

Having served notice of its intention to leave the EU on 29 March 2017 under the so-called Article 50 procedure, the UK is currently scheduled to leave the EU on 29 March 2019, a date that is fewer than three months away.

There are essentially three possible short-term scenarios:

- The UK Parliament ratifies the Withdrawal Agreement concluded between the UK government and the EU, in which case, the UK enters a transition period, which will last until at least 31 December 2020
- The UK Parliament does not ratify the Withdrawal Agreement, in which case, the UK leaves the EU on 29 March 2019, and does not enter into a transition period
- The UK government requests an extension of the Article 50 period beyond 29 March 2019, or unilaterally revokes the Article 50 notification

The Withdrawal Agreement

The Withdrawal Agreement provides for the winding down of various current arrangements applying the EU legal order in the UK, including protection of EU citizens' rights, payment by the UK of an amount in settlement of the UK's commitments to the EU budget and – most controversially – the Irish “backstop”.

In respect of the backstop, the Withdrawal Agreement broadly provides that, in the absence of an alternative agreement regarding the future relationship between the UK and the EU by the end of the transition period, there would be a single customs territory between the EU and the whole of the UK, prohibiting all customs duties and quantitative restrictions between the UK and the EU, and taxes on imports in excess of those applying to similar domestic products. Northern Ireland will be subject to additional provisions: while it will remain part of the UK's custom territory and VAT area, it will also fall within the EU's regulatory union, and certain EU VAT and excise rules will apply in Northern Ireland with respect to the movement of cross-border trade in goods.

Neither the UK nor the EU is able unilaterally to terminate the backstop.

This aspect of the Withdrawal Agreement, in particular, has become the focus of opposition in the UK among a number of Conservative and Democratic Unionist Party (a strongly pro-UK Northern Ireland party that the government relies on for its parliamentary majority) MPs. The fear is that the backstop may mean not only that after transition Northern Ireland may be treated differently from the rest of the UK, but also that the UK may be unable to negotiate independent trade deals with, for example, the US.

During the transition period, the EU will broadly treat the UK – and the UK will treat itself – as if it were a member state. The UK will effectively be part of the EU customs union and regulatory framework, subject to the jurisdiction of the Court of Justice, and will still be required to accept freedom of movement of citizens from other EU member states, but without any participation in EU decision-making. The EU will request that third countries also treat the UK as part of the EU for the purposes of their free trade and other agreements; it remains unclear to what extent those third countries will agree to do so. There may be some changes to international trade, even if the Withdrawal Agreement is ratified.



The Withdrawal Agreement does not, as a matter of law, conclude the future trading relationship between the UK and the EU. Instead, the parties have concluded a Political Declaration on the future relationship between the UK and the EU, establishing a general but non-binding direction of travel for future negotiations during a transition period. That Political Declaration is capable of providing the basis of a range of future trading relationships, from a customs union to a looser arrangement similar to the free trade agreement entered into between the EU and Canada.

The UK government postponed the intended parliamentary vote on the Withdrawal Agreement that was scheduled for 11 December 2018, on the basis that it would result in a heavy three-figure defeat, with more than 100 Conservative MPs expected to rebel, as well as the Democratic Unionist Party, the Labour Party and other minority parties. The government has confirmed that it intends to hold the vote again on 15 January 2019; there has been little evidence to date that a sufficient numbers of MPs are now inclined to vote in favour.

Assuming, as seems likely, that Parliament rejects the Withdrawal Agreement on 15 January 2019, a range of different scenarios could play out. It is not impossible (and it may even be the government's calculation) that, after Parliament has failed to agree on any alternative way forward, the government could bring the Withdrawal Agreement back to Parliament as the only alternative to the consequences of failure to ratify the Withdrawal Agreement.

No Ratification

If the UK fails to ratify the Withdrawal Agreement, it will leave the EU on 29 March 2019, will not enter into a transition period and will immediately be treated by the EU as a third country. It will, as a matter of law, cease to be subject to the rights and obligations under existing EU agreements, including free trade agreements. The UK would need to revert to the World Trade Organization (WTO) General Agreement on Tariffs and Trade to govern its trade in goods, and the General Agreement on Trade in Services to govern its trade in services. It remains unclear precisely how this would work in practice and whether the UK would be in a position immediately to apply WTO rules and tariffs on 30 March in relation to trade with the EU and other countries with which the EU has trade agreements. The UK government has been seeking to "roll-over" existing EU treaties with third countries so that they would, in effect, continue to apply with the UK after Brexit on a bilateral basis; media reports suggest that the UK has made limited progress towards this objective (there are 236 third country treaties, of which around 40 are free trade agreements).

Both the UK and the EU have issued guidance on what will happen if the UK leaves the EU without ratifying the Withdrawal Agreement, and both have made preparations. The UK has, for example, awarded contracts to private companies to run ferry services at additional ports, as it anticipates severe congestion around UK ports, particularly Dover, caused by additional border checks arising as a result of the UK becoming a third state. The concern is that without such measures, the UK could run out of food and medicine.

Precisely, how a "no-deal" Brexit would impact the UK and the EU is impossible to predict, as is the response of the UK government and the EU in the weeks and months following such an outcome. Should the UK leave the EU without ratifying the Withdrawal Agreement, the potential disruption to not only the UK and the EU, but also to other key global players such as the US, China and Japan, should not be underestimated.

The ill will created between the EU and the UK (particularly if the UK government decides not to honour what it had previously accepted as UK financial obligations on leaving the EU) could complicate both the EU-UK relationship and the development of new UK relationships with other countries, including the US, for some years to come.

Extension to Article 50 Time Limit

If (as is currently likely), the UK Parliament rejects the Withdrawal Agreement, the default legal position is that the UK leaves the EU on 29 March as described herein. However, a very large majority in Parliament appear to be against this outcome. What could happen next is, therefore, highly unpredictable: the collapse of the May government and a general election cannot be ruled out. Equally, Parliament could form a majority around an alternative exit route (such as the EEA/EFTA "Norway +" option), or Parliament could refer the matter back to the electorate in another referendum. These alternatives would be very hard – probably impossible – to complete within the Article 50 time limit of 29 March 2019. In these circumstances, the UK could ask the EU to extend the Article 50 process. This can only be done by unanimous agreement of all 27 remaining EU member states. This will likely depend on whether the member states believe that they may either get a deal more favourable to the EU through a renewed negotiation, or stand a better chance of avoiding a "no-deal" Brexit, or even securing no Brexit at all.

No Brexit

Until 29 March 2019, the UK can unilaterally revoke its Article 50 notification and remain in the EU on its existing terms of membership. The UK could also request an extension of the Article 50 period, but this would require the consent of all 27 member states, and would likely involve questions as to the reason for the UK requesting an extension. In principle, the UK could unilaterally revoke its Article 50 notification during an extension period.

It is not clear whether the UK government could unilaterally revoke its Article 50 notification without an Act of Parliament authorising it to do so. In practice, there is insufficient time before 29 March 2019 to introduce legislation for, and hold, a second referendum including an option on whether the UK should remain in the EU or not, and there is currently little appetite in the UK government or Parliament to legislate for one.

As things currently stand, neither the UK government nor Parliament shows an inclination to revoke Article 50, or request an extension. If that sentiment persists following the vote on 15 January 2019, the choice for the UK Parliament is between the Withdrawal Agreement and a "no-deal" Brexit.



How We Can Help You Understand and Plan for Brexit in 2019

With fewer than 85 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 the EU to ensure that they are satisfactorily prepared, in the short and medium term, for the end position of 29 March 2019.

We have provided legal, strategic and policy advice to clients in the US, as well as the UK, the EU and the rest of the world, since immediately after the Brexit referendum result in June 2016. The analysis continues to be extraordinarily complex and evolves on a daily basis. As the date of the UK's departure from the EU draws closer, we are assisting numerous clients every day and 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 news headlines.

Why Choose Us

We are uniquely positioned to be your partner to 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 is likely to aspire to conclude new free trade agreements, including with the US, as soon as it is able to do so. If the Withdrawal Agreement is ratified, the earliest a free trade agreement could come into effect is 1 January 2021. If the Withdrawal Agreement is not ratified, in theory, a free trade agreement could be concluded and come into effect at any point after 29 March 2019.

The UK and other governments, including the US, have already 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 US Trade Representative (USTR) formally notified Congress, on 16 October 2018, of the Trump Administration's intent to negotiate new free trade agreements 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 may now begin on 14 January 2019. The UK has established working groups and high-level dialogues with the US, Australia, China, the Gulf Cooperation Council, India, Japan and New Zealand. In addition, the UK may consider participation in the Trans-Pacific Partnership.

The US and the UK have confirmed the launching of a US-UK trade and investment working group. In his 16 October 2018 notification letter to Congress, 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 free trade agreements 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.

Indeed, US trade agencies have already begun their review process for a possible US-UK free trade agreement. For example, the office of the USTR will hold a hearing on the negotiating objectives for such an agreement on 29 January 2019 (comments are due by 15 January 2019). In addition, the US International Trade Commission (ITC) will hold a hearing on the potential economic effects of a US-UK free trade agreement on 31 January 2019 (public comments are due by 14 January 2019).

In this environment (which has been made all the more fluid by the Trump Administration's unilateral tariff initiatives), private sector businesses, associations and other groups, wherever headquartered, that conduct operations or invest in any sector of the UK and/or EU economies will find it strategically important to get involved now. They should at least monitor the current situation, identify emerging trends and issues critical to their activities and factor them into their own planning, as well as determine 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 a free trade agreement with the US, it is unlikely that significant progress will be made until the form and scope of the UK-EU free trade agreement has been settled. 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 free trade agreement will first need to ensure that the UK-EU free trade agreement enables that agreement.

Our dedicated and multidisciplinary team can provide a full range of timely advice and assistance that is based on decades of relevant experience, pragmatic, attuned to the relevant context, and tailored to the specific needs of each client as it adapts 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 free trade agreements. Moreover, our work in a broad range of matters for clients headquartered outside the UK 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, which enables us to assist clients effectively in identifying and exploiting the 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 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 also uniquely positioned to assist clients in non-trade policy and legal matters such as these. We can assist in navigating this complex web of changing conditions for inbound investment into the UK and the new domestic as well as international frameworks that will be developed to govern that activity.

To discuss further, please contact any member of our Brexit team, or your usual contact at the firm.

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