament elections in May. The motion was approved (412 to 202 votes) after a number of amendments failed, including one (by just two votes) that would have given Parliament the power to hold a series of indicative votes on alternative Brexit models, and one (by a wide margin) calling for a further referendum.

**Monday 18 March** – Speaker John Bercow ruled (following parliamentary convention) that Parliament could not vote twice on a proposition that was the same or substantially the same: “a demonstrable change to the proposition would be required” for there to be a further vote on the Prime Minister’s withdrawal deal. “For something to be different, it has to be fundamentally different; not in terms of wording, but in terms of substance.”

The government has announced that it will bring forward a Statutory Instrument to make the necessary change to UK law to allow an extension to the Article 50 timetable.

## What Happens Next?

According to the government's plan, the withdrawal deal would have come back for a further meaningful vote in the first part of this week. It was already looking difficult for the government to turn the 75 MPs they would need to switch votes, even before the Speaker ruled that there must be a demonstrable change to the government's withdrawal deal. ("Withdrawal deal" refers to Withdrawal Agreement – the proposed Treaty – **and** the Political Declaration on the future relationship between the UK and the EU). The Speaker is understood not to have given the government any notice of his ruling. It is open to the government to bring the same issue for decision in a future session of Parliament.

## "The report of my death was an exaggeration."

Mark Twain

Formally, the legal position remains that the UK will leave the EU on 29 March. Unless the UK decides to rescind the Article 50 notice and effectively cancel the Brexit process (which the government has ruled out doing), for the Brexit date to change, two things have to happen:

- The EU has to agree to an extension to the Article 50 process. This is on the agenda for the European Council meeting this week, on 21 March. The European Council can only decide to extend the process by unanimity. The UK – and the Prime Minister in particular – will come under great pressure to specify the purpose of the extension. Then there is the question for how long. In the view of some jurists, if the UK is still a member of the EU on 23 May, it must participate in the European Parliament elections. However, the European Parliament does not convene until 2 July, so the UK's failure to elect MEPs will have no practical effect until then. A strict interpretation would limit an extension to 22 May, but the EU may judge there to be no risk to any challenge to the validity of the European Parliament so long as the UK is no longer a member by the time the European Parliament convenes. However, it is clear that any extension beyond 1 July puts the question of UK participation in the European elections squarely on the table, in addition to whatever other conditions the European Council decides to impose.
- UK law (the European Union Withdrawal Act) has to be changed, which requires a Statutory Instrument – proposed by the government – to be approved by both Houses of Parliament.

The government's plan, of course, relied on Parliament reversing majorities of 230 and 149 against the PM's withdrawal deal. The withdrawal deal has been pronounced dead several times by numerous MPs and commentators, but it is proving remarkably resilient. It may still be premature to pronounce it dead, though the Speaker's intervention has certainly blown a large hole in its life-support system. *Frankfurter Allgemeine Zeitung* asked at the end of last week whether it is a zombie or a phoenix – it is clearly now in zombie state, but do not be surprised if it re-emerges at some point in the future. Government ministers are still talking about the possibility of a further vote, and the procedural books are doubtless being scoured for a way to make that happen.

Assuming change is necessary, it will take longer – of the key elements of the deal, the Withdrawal Agreement is the hardest to change. Achieving substantial change, as well as finding alternative ways to address the Irish border backstop, can more easily be done by putting more substance into the Political Declaration – given the complexion of Parliament, that process is, however, more likely to lead to further challenges to the UK's red lines, and a softer Brexit.

## So Where Does It All Leave Us?

Parliament has asserted itself, but it has not yet succeeded in taking control. The Speaker has asserted himself and dropped a bomb on Downing Street. The Prime Minister's authority in her Cabinet, party and Parliament has been seriously – perhaps fatally – eroded. Last week saw four Cabinet Ministers defy a three-line whip and keep their jobs, and a Cabinet Minister closing a debate with a strong argument to Parliament to support the government's proposal for a realistic extension to Brexit and then voting against it himself. This week has already seen the government fail to anticipate the Speaker upholding long-standing Parliamentary precedent (dating back to 2 April 1604) and so deny the Prime Minister her preferred strategy of forcing Parliament into a choice between the withdrawal deal and no-deal Brexit on the one hand, or long delay on the other. Unless the government can find some way to get round the Speaker's ruling, the choice is now clear: long delay (which may yet lead back to the withdrawal deal in time) or no-deal Brexit. The first is the expressed will of Parliament; the second is the law of the land.

The question now for British parliamentarians is whether they try to define the future relationship between the UK and the EU is before exit or after. There has been much focus on the lack of unilateral withdrawal provisions from the Irish border backstop. However, the lack of unilateral ability to withdraw from or radically deviate from the Good Friday Agreement (GFA) is the underlying determinant (and no British politician would argue that the UK should go back on the GFA). The GFA does not require there to be no hard border, but there is much argument that the re-establishment of hard border infrastructure would mark a strongly regressive step in the implementation of the GFA, and as such would be incompatible with the GFA. Hence, the UK government's rather preposterous no deal border policy: you simply leave the border wide open.

Brexiters have welcomed the Speaker's decision: it removes them from the immediate trap the government had set for them. It opens the way for a no-deal Brexit, which some of them want. However, given the clear majority in Parliament against a no-deal Brexit, and the Speaker's ability to use the flexibility of parliamentary convention, the Speaker's ruling also makes the prospects for a longer delay to the Article 50 process, and more parliamentary input to the definition of the future relationship – both of which point strongly towards softer Brexit model – more likely. The government has said it will propose the necessary changes to UK law to delay the Brexit date – this is likely to command a strong parliamentary majority. Parliamentary opinion would define the future relationship in ways likely to lead to closer integration with the EU than the Brexiters would want.

The Brexiteers favour a relationship along the lines of the EU-Canada FTA, but even this would need a very high degree of regulatory and tariff alignment in order to minimize the Irish border impact (unless new technology provides an answer at some point in the future). Labour argues for a renewed customs union, which would constrain the UK's ability to run its own trade policy. Pro-European MPs favour the European Economic Area (Norway) (EEA), which would raise questions about the point of Brexit (Norway's position is best described as a waypoint on the way in, not an exit route). Increasing focus is being paid to a cross-party model called "Common Market 2.0", which would involve the UK going into the European Free Trade Area (EFTA) (ironically founded by the UK in 1960). EFTA currently has four members, three of which (Norway, Iceland and Liechtenstein) are members of the EEA. Switzerland is not. In fact, if Parliament could agree the future direction quickly, the adaptations to the current withdrawal package need not take very long: the Withdrawal Agreement would remain; the Political Direction on the future relationship would be amended and, by doing so, provide a pre-agreed route out of the Irish border backstop (and the substantive change the Speaker has ruled necessary). If that is a pre-existing structure (EEA or EFTA), there would be much greater comfort about sorting out the details later. If it is a wholly new FTA, there is much more uncertainty and, hence, in the minds of the Brexiteers, scope for the EU to leverage its strength and veto over the route out of the backstop.

## Meanwhile, There's Another Party Involved in This Process

In the EU, the UK's Parliamentary contortions have given rise to exasperation and irritation. The Prime Minister will write to the European Council requesting an extension to the Article 50 process, which will be debated at the European Council's meeting on 21 March. While the EU is unlikely to refuse the UK's request (and thus precipitate a no-deal Brexit), the debate is unlikely to be a comfortable one for the Prime Minister. It would not be unreasonable for the EU leaders – who have lost faith in Theresa May as a negotiating partner – to expect her to be clear about the purpose of the extension: simply giving more time to allow the UK's parliamentary stalemate to continue is very unlikely to command support. If the Prime Minister is unable to give a satisfactory description of the purpose of the extension, it is likely that the EU will make any agreement to extension conditional.

## How We Can Help

**We can help you understand and plan for the various permutations of Brexit in 2019 and beyond.** With an uncertain deadline for the UK to leave the EU as a matter of law it is essential for businesses with financiers, operations, suppliers or customers in the UK or the 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 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 conclude its own 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 and 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 1 January 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, were 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 FTA. 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 FTA. However, citing the government shutdown, the ITC cancelled the hearing, which was subsequently held on 6 February 2019.

Following these hearings, on 28 February, USTR published its official "negotiating objectives" for the US-UK FTA, a key step towards 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 EU 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 policymakers 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, participate in) the process by which the new era of UK trade relationships with the EU and non-EU countries is created. 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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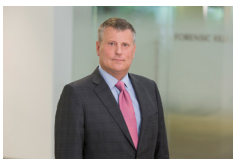
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