

## Brexit Essentials

### Where do we go from here?

5 August 2019

*"I don't want no deal as the outcome... I don't want to lead with a WTO solution as my number one priority..."* Boris Johnson, July 2019

Mr Johnson's view that in the absence of a deal, the UK will leave the EU on 31 October "do or die" is little different in substance to his predecessor's mantra "no deal is better than a bad deal". The Prime Minister also appears to agree with Mrs May that a deal is preferable to the alternatives - or at least a higher priority objective. Where they diverge, is on what that deal might look like.

The tone of current rhetoric is focussed on "all or nothing" from both sides. Mr Johnson says the current Withdrawal Agreement has "got to go". EU leaders, for their part, are adamant that it cannot be re-opened. If a deal is a genuine priority, a more nuanced solution than is currently being put forward seems inevitable. But no one has articulated clearly what that might comprise, leaving observers to speculate based on speeches and soundbites.

As we approach the final strait (again), this briefing contains a reminder of the possible outcomes (expressing no view on the likelihood of any particular result) and some of the legal constraints that might shape the UK's future relationship with the EU.

#### Deal, no deal or no Brexit?

The Article 50 timetable and the EU (Withdrawal) Act 2018 (EUWA) provide that absent specific action, the UK will leave the EU on Halloween, with or without a deal. For that timetable to change, one of two things must happen: the EU (acting with the consent of all member states)

*In summary: No deal on 31 October remains for the time being, the only outcome we would recommend planning for. The other outcomes - a deal or no Brexit - hinge almost entirely on political will.*

and the UK agree a further extension of time or the UK revokes the Article 50 notice prior to 31 October. Neither, is of course consistent with the new Prime Minister's stated intentions.

The new Prime Minister and his team are galvanising Whitehall to step up preparations for a hard Brexit on 31 October. Businesses are being urged to review and refresh "no deal" plans, rightly in our view. "No deal" on 31 October remains, for the time being, the only outcome we would recommend planning for. The other outcomes - a deal or no Brexit - hinge almost entirely on political will. This suggests that any movement in the timetable will be mandated by Parliament.

#### How might a further extension come about?

Changes to the Article 50 period, as most will be aware, must be agreed with the EU. The EU (including the incoming Council President Ursula Van der Leyen, who will take over from Jean-Claude Juncker on 1 November) has indicated that it is open to considering a further extension if the UK has "good reasons" for the request. There would appear to be three obvious possibilities from the UK side.

#### *An eleventh hour deal*

The first is that a deal is agreed at the eleventh hour. It is to be anticipated, given the history of Brexit, that the negotiators will utilise every minute available, leaving the parties with insufficient time to complete the ratification process. From the UK side this involves:

- A successful “meaningful vote” under s13 of the EUWA.
- The completion of the statutory process for the ratification of international treaties under the Constitutional and Governance Reform Act 2010.
- The introduction to Parliament and successful passage of the EU (Withdrawal Agreement) Bill, which will implement the deal legally in the UK.

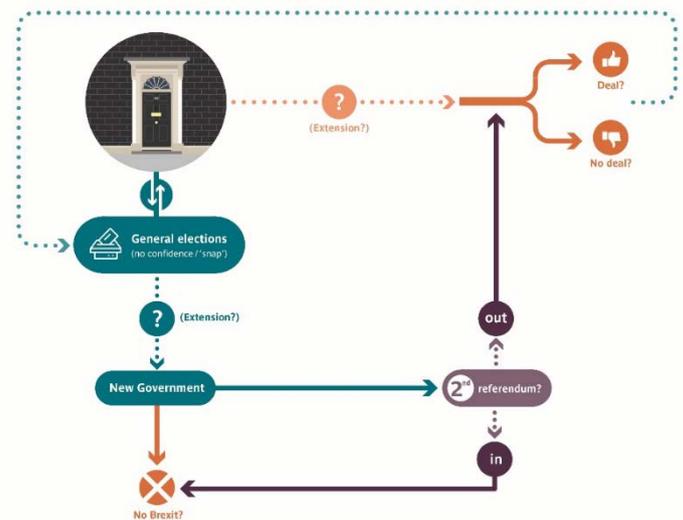
Even if Parliament determines to cut short or abandon the traditional two week recess for Party conference season and sits on extra days when it resumes in September, completion of the above steps by 31 October alongside the finalisation of the domestic legislative programme (the on-shoring of EU law) will be challenging. Accordingly, a situation could be envisaged whereby the Government requests an extension to complete this process.

How long would the extension be in these circumstances? If the deal is derailed in Parliament, the default option is “no deal”. One might assume therefore that the Government’s intention would be for a short “technical” extension.

The EU may also be unwilling to provide more time than absolutely necessary. An extension requires the consent of all member states acting in Council. Back in March, there was reportedly support for a year-long extension from the majority, but as a result of objections from France and others, the date was re-set to 31 October.

### A rejected deal

If the meaningful vote is unsuccessful and Parliament rejects the deal, it is possible we could see a repeat of the steps taken in April whereby the Government’s motion seeking approval of the deal is amended and the Prime Minister effectively forced by Parliament to go to the EU to request a further extension.



The process would involve amending the motion to override the Government’s ability to set the Parliamentary agenda - and therefore support from the Speaker of the House. This enabled Yvette Cooper to put forward the EU (Withdrawal) No. 5 Bill in April, which would have forced Theresa May to request an extension, had she not already done so by the time the Bill received Royal Assent.

Were Mr Johnson to be forced to request an extension in these circumstances, what would be the “good reasons” that persuade the EU to acquiesce? A second referendum (asking the public to vote on whether to take the deal, to proceed with no deal, or (possibly?) to revoke the Article 50 notice)? A general election? The outcome of any election could also prompt a second referendum as well as changing both the UK’s relationship with the EU and the business environment in the UK, quite significantly.

The possibility of a general election before May 2022 is limited by the Fixed Term Parliaments Act 2011, which provides for a 5 year election cycle. For an election to happen earlier, either:

- two-thirds of MPs must vote in favour of a Government motion proposing a snap election; or
- a simple majority of the Commons must vote in favour of a motion of no confidence in the

Government. If the motion passes and no alternative Government can be formed within 14 days, a general election can follow.

Either route is possible against the backdrop of a rejected deal.

### **What if there's no deal?**

A Labour-led no confidence vote is conceivable in the autumn if there is no prospect of a deal. This would give Labour MPs in "Leave" seats a difficult choice - and could lead to a general election on the basis outlined above.

Those opposed to "no deal" - potentially on the EU or the UK side - may also look for ways to mandate leaders to agree to an extension in this scenario. Opposition to the prospect of no deal is perhaps less prominent on the EU side. However, concerns are starting to be voiced more forcefully by industry and it is not impossible to envisage that EU leaders could come under some pressure to try to avoid "no deal".

From the UK side, MPs opposed to "no deal" are considering their options, as discussed further below. How Parliament could force the Prime Minister to seek an extension in the absence of a deal is not clear. The "Yvette Cooper" route outlined above would not be available in the absence of a deal, as the EUWA process only requires the Government, if there is no deal, to put forward a motion in neutral, ie non-amendable terms, setting out its proposed course of action. As noted in the [House of Commons' 2018 Briefing Paper "Brexit Unknowns"](#), "There is considerable ambiguity in the extent to which Parliament can influence the Government's approach". This is potentially a reason why the possibility of the Prime Minister proroguing Parliament is currently being discussed.

### **Can the Government "force" no deal?**

If "no deal" becomes the Government's first priority (because "no deal is better than a bad deal.."), MPs opposed to "no deal" have vowed to do everything possible to avert it, ie to put the

Government in a position where it is forced to take steps to request an extension from the EU - or even, potentially, to revoke the Article 50 notice.

Suggestions that the Prime Minister could prorogue or suspend Parliament to inhibit attempts to abort "no deal" (which Mr Johnson has refused to rule out), have resulted in a number of initiatives. These include an amendment to the Northern Ireland Bill requiring the relevant Minister to update Parliament every two weeks on progress on restoring the Northern Ireland Executive. The thought behind this is that attempts can be made to avert "no deal" only if Parliament is sitting - and this amendment, which passed successfully, not only forces Parliament to sit, but provides for the automatic re-calling of Parliament to allow the update were it to be suspended.

Another option that has been mooted is the formation of an alternative Parliament, should Parliament be suspended, a threat that achieved its aim in 2002 when Tony Blair tried to avoid a Parliamentary vote on Iraq.

The prospect of legal action is also being examined closely by activists including Gina Miller. The first shot was recently launched by the Good Law Project, backed by a cross-party group of MPs including Liberal Democrat leader Jo Swinson. An application has been made to the Scots Court of Session for a declaration that Mr Johnson cannot lawfully advise the Queen to suspend Parliament. There is an ongoing debate about whether the judiciary is able to intervene in matters of Royal Prerogative. The Court of Session, which sits during August, is expected to rule shortly.

### **On what basis might a deal be agreed?**

The force of opposition to "no deal", puts some pressure on the Government to agree a deal if a workable solution can be found. As noted above, both parties are currently maintaining quite bald positions publicly so it is difficult to discern what

that solution might be. Notwithstanding Mr Johnson's recent comments, it is worth highlighting that a number of aspects of the existing Withdrawal Agreement (probably the bulk by volume) are, in relative terms, politically uncontroversial:

- **Protection for citizens' rights:** The Withdrawal Agreement provides EU citizens in the UK and UK citizens in the EU, with the assurance of settled status (if they have completed 5 years' residence) or the potential to achieve settled status, if they are living and working in the EU/UK at the end of the transitional period. If there is "no deal", notwithstanding goodwill on both sides on the topic of citizens' rights, the cut-off for rights to settled status is likely to be brought forward significantly to 31 October (absent any further extension of time).
- **A transitional period during which time the UK is, broadly speaking, treated as an EU member state:** The current draft provides for a transitional period extending to the end of 2020, with the potential to extend for a further two years. This is an important protection for businesses and citizens, providing a glidepath to life outside the EU. It is not clear how the parameters of the "implementation period" or "standstill" mentioned on a couple of occasions recently by the Prime Minister differs from what is contemplated in the Withdrawal Agreement as it stands.

There are some deficiencies in the current draft - not least that the period was set on the basis of the UK's original 29 March exit day, and therefore would now provide a shorter period within which to conclude the terms of the EU/UK's future trading relationship. In particular, if the UK wished to exercise the extension option, it would need to notify the EU of its intention (were the Treaty signed) by 1 July 2020, only 8 months after Brexit day. However, the current arrangements might be considered by business

to provide a softer landing than the alternative.

During the transitional period, the UK is treated as a member state in terms of the four freedoms and the application of EU law, but it is not an EU member state. As a result, the UK would have a limited role in institutional decision making during that period, including in relation to any new laws that come into force. This was the basis of the "vassal state" criticisms from certain Tory Brexiteers at the end of last year. However, the prospect of Brexit has prompted close focus on the EU acquis and the impending pipeline of legislation. A point we have made previously is that the EU legislative process moves slowly and most upcoming changes in law will already be on the horizon. In addition, in many instances (in the context of financial services for example), it is likely to be in the UK's interests to remain aligned with EU rules at least until the end of the transition period. Full alignment at the point of exit proper will provide a more straightforward basis for any initial equivalence or adequacy rulings that form the basis of the parties' future relationship.

- **Grandfathering protection for "separation issues":** The bulk of the Withdrawal Agreement is highly technical. It highlights a range of processes that currently operate under the auspices of EU law, but would potentially operate differently once the UK is outside the bloc - and ensures that the guillotine of the UK's final exit date at the end of transition does not cut off the benefits of EU law in relation to processes that started prior to that date. For example, goods placed on the market under UK approvals and authorisations prior to the end of the transition period, can complete their journey to their final EU27 destination. Judgments arising out of legal proceedings commencing prior to the end of transition can be enforced after that date in accordance with the EU rules that would have applied on Day 1.

The scope of this grandfathering protection would, in an ideal world, be wider in certain areas - it is not perfect from the UK's perspective. However, it will certainly facilitate a smoother transition than any actions the UK is able to undertake unilaterally.

The section of the Withdrawal Agreement dealing with the UK's financial settlement on exit has been the subject of criticism - but more recently has been mentioned by the Prime Minister largely in the context of potential savings in a "no deal" scenario. It might be assumed that the Government would be less vocal about the exit bill and meeting the UK's budget obligations to the point of exit were a deal to be reached.

This leaves the Protocol to the Withdrawal Agreement on Northern Ireland and Ireland as the main bone of contention. Is it all about the Irish backstop? Is there a compromise to be reached?

### **“Never mind the backstop”?**

The Irish backstop arrangement as set out in the Protocol provides that in the absence of alternative arrangements being agreed (ie the EU and UK concluding a deal on their future relationship), by the time of the expiry of the transition period set forth in the Withdrawal Agreement, the UK will remain in a "Single Customs Territory" with the EU.

As noted in our previous [Brexit Essentials](#), this arrangement has been politically contentious for two main reasons:

- It is open ended - the arrangement will continue until such time as other arrangements, under the umbrella of the UK's future trading relationship with the EU, can be finalised. The UK is unable to bring it to an end unilaterally.
- It inhibits the UK's ability to chart its own course as regards trade in goods. It requires the UK to adopt the EU's Common External Tariff, which will effectively prevent

alternative arrangements being reached with third countries. It also limits the potential for regulatory divergence - in particular for Northern Ireland.

The "Strasbourg" package of assurances procured by Theresa May was insufficient to enable her deal, including the backstop, to get through Parliament. This included expressions of goodwill with regard to the parties' intentions to conclude their future relationship agreement (which would mean that the backstop never comes into play). The package also highlighted a number of legal points - for example, that the EU cannot conclude permanent trade relationships under the auspices of Article 50.

What more could be done? The chink of light potentially lies in the EU's willingness, reiterated on a number of occasions, to reopen the Political Declaration that is annexed to the Withdrawal Agreement.

### **How might the Political Declaration be re-negotiated?**

The Political Declaration is a "heads of terms" which is intended to provide the basis on which discussions on the future relationship will proceed once exit day has occurred. It is short and high level.

The current draft contemplates a trading relationship in relation to goods that is "as close as possible" - in the form of a comprehensive free trade area (no tariffs or quotas) building on the single customs territory that forms part of the Irish backstop - coupled with deep regulatory and customs co-operation. The free trade area will be underpinned by a "level playing field" for open and fair competition and customs arrangements that make use of "all available technologies".

In relation to services, the Political Declaration broadly reflects the EU's starting position that the UK will be assessed according to third country regimes. In relation to financial services and data protection, for example, the basis of the future

relationship will be the existing equivalence/adequacy frameworks.

The Political Declaration does say, in relation to trade in services and investments, that “the Parties aim to deliver a degree of liberalisation well beyond the Parties’ WTO commitments and building on recent Union free trade agreements” (presumably a reference to CETA). But there is no detail on what that might mean.

There would certainly seem scope to expand the Political Declaration to enunciate the terms of the parties’ future relationship more clearly. Mr Johnson has not gone into any detail about his vision since becoming Prime Minister, but his pre-promotion writing suggests he is in favour of a wide ranging free trade agreement (“ambitious” even) covering goods and services. The Political Declaration thus provides a platform on which to build. Also helpful would be the inclusion of a more detailed timeline for negotiations. Consideration may be given to whether more could be done also to make the Political Declaration more legally robust, beyond the current reliance on the parties’ best endeavours and good faith obligations to reach a conclusion.

If the Political Declaration provided a clearer roadmap to life outside the EU - one which all parties were happy with - could that provide greater comfort that the backstop will never be required or come into play, sufficient to enable a deal to be agreed? The Prime Minister has been

quite unequivocal about his demand to delete the “anti-democratic” backstop, so that remains to be seen.

### So where do we go from here?

As predicted in one of our early [Brexit Essentials](#), we are now deep into uncharted seas. The balance of probabilities has tilted towards “no deal”. How and whether it is possible to turn the ship remains uncertain, as does the likely timing of any further developments. Our advice therefore remains to review and refresh “no deal” contingency plans. Consideration should be given to progressing action points, especially “easy wins”, sooner rather than later given we are now into the final months of the timetable to exit.

Last week the CBI published a detailed report “[What comes next? The business analysis of no deal preparations](#)”, which is very useful as a single link into the no deal resources published by both the UK and the EU so far. It concludes that neither the UK nor the EU is ready for “no deal”. Readers will no doubt have their own views on the readiness or otherwise of their own organisation, but we agree with the CBI’s recommendation that business refresh their no-deal plans and to the extent possible, be ready to engage with appropriate Government departments to discuss residual risks when Parliament resumes in September.

## OUR BREXIT ADVISORY PRACTICE

Slaughter and May is equipped to help you across the full spectrum of legal issues triggered by Brexit.

Our team has advised and continues to advise clients in a range of sectors on issues arising out of the UK's departure from the EU. These include the effects of Brexit on M&A, financing transactions and other types of investment activity, its likely impact on the regulatory environment and on the cost of cross-border trade.

We are also able to assist with contingency planning, lobbying efforts and the formulation and implementation of restructuring options.

Further information on the contents of this Briefing or in relation to Brexit, or visit [www.slaughterandmay.com/brexit](http://www.slaughterandmay.com/brexit).

## KEY CONTACTS



**Jeff Twentyman**  
BREXIT  
t: +44 (0)20 7090 3476  
e: jeffrey.twentyman@sllaughterandmay.com



**Jan Putnis**  
BREXIT/FINANCIAL SERVICES  
t: +44 (0)20 7090 3211  
e: jan.putnis@sllaughterandmay.com



**Kathrine Meloni**  
BREXIT  
t: +44 (0)20 7090 3491  
e: kathrine.meloni@sllaughterandmay.com