

BREXIT: BREAKING THE STALEMATE AT WESTMINSTER?



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THE WAY AHEAD

KEY BREXIT POINTS

- Any end status deal (unless it's continued EU membership) requires the Withdrawal Agreement.
- The Withdrawal Agreement will have to contain the Irish Protocol (including the backstop).
- If/when the UK does leave the EU, a standstill transition period is only available with the Withdrawal Agreement.
- A customs union on its own is not a solution to the Irish border issue – regulatory & product standard requirements, VAT & excise have to be considered too and need a sustainable legal solution for the long term compatible with the EU legal order.
- The EU has been clear - no half in/half out solution for the UK on the four Single Market freedoms in any future relationship deal.
- Current Political Declaration enables a range of outcomes on end status relationship from a standard free trade agreement (FTA) to a customs union to a Single Market mechanism, depending on UK and EU red lines. The UK and the EU could, however, decide to make the preferred relationship more specific within the Declaration.



THE WAY AHEAD

PROCESSES AT WESTMINSTER

- Twin track approach –
- First track:
- UK Government still continuing with meaningful vote pre-ratification process in terms of s 13 (1) (b) of EUWA 2018 – could be further attempt to secure this tomorrow. In terms of current UK law, **cannot ratify deal without passing this stage first.**
- **EU Withdrawal Agreement Bill** would need to be passed to give legal force to key parts of deal in the UK: transition mechanism, citizens' rights, financial settlement and Irish protocol. Could take 6 weeks or so to pass.
- May not go through CRAG 2010 procedures, so ratification instrument could be deposited if EUWAB obtains Royal Assent.



THE WAY AHEAD

PROCESSES AT WESTMINSTER

- Twin track approach –
- Second track:
- House of Commons now embarked on process of indicative votes on Brexit outcomes. Votes last night on following options – none secured a majority - will resume Monday.
- CU (permanent): Aye 264-No 272
- CU (& regulatory alignment): Aye 237-No 307
- SM + customs arrangement: Aye 183-No 283
- SM, no customs union: Aye 65-No 377
- No Deal: Aye 160-No 400
- Malthouse proposal: Aye 139-No 422
- Revoke Article 50 notice: Aye 184-No 293
- Confirmatory ballot: Aye 268-No 295



THE WAY AHEAD

PROCESSES AT WESTMINSTER

- If Withdrawal Agreement (at least) is approved by end of tomorrow then extension until May 22 is triggered, which could also include redrafting of PD (if requested), and time to pass EUWAB.
- If it is approved by April 12, it may be possible to extend until May 22 or to some other date depending upon EUCO legal decisions.
- If it is not approved by April 12, further EUCO intervention would be required to re-extend the Article 50 period, or not (no deal exit).
- If UK Govt does not accept or will not negotiate upon a non-binding motion agreed by the House of Commons on an alternative path forward, where is the delivery mechanism to negotiate with EU without new govt. or PM?
- Indicative vote process could still shape development of PD even if WA agreed by Commons by end of tomorrow.
- Ratification requires – WA & PD to be approved. EUCO Decision only refers to approval of WA to secure longer extension beyond April 12.



THE WAY AHEAD

EUCO DECISION March 22

Article 1

In the event that the Withdrawal Agreement is approved by the House of Commons by 29 March 2019 at the latest, the period provided for in Article 50(3) TEU is extended until 22 May 2019.

In the event that the Withdrawal Agreement is not approved by the House of Commons by 29 March 2019 at the latest, the period provided for in Article 50(3) TEU is extended until 12 April 2019. In that event, the United Kingdom will indicate a way forward before 12 April 2019, for consideration by the European Council.

Article 2

This decision shall enter into force on the day of its adoption.

END STATUS OPTIONS



Canada – FTA: reduces tariffs across many product lines but still high NTBs. Low regulatory alignment, high control



Turkey – bespoke customs union with very limited regulatory alignment. Some FTA terms added alongside?



UK Govt plan – European Free Trade Area with zero-tariff & free trade in goods (apart from aquaculture).



Ukraine – strong alignment with SM acquis & SM access in goods. No CU or VAT arrangement so border checks exist



Norway+ – 4 SM freedoms with high alignment with acquis in goods & services. Could add customs arrangement. No CU or VAT arrangement so border checks exist.

EITHER BACKSTOP MAY NEED TO APPLY FULLY IN CANADA or UK OPTIONS INITIALLY or NI-SPECIFIC MEASURES ON REGULATORY ALIGNMENT REQUIRED AND ALSO IN TURKEY OPTION



END STATUS OPTIONS

	Type of relationship				
	FTA	CU	UK Govt plan	Ukraine-style Association Agreement	Norway+ (with CU)
Checks for products of animal origin moving UK-EU?	YES	YES	?	YES	NO
Checks for origin of goods at border?	YES	NO * but movement certificate required	?	YES	NO
Checks for tariffs?	YES	NO	Intention NO but is arrangement negotiable with the EU?	YES	NO
Autonomous UK trade policy?	YES for GB but special arrangements needed for NI	NO	YES for GB but special arrangements needed for NI	YES for GB but special arrangements needed for NI	NO (if in EFTA pillar would need opt-out from EFTA trade deals process)



END STATUS OPTIONS

Common external tariff with EU?	NO	YES	NO	NO	YES
Full access to EU VAT system & no VAT system border EU/UK?	NO	NO	NO	NO	NO * not in EEA Agreement, would need to be negotiated in addition
Involves jurisdiction of CJEU?	PARTIALLY (NI border issues could be referred to CJEU for binding ruling)	PROBABLY (unless dock into EFTA Court as an alternative in terms of flanking provisions with CU)	PARTIALLY (NI border issues could be referred to CJEU for binding ruling if backstop operated & for some other purposes)	YES (Must take due account of CJEU decisions. Legal issues can be referred to CJEU for binding ruling)	TO BE NEGOTIATED. (EU may require separate pillar from EFTA pillar involving CJEU oversight rather than EFTA Court)



THE WAY AHEAD

CONSIDERATIONS FOR EU27 HEADS OF GOVT

DURATION OF EXTENSION

- Any agreed extension date becomes departure date unless a Withdrawal Agreement enters into force prior to that or the UK Article 50 notice is revoked. **Realistic prospect of WA still being approved at Westminster?**
- Possible could be more than one extension, but cannot be in such a way that would make extension indefinite. **Extension process must be time-limited in nature.**
- Any extension must be compatible with continued functioning of EU institutions, viz. necessity of UK participation in EU elections for extension to last beyond 1 July.
- Treaty change required to exempt departing state from this requirement – a 2 year process.
- Future relationship can only be negotiated once departing state becomes third country to Union – separation of Article 50 process & Future relationship reasserted.
- Requires official approval of extension request from departing state. **Would rolling extensions be considered or any further decision for a long one only?**

CONDITIONS ATTACHED

- No special conditions applicable other than those of continuing membership apart from deciding on participating in European elections by April 11.
- Trade-off between duration of extension and purpose served by it, viz. to facilitate orderly withdrawal, or new political process in the UK.
- **Member state bound by obligations and enjoys rights of membership as before. Only excluded from EUCO meetings at 27 – as now.**



THE WAY AHEAD

CONSIDERATIONS FOR EUCO IF WA STILL not APPROVED

OPTION 1

- Longer extension (9+ months), granted by EUCO
- Purpose – WA & backstop still required for orderly exit. For new political process or to negotiate new PD or bridging document? Cannot go further than that under Art 50 legal basis

OPTION 2

- Further short extension (up to 3 months) granted by EUCO
- Purpose – to facilitate UK ratification of WA, PD and other documents. Could also be used to redraft PD in line with and joint House of Commons & UK Govt positions on end status relationship.

OPTION 3

- No long extension granted – short technical extension to prepare both sides for no deal.
- Purpose – to further strengthen no deal preparations pursuant to EU institutions unilateral measures adopted.



THE WAY AHEAD

THE WITHDRAWAL AGREEMENT

- Treaty which will arrange for the UK's **orderly exit from the political institutions and EU membership.**
- Secures four key aims: the **standstill transition period; preventing a hard border on island of Ireland; reaching a settlement on citizens' rights (EU in UK, UK in EU); and providing for the financial settlement** in terms of previous UK commitments.
- The transition –will apply the **relevant parts of the EU single market and customs union rules to the UK in the same way as now.** There would be **no change in trading conditions** for the duration of the transition.
- In **July 2020** (six months prior to the expiry of the transition period if not extended), if there is no deal ready to be implemented, the UK faces a choice **either to request an extension of the transition period (with a continuation of free movement of people and negotiated ad hoc contributions to the EU) or to enter the backstop.**
- The transition period can be extended once beyond the **21 month specified period** for an undefined period in the Treaty, but cannot be extended again.



THE WAY AHEAD

THE WITHDRAWAL AGREEMENT

- There is a reciprocal agreement on each others **GIs in relation to food** pending any final relationship deal.
- In terms of **governance** of the agreement, the arrangements bear similarity to those favoured by the EU in some of its most recent third country agreements, eg. there will be a **Joint Committee comprised of officials from both sides, a dispute resolution process**, no provision that the UK courts or ECJ could bind each other, but on **matters involving the definitive interpretation of EU Law concepts, the ECJ will be able to make an authoritative and binding interpretation.**
- The ECJ will also have a **distinct influence** in some of the other areas of alignment within the backstop.
- Needs to be passed into UK law through an **EU Withdrawal Agreement Bill.**



THE WAY AHEAD

THE POLITICAL DECLARATION

- The **Withdrawal Agreement and Political Declaration** were adopted by the European Council on November 25.
- This would expect to be converted by the Council of the European Union into a Directive mandating negotiations of the co-operative relationship by DG Trade within the Commission with the UK.
- Calls for an ambitious, broad, deep and flexible partnership on trade, economic co-operation, law enforcement, criminal justice, foreign policy, security, defence.
- Any future economic relationship must respect the **indivisibility of the four freedoms and the integrity of the EU Single Market and Customs Union**.
- Should also respect decision of 2016 Referendum in the UK on the **ending of free movement of persons and an independent trade policy** – no definition of what independent means in or outside of the EU Common External Tariff.



THE WAY AHEAD

THE POLITICAL DECLARATION

- On regulation agree to build upon the WTO commitments on TBTs (technical barriers to trade) and SPS (sanitary and phytosanitary) rules with **common principles on standardisation, technical regulations, conformity assessment, accreditation, market surveillance and labelling.**
- Parties agree to **ambitious customs arrangements, making use of all available facilitative arrangements and technologies,** to be considered in avoiding a hard border on Ireland on a permanent footing.
- On goods, **there is no commitment to frictionless trade.** The nearest reference is a common commitment to create a Free Trade Area with **deep customs and regulatory co-operation underpinned by provisions securing a level playing field and open and fair competition.**
- **No tariffs, fees, charges or quantitative restrictions across all sectors with ambitious customs arrangements which build upon the single customs territory proposal in the Withdrawal Agreement to prevent checks for rules of origin.**



THE WAY AHEAd

THE POLITICAL DECLARATION - analysed

- The future relationship discusses the balance between an agreement respecting the autonomy of the EU's decision making processes, in particular the Single Market and Customs Union and the four freedoms as an indivisible whole, with the UK's red lines including on trade and control of migration. **This provision is simply declaratory of both sides current red lines.**
- Recognises the limitations on the depth of the relationship posed by the UK Government's current negotiating red lines on an independent trade policy.
- No commitment to “frictionless” trade in goods – biggest departure from Chequers White Paper. EU sees a deal based upon the backstop as baseline for end status negotiations. UK sees other options as still being on the table. Withdrawal Agreement is clear – in the absence of other workable options to deal with the regulatory issues at play, the UK would enter the backstop upon the expiry of transition.



The way ahead

THE POLITICAL DECLARATION - analysed

- On services, no guarantee of deep mutual access without common regulatory systems, rules or dispute resolution processes. It would also be impacted by MFN clauses in FTAs the EU has recently applied with Canada, South Korea and Japan. Any preferential access given to the UK out of a Single Market structure would also have to be offered to these states. Hence, strong UK access to the services element of the Single Market is unlikely.
- UK data protection rules and practices must remain in strong alignment with those of the EU to secure future data flows. The EU has the discretion to withdraw access if the adequacy standards are no longer met by the UK.
- No reciprocal preferential labour market entry scheme between the EU and UK. Would require changes in red lines to bring this about.



ADDITIONAL DOCUMENTS WITHIN EXIT DEAL

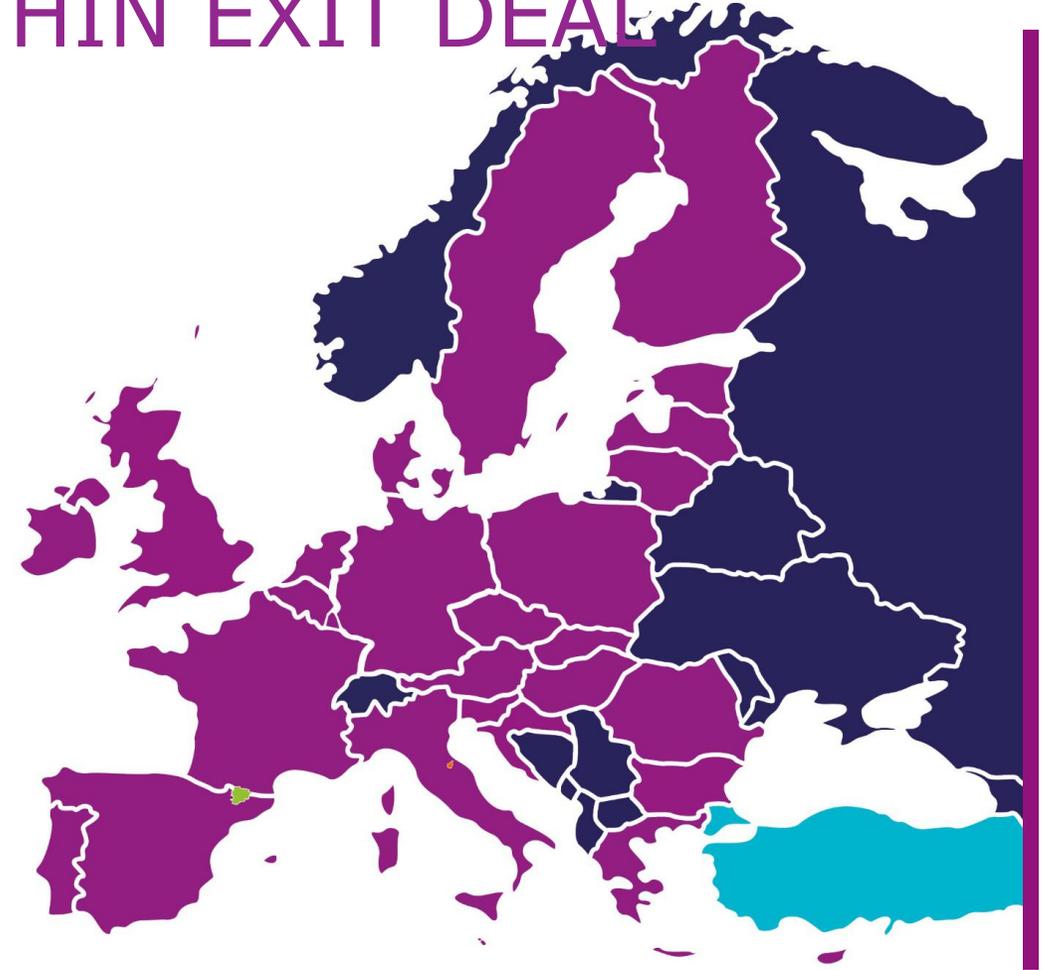
JOINT INTERPRETATIVE INSTRUMENT
CLARIFYING TEMPORARY NATURE OF
BACKSTOP IN WA AND ACTIONABILITY OF
BAD FAITH CONSIDERATION IN ARBITRATION
PROCESS WITHIN IRISH PROTOCOL

JOINT STATEMENT PROVIDING FURTHER
DETAILS ON POLITICAL DECLARATION – ON
THE USE OF TECHNOLOGY AROUND IRISH
BORDER

UK UNILATERAL STATEMENT ON TEMPORARY
NATURE OF BACKSTOP AND ABILITY TO
SUSPEND PROTOCOL SHOULD ARBITRATION
PANEL RULE BAD FAITH ON PART OF EU
AROUND IRISH BORDER NEGOTIATIONS AND
PANEL RULING FLOUTED BY EU.

KEY

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|--|---|
|  EU Customs Union |  EU- SanMarino Customs Union |
|  EU-Turkey Customs Union |  Outside Customs EU Union |
|  EU-Andorra Customs Union | |





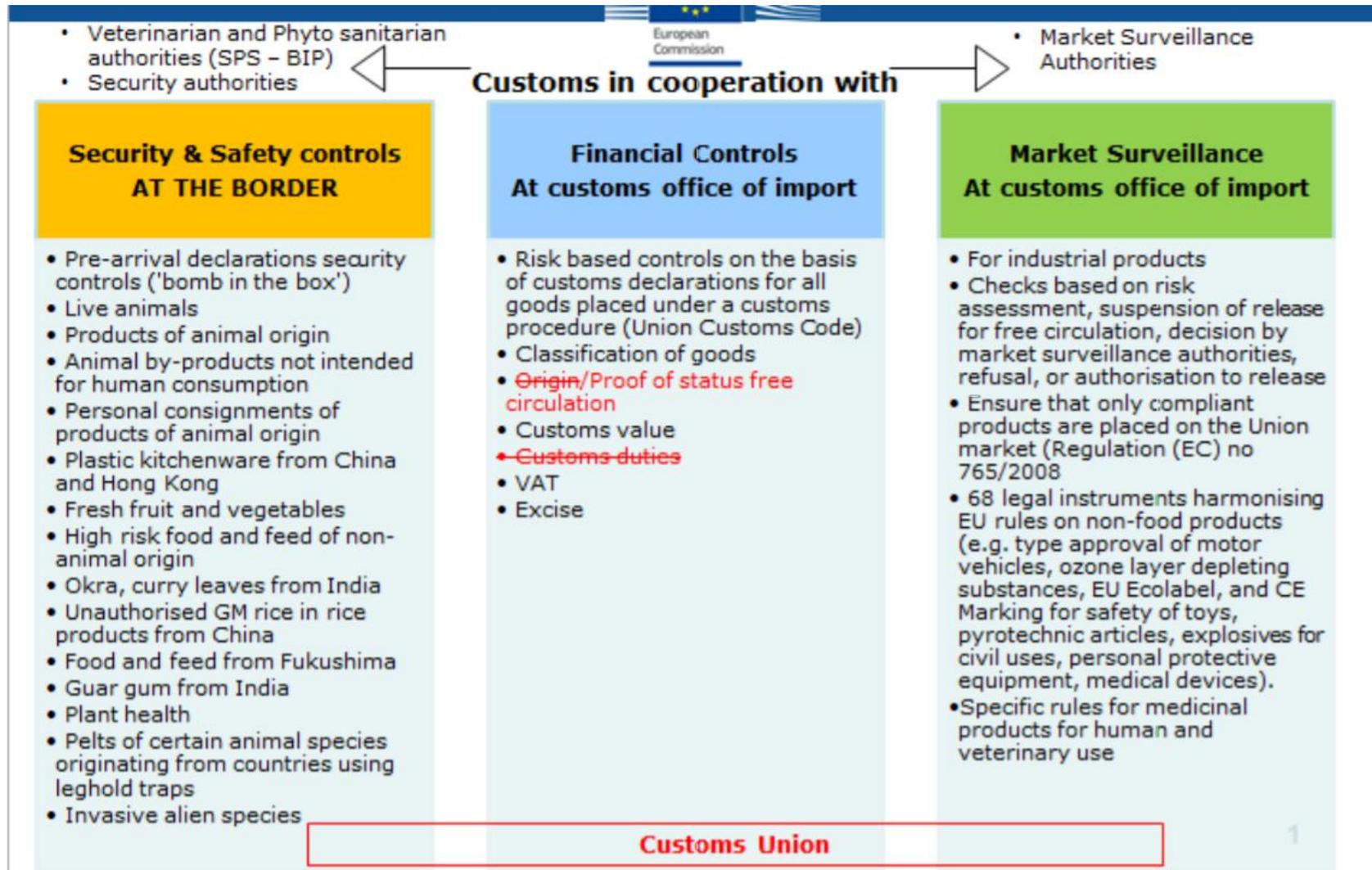
The way ahead

THE IRISH PROTOCOL – THE BACKSTOP

- On environmental policy, labour standards, and taxation matters non-regression clauses will apply.
- These would not involve dynamic alignment with updated EU standards but there would be an expectation that UK standards would not fall out of sync with the EU floor of rights.
- Any **breach of these clauses could be referred to the Joint Committee** governing this part of the agreement.
- As currently drafted **fish and fish products would be out of the customs union** (and potentially subject to MFN tariffs). A further agreement to be negotiated from April 2019 would be required to alter this. Much would depend on whether the UK fishing industry accepts the trade-off of common fisheries management and access (albeit outside of the CFP) for tariff-free access to the EU market for fish exports.
- UK retailers would face additional costs on EU fish imports if MFN tariffs were payable.



COMMISSION SLIDE ON BORDER CONTROLS





THE BACKSTOP

