



A NEW DEAL – WHAT HAS CHANGED AND WHAT HAPPENS NEXT?

A new withdrawal agreement and political declaration have been agreed in principle between the EU and the UK, with limited – but important – changes to the previous deal. For the EU, this now means putting the deal to the European Parliament. For the UK Prime Minister, this means securing the backing of a Parliament in which he lacks a majority.

WHAT HAS CHANGED IN THE WITHDRAWAL AGREEMENT?

Much of the Withdrawal Agreement remains unchanged. The most politically-charged amendment is the removal of the "backstop" provision negotiated by former UK Prime Minister Theresa May in her previous deal, the purpose of which was to avoid a hard border on the island of Ireland. Had Theresa May's negotiated deal come to fruition, the backstop provision would have seen the whole of the UK indefinitely remain in the customs union and maintain regulatory alignment for goods crossing from the UK to the EU if the parties did not agree a future UK-EU relationship by the end of the transition period. For Brexiteers this represented the entrapment of the UK in the EU and adversely affected the UK's ability to enter into trade deals.

In Boris Johnson's renegotiated deal, Northern Ireland leaves the EU customs union after the end of the transition period along with the rest of the UK, but avoids a hard border across the island of Ireland by moving customs and regulatory checks to the Irish sea: goods passing through "points of entry" to Northern Ireland from Great Britain may be subject to payment of duty if the goods are deemed to be "at risk" of being carried further across the Irish border, though duty payment may be refunded by the UK if the goods stay in Northern Ireland.

Significantly, from the Brexiteers' perspective, the UK will be free to sign new free trade agreements and these agreements will apply to Northern Ireland. Northern Ireland would follow EU single market rules on the regulation of goods to avoid regulatory checks at the Irish border.

A new element is that these arrangements would be subject to a vote of the Northern Ireland Assembly four years after the transition period ends, and if they continue to have the Assembly's support they will remain in place for another four years or until an agreement on the future relationship between the EU and UK is found. Critically, that vote is by way of a majority in the Northern Irish assembly, with neither nationalists nor republicans having a veto. This is the

cause of the Northern Irish Democratic Unionist Party's (DUP) concerns and ultimately appears to have cost their backing.

Another important change, which is discussed further below, is that all "level playing field" provisions that were contained in previous draft of the Withdrawal Agreement (a legally binding document) have been removed. The parties stated in the previous draft that they will commit to uphold "common high standards" in areas of "state aid, competition, social and employment standards, environment, climate change and relevant tax matters". The removal of these level playing field provisions from the Withdrawal Agreement may have an impact on the extent to which the UK and EU share "common high standards" in the future, though arguably level playing field provisions are now addressed in the (non-legally binding) Political Declaration (see below).

Further, while this removal would mean that the UK is no longer bound to level playing field provisions as a matter of international law, the UK will still remain bound to a level playing field as a matter of domestic law, as current EU law will be incorporated into domestic law at the point of exit under the European Union (Withdrawal) Act 2018. This could be changed by a future government, but given the lack of a working majority, it is unlikely that the current government could.

TRANSITION

Aside from the above, most of the previous draft Withdrawal Agreement remains the same and, while supplemented by the revised Northern Ireland Protocol, still stands as a separate draft document.

Having already eaten into a portion of the transition period by way of previous extension, the transition period would still be in place until 31 December 2020, and during this period the UK would for the most part continue to be treated as if it were still a member of the EU. EU rules will still apply in the UK during this period and the UK will continue to pay into the EU budget, though the UK's voting rights will be ended and it will lose its membership of the EU institutions. The parties will also still have the option to extend the transition period until either the end of 2021 or the end of 2022 should they wish to do so by mutual agreement.

It is not clear however that everything will stay the same for the UK during the transition period. Third countries might not be willing to treat UK as if it were still an EU member state under their trade or other agreements with the EU or under their local law (for instance, when giving special treatment to "EU" firms for the purposes of local derivatives regulation). However, the UK government has sought to make arrangements with many third countries to preserve the status quo during this period. In addition, the exit of the UK from the EU may have an impact on contracts or other documents (for instance, it may no longer be wholly clear whether references to "EU" or the "EEA" include the UK), though the courts may take a practical view on this in the event of a dispute.

WHAT HAS CHANGED IN THE POLITICAL DECLARATION?

Again, not much. Ultimately, the changes have been made to a document that is non-binding. The most significant changes to the Political Declaration can be found in paragraph 77, where the parties agree that the future relationship should maintain a level playing field for open and fair competition. Under Theresa May's deal, those level playing field commitments were contained in the legally-binding Withdrawal Agreement.

Other changes include more specific references to the UK-EU free trade agreement (FTA) to be negotiated in the next phase, replacing references to a

"free trade area" from the previous draft. References to possible alignment with EU regulations to facilitate trade have also been removed. The parties have made it clear that the nature of the economic partnership, including issues such as the trading of goods, tariffs and restrictions are to be determined in the next phase when negotiating the FTA.

It is worth noting that the future UK-EU relationship could go in one of a number of different directions. The current UK government would presumably try to negotiate something more like the EU's free trade agreement with Canada. A future UK government could try to negotiate a much more comprehensive deal (even a customs union), or indeed a future government could abandon the idea of an FTA altogether.

Most other provisions in the Political Declaration, including provisions such as those on trade in services and investment, market access, public procurement, movement of people and energy, have remained untouched since the last draft, despite previous suggestions by Mr Johnson that the government would not sign up to EU social, environmental and workers' legislation in the future. Provisions on financial services (and data) are unchanged – still envisaging that parties will endeavour to conclude equivalence (and adequacy) assessments of the other side by June 2020 – but with no commitments.

NEXT STEPS REQUIRED

On the EU side, the European Council endorsed the Withdrawal Agreement and Political Declaration on Thursday 17 October. The European Parliament will now need to approve the deal by a simple majority in the next plenary sitting, which is scheduled to take on 21 October. Following approval from the European Parliament, the Council of the European Union will have to give its endorsement by qualified majority and authorise the signature of the Withdrawal Agreement. This is all expected to proceed smoothly.

In the UK, the House of Commons is due to hold a vote on the deal on Saturday 19 October 2019, which is likely to be very closely contested. Among its opponents, the DUP and some Labour Party MPs have already ruled out backing the motion. The motion to approve the deal on Saturday will also be subject to amendment. MPs have already laid amendments calling for the Government to seek an extension of the Article 50 period or to propose legislation revoking the Article 50 notice.

Even if MPs vote in favour of the agreement, Parliament will still need to give effect to the Withdrawal Agreement in UK domestic law by passing the European Union (Withdrawal Agreement) Bill (EUWAB). This bill will need to pass through both Houses of Parliament and receive Royal Assent before exit day.

Another procedural hurdle, though more easily overcome, is the Constitutional Reform and Governance Act 2010 (CRAGA), which would require the Withdrawal Agreement to be laid before Parliament for 21 days before ratification. To speed things up, the Government may include a provision in the EUWAB dispensing with this requirement or make use of section 22 of the CRAGA, which is an emergency procedure that allows international treaties to be ratified without following the usual process.

A possible judicial hurdle is also emerging. A legal bid in the Court of Session has been launched by anti-Brexit campaigners who claim that the deal would contravene Section 55 of the Taxation (Cross-border Trade) Act 2018, which

prevents Northern Ireland having different customs rules to the rest of the UK. However, the EUWAB will likely seek to address any domestic law obstacles to the deal by amending the relevant legislation.

WILL THERE BE AN EXTENSION?

Although the Prime Minister has ruled out seeking an extension of the negotiating period under Article 50 of the Treaty on European Union, the European Union (Withdrawal) (No. 2) Act 2019 (known as the "Benn Act") requires the Government to request an extension unless the agreement has been approved by MPs in a motion and the House of Lords has debated the motion, or Parliament otherwise approves a no deal Brexit by Saturday, 19 October. The Government has laid resolutions before both Houses for debate on Saturday in terms that aim to release the Government from the requirement to seek an extension. However, even if the Government did seek an extension, comments made by Jean Claude Juncker in a press conference on the 17 October fuelled speculation that the EU may be willing to reject an extension request, though this ultimately is a question for the European Council to decide and Donald Tusk, President of the European Council, has made some more conciliatory statements.

CONCLUSION

The Prime Minister's efforts will now be focused on gathering a coalition of MPs from across the House who are willing to vote for his new deal both on Saturday and throughout the process of enacting the EUWAB. If MPs do not agree to the deal on Saturday or reject the EUWAB, the question of extension looms. If the deal comes into effect, the Government, whether led by the current Prime Minister or otherwise, will enter the next phase of negotiations, and may decide to make use of provisions to extend the transition period until 2021 or 2022. One thing that is for certain, a deal, no deal or an extension on the 31 October will not mean that Brexit is done.

CONTACTS

Phillip Souta
Head of UK Public
Policy, London
T +44 20 7006 1097
E phillip.souta
@cliffordchance.com

Christopher Bates
Partner, London
T +44 20 7006 1041
E chris.bates
@cliffordchance.com

Kate Gibbons
Partner, London
T +44 20 7006 2544
E kate.gibbons
@cliffordchance.com

Dan Neidle
Partner, London

T +44 20 7006 8811
E dan.neidle
@cliffordchance.com

Simon Gleeson
Partner, London

T +44 20 7006 4979
E simon.gleeson
@cliffordchance.com

Simon James
Partner, London

T +44 20 7006 8405
E simon.james
@cliffordchance.com

George Bumpus
Trainee Solicitor
T +44 20 7006 1271
E george.bumpus
@cliffordchance.com

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

www.cliffordchance.com

Clifford Chance, 10 Upper Bank Street,
London, E14 5JJ

© Clifford Chance 2019

Clifford Chance LLP is a limited liability partnership registered in England and Wales under number OC323571

Registered office: 10 Upper Bank Street,
London, E14 5JJ

We use the word 'partner' to refer to a member of Clifford Chance LLP, or an employee or consultant with equivalent standing and qualifications

If you do not wish to receive further information from Clifford Chance about events or legal developments which we believe may be of interest to you, please either send an email to nomorecontact@cliffordchance.com or by post at Clifford Chance LLP, 10 Upper Bank Street, Canary Wharf, London E14 5JJ

Abu Dhabi • Amsterdam • Barcelona • Beijing •
Brussels • Bucharest • Casablanca • Dubai •
Düsseldorf • Frankfurt • Hong Kong • Istanbul •
London • Luxembourg • Madrid • Milan •
Moscow • Munich • Newcastle • New York •
Paris • Perth • Prague • Rome • São Paulo •
Seoul • Shanghai • Singapore • Sydney •
Tokyo • Warsaw • Washington, D.C.

Clifford Chance has a co-operation agreement with Abuhimed Alsheikh Alhagbani Law Firm in Riyadh.

Clifford Chance has a best friends relationship with Redcliffe Partners in Ukraine.