

‘Brexit’: Proposed Withdrawal Agreement Between the EU and the UK

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Public Policy

The proposed withdrawal agreement between the European Union and the United Kingdom was published by the European Commission on November 14 (see [here](#)). The text runs to 585 pages, and represents a tentative agreement reached between the UK and EU negotiating teams. It is accompanied by an eight-page outline of the proposed political declaration on the future relationship between the EU and the UK (see [here](#)).

Both documents will need to be agreed by the 27 EU Member States remaining within the Union on the one hand, and the UK on the other. Although the UK Cabinet has agreed the deal in principle, it has immediately faced significant opposition in Parliament, and led to a number of Government Ministers’ resignations. On the EU side, the remaining 27 Member States are expected to agree on the withdrawal agreement and political declaration on the future relationship at an extraordinary summit scheduled for November 25. The European Parliament will then have to ratify it as well. On the UK side, the UK Parliament is expected to vote on 9 December. This is likely the most significant hurdle to the entry into force of the proposed withdrawal agreement. As indicated by the UK Prime Minister, if the proposed withdrawal agreement is rejected, the outcome is either a disorderly Brexit, or no Brexit at all. Currently, the former is a distinct possibility.

Despite the significant political hurdles remaining, the text gives some greater clarity for business on the likely effects of Brexit. This alert outlines some of those details that arise from the text.

Key Elements of the Draft Agreement

The basic approach of the withdrawal agreement is the following.

There will be a transition period which would start on 30 March 2019 and which in principle ends on December 31, 2020. It is possible for the transition period to be renewed once. This renewal needs to be decided by the Joint Committee (a new institution established under the agreement) before July 1, 2020.

During the transition period, EU law will in principle apply “to and in” the UK. In practice, this means that the UK will remain in the EU’s internal market for another 20 months, and that it will continue to benefit from fundamental principles such as the free movement of goods, services and capital. In the life sciences, for instance, this would mean that an EU-wide marketing authorization for a medicinal product will also permit commercialization of the product in the UK.

A word of caution is in order. While the UK will be treated as if it were a Member State, it is still a “third country” that is no longer a part of the Union. This means that, even under the withdrawal agreement, the transition is unlikely to be frictionless. For instance, the legal entity that holds the above-mentioned EU-wide marketing authorization may well no longer be established in the EU.

During this transition period, the free movement of people will also continue. It was a key demand of the Vote Leave campaign that the UK should have the freedom to set its future immigration rules. It will have the flexibility to do so at some point in future – but exactly when remains far from clear.

The greatest obstacle to a withdrawal agreement was the mechanism needed to avoid border checks on the island of Ireland, no matter how the future relationship develops. Should the UK depart the EU without any agreement, border controls would need to take place between Ireland and Northern Ireland, upsetting the hard-fought settlement attained in the region during the 1990s. Avoiding this has been termed the “backstop” agreement, and is contained in the Protocol on Ireland/Northern Ireland (“INI Protocol”).

The Northern Irish “Backstop” Means the UK Must Remain Aligned with EU Customs Rules

The INI Protocol would enter into force after the expiry of the transition period, on January 1, 2021, unless an alternative is agreed. Under the Protocol, for customs purposes, the entire UK and the EU will together form a single customs territory. For the purpose of unity towards third countries (e.g., the U.S.), the UK is obliged by the INI Protocol to align its tariffs and international trade policy to those of the EU. This would limit severely the UK’s ability to negotiate international trade deals independently, which has consistently been a key aspiration for pro-Brexit politicians.

Within the UK, however, a distinction is made between Great Britain and Northern Ireland. For instance, EU customs legislation as defined in the Union Customs Code “shall apply to and in the United Kingdom in respect of Northern Ireland, but not to the territorial waters of the United Kingdom.” From a regulatory perspective, much of EU law on goods (medicine, food, machinery, medical devices, etc.) will apply to Northern Ireland, but not Great Britain. Complex provisions would further apply to guarantee the integrity of the UK’s market and ensure unfettered market access for goods moving from Northern Ireland to the rest of the UK.

The Political Declaration on the Future Relationship

The withdrawal agreement will span only 20 months, extendable once. The long-term future of the EU-UK relationship has been, to some extent, outlined in the eight-page political declaration. It is scarce on detail, but the essence is clear: there will be no extension of the EU internal market to the UK. In other words, the free movement of capital, persons, services and goods will end. Although the declaration is not a binding agreement, such a relationship would have a number of consequences, including:

- The application of the adequacy framework under the GDPR applying to transfers to third countries in respect of the UK;
- The potential for regulatory divergence – but including “provisions ensuring a level playing field”;

- Sector-by-sector commitments on services, providing for “the absence of substantially all discrimination, with exceptions and limitations as appropriate”;
- “Close and structured cooperation on regulatory and supervisory matters” for financial services, based on the “principles of regulatory autonomy, transparency and stability”.

The political declaration essentially outlines deep and comprehensive free trade agreement (“DCFTA”), but one that stops considerably short of deeper models of regulatory integration (e.g., the European Economic Area with Norway). Although there will likely be unique measures to ensure smooth trade between two geographically close partners, it is likely that from a legal-regulatory perspective there will be two distinct markets.

Backstop Likely to be in Force Longer Than the UK Government Suggests

The backstop is meant to avoid the need for border controls either between Northern Ireland and the rest of the United Kingdom or between Northern Ireland and Ireland. In theory, it would only remain in place until a new long-term trade agreement between the UK and the EU enters into force, on the assumption that this new agreement will eliminate any need for a hard border across the island of Ireland on a permanent basis.

However, a free trade agreement in goods, with limited services coverage, as suggested by the draft political declaration, entails future border controls in Ireland. To avoid these, either the backstop agreement would need to remain in force indefinitely in Northern Ireland, or the British government would have to accept a future partnership similar to the European Economic Area (involving the EU, Iceland, Liechtenstein and Norway).

Unfortunately, the spectre of a disorderly Brexit still looms large. If the draft withdrawal agreement is voted down by the UK Parliament on 9 December, this outcome is a real possibility.

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Covington’s [Brexit Task Force](#) includes a number of sectoral specialists. If you have any questions concerning the material discussed in this client alert, or require advice on how the proposed Withdrawal Agreement may affect your business, please contact the following members of our [Brexit Task Force](#):

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