

## Brexit Bulletin—UK and EU announce a new Brexit deal

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**On 17 October 2019, the European Commission and UK government announced an agreement in principle on the revised legal terms of the Withdrawal Agreement, which includes a revised Protocol on Ireland/Northern Ireland and revised political declaration on the framework of the future EU-UK relationship. With the European Council ongoing, the Commission recommended that the European Council (Article 50) endorses the revised agreement and the European Parliament give its consent, but the deal cannot be ratified without the approval of the UK Parliament. Adam Cygan, professor in EU law at University of Leicester, Kieran Laird, partner at Gowling WLG and Laura Rees-Evans, senior associate at Fietta Law, comment on the agreement and provide insight into what happens next.**

### What has been announced?

As noted above, the UK and EU have announced agreement at negotiator level on a revised Withdrawal Agreement Protocol on Ireland/Northern Ireland and a revised Political Declaration on the framework of the future EU-UK relationship. In accordance with the European Commission's original mandate, there are no substantive changes to the core text of the Withdrawal Agreement which was endorsed by the EU in 2018.

Documents published set out the revised legal text of the Northern Ireland Protocol and political declaration, plus limited technical amendments to the previous Withdrawal Agreement. There are no substantive changes to the core text of the Withdrawal Agreement endorsed by the EU in 2018. With the European Council ongoing, the Commission recommended that the European Council (Article 50) endorses the revised agreement and the European Parliament give its consent, but the deal cannot be ratified without the approval of the UK Parliament.

### What has been published?

The European Commission published the following documents:

- [Revised text of the Protocol on Ireland/Northern Ireland included in the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community \(Withdrawal Agreement\), plus consequential technical adaptations to Article 184 'Negotiations on the future relationship' and Article 185 'Entry into force and application' of the Withdrawal Agreement](#)
- [Revised Political Declaration setting out the framework for the future relationship between the European Union and the United Kingdom](#)
- [European Commission communication on the endorsement of the revised Protocol on Ireland/Northern Ireland and of the revised Political Declaration, as agreed at negotiators' level](#)

The Commission also published a [Q&A](#) document, setting out in very simple terms, what has been agreed, the main changes to the Northern Ireland Protocol and political declaration and the next steps.

The UK government has published its own copies of the revised Northern Ireland Protocol and political declaration, plus an additional document concerning the democratic consent mechanism in the Northern Ireland Protocol:

- [Unilateral Declaration on Consent](#)

These documents should be read alongside the text of the Withdrawal Agreement previously agreed in principles by the Commission and UK government and endorsed by the EU27. For details see: [Brexit Bulletin—examining the key announcements, documents and next steps for the draft Withdrawal Agreement](#)

The original Withdrawal Agreement documentation (including the original text of the Withdrawal Agreement, Northern Ireland Protocol and Political Declaration) published by the government is accessible [here](#).

The government has also published its legal position on the terminability of the Protocol on Ireland/Northern Ireland to the Withdrawal Agreement, available [here](#).

### What has changed?

The key changes are found in the [revised Northern Ireland Protocol](#), which replaces the backstop arrangements which were contained in the previous Withdrawal Agreement with arrangements more in line with the government's recent proposals. For background reading, see: Brexit Bulletin—UK sets out alternative Northern Ireland Protocol, [LNB News 02/10/2019 65](#) and Brexit Bulletin—MPs debate the UK's alternative Northern Ireland Protocol, [LNB News 03/10/2019 76](#).

The European Commission described it as a 'legally operative solution that avoids a hard border on the island of Ireland, protects the all-island economy and the Good Friday (Belfast) Agreement in all its dimensions, and safeguards the integrity of the EU Single Market.' Provisions are said to avoid a hard border and a customs border on the island of Ireland, while ensuring that Northern Ireland remains part of the UK's customs territory and will be able to benefit from future Free Trade Agreements (FTAs) that the UK agrees with third countries.

Under the revised provisions:

- Northern Ireland will not be required to stay in the EU customs territory, but will be required to stay aligned to certain EU Single Market rules. These rules (which the Commission has described as a 'limited set' of rules) include rules on goods, sanitary rules for veterinary controls (SPS rules), rules on agricultural production/marketing, VAT and excise rules for goods, and State aid rules.
- the EU Customs Code will also apply to goods entering Northern Ireland and EU customs duties will apply to any goods entering Northern Ireland that risk entering the EU Single Market. Any checks, controls and duties required for goods entering Northern Ireland from the rest of the UK will be conducted and administered by the UK authorities subject to appropriate EU supervisory and enforcement mechanisms
- the revised Protocol is no longer a time limited backstop position to provide cover until a future arrangement is agreed. It is intended to subsist for as long as it has the democratic support of the Northern Ireland Assembly. Provisions

therefore also include a mechanism to allow the Northern Ireland Assembly an opportunity to consent (by simple majority) to the continued application of the regulatory alignment provisions every four years, starting four years after the end of the transition period. If consent is refused, the Northern Ireland Protocol would cease to apply two years later

The key change in the [revised Political Declaration](#) relates to the objectives for the future EU-UK economic relationship, with amendments to reflect the UK government's preference for an FTA model. The revised Political Declaration sets out the aim of agreeing an FTA with zero tariffs and quotas between the EU and the UK, while respecting the EU's requirements for robust commitments on a level playing field to ensure open and fair competition.

The stated aim of the amendments to the Political Declaration is to reinforce the objectives with references to a free trade agreement (FTA). Some sections of the old draft are removed, for instance references to the backstop and regulatory alignment, and certain provisions in the new draft have been altered to reflect the current timeline and approach:

- FTA/regulatory autonomy—amends in new paras 3, 17, 19, 22, 23
- removal of backstop and regulatory alignment provision—removal of paras 19 and 25 of original
- decision making autonomy in crisis management—amends in new para 99
- strategic dialogue—removal of para 126 of original
- disputes—amends in new paras 129-132
- forward process—new paras 137-141

### **What happens next?**

In a [letter](#) to European Council President Donald Tusk, European Commission President Jean-Claude Juncker highlighted the agreement on the revised Northern Ireland Protocol and Political Declaration is endorsed by the European Commission. The Commission is recommending that the European Council (Article 50) endorses the agreement and that the European Parliament also consents.

President Jean-Claude Juncker said:

'This agreement is a fair compromise between the EU and the UK. It is testament to the commitment and willingness of both sides to do what is best for EU and UK citizens. We now have a newly agreed Protocol that protects peace and stability on the island of Ireland and fully protects our Single Market. I hope that we can now bring this over the line and provide the certainty our citizens and businesses so deserve.'

Prime Minister Boris Johnson echoed President Juncker's remarks, stressing that the agreement is a 'great deal' for the UK:

'Now this is the moment for our parliamentarians to come together and get this thing done, and, as I say, to begin building a new and progressive partnership with our EU friends, with whom, of course, we share so many priorities.'

President Juncker's remarks are available [here](#).

The Prime Minister's remarks are available [here](#).

Commission negotiator Michel Barnier's remarks are available [here](#).

Shortly after the deal was announced, the European Council adopted conclusions endorsing the revised terms and calling on the Commission, European Parliament and the Council to take the necessary steps towards ratification. More details are available [here](#).

Speaking after the announcement, President Tusk said:

'The European Council endorsed this deal and it looks like we are very close to the final stretch... Now we are all waiting for the votes in both Parliaments.'

President Tusk's remarks are available [here](#).

Having reportedly provided assurances that the deal could pass through Parliament, the Prime Minister issued an [open letter](#) to business, promising that the deal would deliver Brexit without disruption and calling on MPs to support the deal.

Meanwhile, MPs convened to debate a business motion approving a special sitting of Parliament on 19 October. In a move that could complicate proceedings for the Prime Minister, MP's approved an amendment to the business motion, allowing for further amendments to motions tabled on the day. To view the transcript, see [Hansard, House of Commons, 17 October 2019—Business of the House \(Saturday 19 October\)](#)

### **Removal of backstop is the 'key legal point'**

**Adam Cygan (AC):** 'The key legal point about the deal is that it has removed the backstop arrangement in which the whole UK would remain in a customs union in the event of no future trade agreement being in place in order to avoid a hard border in Ireland.'

'This has been replaced with a new arrangement that would keep Northern Ireland in a territorial customs union of the entire UK, but that Northern Ireland will apply EU customs rules for goods moving across the Irish border. There would be a regulatory border in the Irish Sea and goods from mainland Britain moving to Northern Ireland will need to undergo some form of customs check prior to them crossing the Irish border. However, goods moving from mainland Britain to Northern Ireland will not attract any customs duties. Where appropriate, Northern Ireland will collect VAT for the EU on such goods coming from mainland Britain and which cross the Irish border, as well as carrying out some form of checks to ensure compliance with the standards of the EU Single Market. In effect Northern Ireland will be in two different customs arrangements and will need to fulfil its obligations for both. This is an issue which the DUP are very strongly against and have indicated that they cannot support this deal when it is brought before the Commons.'

**Laura Rees-Evans (LRE):** ‘The revised Protocol is also accompanied by “consequential technical adaptations” to Articles 184 and 185 of the draft Withdrawal Agreement, which relate to negotiations on the future relationship and the entry into force of the draft Withdrawal Agreement. Other provisions of the draft Withdrawal Agreement negotiated by former Prime Minister May, including those relating to such issues as the transition period, citizens rights, the so-called “divorce bill”, and the jurisdiction of the Court of Justice of the European Union, stand unchanged by the latest round of negotiations.’

‘In relation to the Protocol on Ireland/Northern Ireland, the major change in the newly revised agreement is that Northern Ireland will leave the customs union alongside the rest of the UK (Art 4). In principle, this means that, in contrast to the Protocol as it stood under the earlier drafts of the Withdrawal Agreement, Northern Ireland will be able fully to participate in UK trade deals (also Art 4). However, in order to maintain the integrity of the EU single market without imposing a customs border on the island of Ireland, Northern Ireland will continue to apply various EU customs and tariff rules, including those listed in the Annexes to the Protocol (ie Northern Ireland would continue to maintain some level of regulatory alignment with the EU). This arrangement will therefore require customs checks between Great Britain and Northern Ireland (a so-called “legal border” in the Irish Sea) but avoids customs checks on the island of Ireland.’

‘The other major change introduced by the revised deal is the inclusion of a provision whereby the UK “shall provide the opportunity for democratic consent in Northern Ireland to the continued application” of these arrangements every four years after the end of the transition period (Arts 18.1 and 18.5). That democratic consent is said to be exercised in accordance with the unilateral declaration (to be) made by the UK, which in turn, provides that the democratic consent of Northern Ireland consists of, among other things, a simple majority of the Members of the Northern Ireland of the Assembly voting in favour of the continuation of these arrangements. This is a major departure from Prime Minister May’s deal because, in contrast to her deal, the new arrangements are time-limited in the event they no longer attract the democratic consent of the Northern Ireland Assembly.’

### **Political declaration crucial going forward**

**AC:** ‘Going forward the main changes come in the form of the revised political declaration that will accompany the Withdrawal Agreement. Much of it is unchanged but gone is commitment to “a trading relationship on goods that is as close as possible”. Instead there is a reference to a UK-EU FTA. This matters because, unlike the earlier version of a close trading relationship, an FTA of the sort being envisaged (eg Canada plus) would potentially lead to higher trade barriers which in turn leads to greater economic cost.’

‘In addition, the commitment in the 2018 political declaration to a “single customs territory” has been scrapped, confirming the need for checks at the border. The plan would appear to be that in the future goods will not attract tariffs (as part of an FTA) but only if they satisfy rules of origin checks. This is very likely to make some UK-EU trade more costly.’

‘Thus, in summary, with respect to the political declaration, the 2018 political declaration made a commitment to customs arrangements that “obviate the need for checks on rules of origin”. By contrast the new version of the political

declaration envisages an FTA “with appropriate and modern accompanying rules of origin”. This will surely have an impact upon integrated supply chains as used in the motor industry.’

‘However, the political declaration is non-legally binding, and these issues will still need to be fully negotiated in future talks where the EU will shift its focus (and arguably its own red lines) on to the need for a regulatory playing field. As things stand this political declaration has moved what were previously firm obligations around areas such as worker rights and consumer protection from the Withdrawal Agreement and become a much looser form of words in the political declaration. In effect, to reach this deal the EU has agreed to kick the further UK-EU regulatory relationship in to the long grass and will return to its level playing field concerns when negotiating the future trade relationship. The likely position will be that the EU will say to the UK if you want an FTA with us it will only be signed off if the UK makes binding commitment on areas such as employment rights, consumer protection and the environment.’

### **EU Parliament unlikely to consider deal until ‘it has cleared the hurdles in the UK’**

**Kieran Laird (KL):** ‘On the EU side, the European Council having signed off on the draft deal in principle during the summit, it must be approved by a majority of the European Parliament. It will then be formally concluded by the European Council on approval by at least 20 of the remaining 27 Member States with 65% of the remaining EU population. The deal is likely to pass the EU stages, but the EU Parliament will probably not look at it until it has cleared the hurdles in the UK (it did not vote on the last version of the deal, for example).’

‘On the UK side, under [section 13](#) of the European Union (Withdrawal) Act 2018, the deal must be laid before Parliament, approved by the House of Commons and debated by the House of Lords (or a motion has been laid for the Lords to debate and they have not done so within five days). There must also be an Act of Parliament implementing the withdrawal agreement, which would be the European Union (Withdrawal Agreement) Bill trailed in the Queen’s Speech on 14 October 2019.’

‘It is likely that the approval of MPs will be sought in a special sitting on 19 October 2019, mainly because if the deal has not been approved by then and Parliament has not consented to a no-deal Brexit, then the PM will be required to request the EU for an extension under the [European Union \(Withdrawal\) \(No 2\) Act 2019](#). It will be interesting to see whether the PM succeeds in his attempt to get the EU27 to state that it will not grant an extension if this deal is voted down—essentially giving MPs a straight choice between this deal and a no-deal Brexit on 31 October.’

‘If not, then whether or not MPs vote it down will depend on how many pro-Brexit MPs choose to side with the DUP who have stated that they are opposed to it because it would involve different treatment between Northern Ireland and the rest of the UK. The number of MPs voting against successive versions of the deal has decreased with each vote and it may be that MPs feel that now is the time to bite the bullet and accept a compromise, no matter what the DUP’s concerns are—particularly on the Conservative side, if that would allow the party to go into the inevitable election having secured Brexit. However, approval will still require a number to swing behind the deal (including those who have left the Conservative Party and some Labour MPs).’

‘Another factor to watch is Jolyon Maugham’s latest challenge in the Scottish Court of Session, following his statement that he would seek to prevent the deal being laid before Parliament on the basis that it is contrary to [section 55](#) of the Taxation (Cross-border Trade) Act 2018. However, it is likely that the courts would be unwilling to go so far as to

prevent a debate in Parliament, particularly given the recent lengths that the Supreme Court went to in order to protect the ability of Parliament to carry out its functions and the fact that Parliament can simply use the Withdrawal Agreement Bill to remove any contradiction from the statute book.'

**For now, 'little direct impact on lawyers' until the deal is passed on both sides**

**LRE:** 'Until the deal is agreed by the UK Parliament and on the EU side, there is little direct impact on lawyers. However, the impacts will be great if and when the deal is approved and enters into force, largely as a result of the application of the provisions relating to the "transition period" under the draft agreement.'

Source: [New Protocol on Ireland/Northern Ireland and Political Declaration](#)

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