

November 19, 2018

BREXIT - THE DRAFT DIVORCE DEAL AND ITS FALL-OUT

To Our Clients and Friends:

1. Negotiators for the European Union and the United Kingdom have agreed a 585-page draft withdrawal agreement (the “**Withdrawal Agreement**”). A copy of the Withdrawal Agreement can be found [here](#).
2. The draft Withdrawal Agreement sets out how and when the UK will leave the EU and will be legally binding. A separate, non-binding draft declaration ([available here](#)) sets out the aspirations for the future trading relationship between the UK and EU (this draft declaration is still being negotiated, with the UK and EU expected to agree a final draft this week).
3. This long-awaited “divorce deal” has been agreed by the UK Government’s senior ministers (the Cabinet) but it now needs to be approved by MPs in the UK House of Commons and by the 27 other EU member states and the European Parliament.

Next steps

4. An EU summit is currently due to be held on 25 November 2018, where EU 27 leaders are expected to sign off on the Withdrawal Agreement and the future relationship declaration.
5. Following the EU meeting the deal will be put to the House of Commons in the UK Parliament for a “meaningful vote”. It is not yet clear what the motion will be nor what amendments will be permitted. But, for all practical purposes, it is a critical vote to approve the deal.
6. The House of Commons vote is expected around 7 December 2018 and at present it looks unlikely that the vote will be passed. That could change if amendments are agreed to the Withdrawal Agreement or future relationship declaration.
7. If the House of Commons votes the deal down, the Government will have up to 21 days to put forward a new plan. Any new agreement would need to be agreed with the EU.
8. Two of the key issues relate to (i) the circumstances in which the UK can withdraw from the transition arrangements and whether it can do so without an EU veto and (ii) whether Northern Ireland will have a different regulatory regime to the rest of the UK, creating a border down the Irish Sea. “Backstop” arrangements are in place to prevent that happening but there is a lack of consensus over whether those arrangements are good enough. The political debate in the UK is focused on whether improvements can be made to the provisions relating to these two issues in particular. The EU position

is that no changes of substance will be allowed but “some tweaking” of the language in the political declaration may be possible. Some of the EU 27 countries are also thought to be considering comments.

9. The UK Cabinet backed the divorce deal. However, two cabinet ministers and two junior ministers subsequently resigned, including the Brexit secretary Dominic Raab. New cabinet appointments have been made, including one Brexit supporter and one Remain supporter.

10. A number of leading backbench Conservative Party MPs have called for the Prime Minister to stand down, and are seeking to move for a vote of no confidence in her leadership of the Conservative Party. A challenge is triggered if 15% of Conservative MPs (48 in total) write letters to the Party’s Chief Whip demanding a confidence vote. As of today, at least 24 MPs have publicly confirmed they have submitted letters. If a confidence vote is called, then it is passed if a simple majority of Conservative MPs vote in favour. It is not clear that this will happen and, if Theresa May wins, the rules then prevent another vote of confidence for twelve months. If she lost, there would be a separate process to elect a new leader but Theresa May, or a caretaker, would remain as Prime Minister until a new leader was elected.

Content of Withdrawal Agreement

11. The UK is due to leave the EU at 11 pm on Friday 29 March 2019 (midnight CET on 30 March 2019). The Withdrawal Agreement sets out the terms of the UK’s departure from the EU:

- **Transition period:** The Withdrawal Agreement proposes a 21-month transition period after the UK’s departure at the end of March 2019. That end date can be extended once if more time is needed for a trade deal to be secured and to avoid the UK entering into the backstop (see below). The draft Withdrawal Agreement does not yet give a specific end-date for this extension, stating only that it will end by “20xx”.
- **Governance:** During the transition period, and if the transition period is extended into a backstop, the UK will have to follow all EU rules and abide by Court of Justice of the European Union (CJEU) rulings. Opponents argue this leaves the UK as a rule taker and no longer a rule maker.
- **Financial arrangement:** The Withdrawal Agreement does not specify the “divorce bill” but additional notes provided by the Government estimate a “fair financial settlement” of around £39 billion from the UK. This covers financial liabilities accrued but not yet paid during the UK’s membership of the EU and payments to be made to the EU Budget during the transition period.
- **Future trading relations:** The Withdrawal Agreement does not include a trade deal, which will be hammered out in the transition period. Under the Withdrawal Agreement, there will be a “single customs territory” until the end of the transition period on 31 December 2020. The UK will then remain indefinitely in a customs union with the EU if a new trade agreement is not reached in that time. This arrangement is intended to avoid a “hard border” between Northern Ireland and the Republic of Ireland – see below. Among the political difficulties with this proposed arrangement is that a customs union is, along with the single market, essentially one of

the key structures of the EU, and remaining in such a customs union is likely to be characterised as hollowing out the whole purpose of Brexit.

- **Northern Ireland backstop:** The management of the flow of goods and people across the Irish land border, and between Northern Ireland and the UK, have become critical issues in the Brexit debate and negotiations. Both sides want to avoid a “hard border” (physical checks or infrastructure between Northern Ireland and Ireland), and a key part of the negotiations for the Withdrawal Agreement has been agreeing the position of last resort in the event that the UK leaves the EU without securing an all-encompassing deal (the so-called “backstop”). The agreed backstop would involve Northern Ireland being in the same customs territory as the rest of the UK and the EU. It would, however, mean different (EU) regulations for Northern Ireland in agriculture, the environment, state aid and other areas. There would also be checks on goods traded from Northern Ireland to the rest of the UK. The agreement states that the EU and the UK will use their “best endeavours” to come to a future trade agreement to avoid the backstop, and notes the transition period can also be extended. While this arrangement can likely command the support of the other 27 EU member states, including, critically, the Republic of Ireland, the fact that it creates trade barriers, however technical, between Northern Ireland and Great Britain is likely to render it unacceptable to a large minority of Conservative MPs and to the DUP.
- **Exiting the backstop:** There will be no unilateral right of withdrawal from any backstop arrangement and Britain will not be able to implement free trade deals during this time. It can request to pull out, but the final decision will rest with an independent arbitration panel with members nominated by both sides: two from the UK-side, two from the EU-side and one chairperson agreed by both parties.
- **Immigration:** EU nationals who have lived in the UK continually for five years, and UK citizens who have lived in EU countries, will have the right to stay permanently in the UK (or the EU, as the case may be), along with their family members. Free movement of workers between the EU and UK will come to an end, although there will be visa-free travel to EU countries.

Conclusion

12. Some UK business leaders and senior City figures have backed the deal as a significant breakthrough in Brexit negotiations. If Brexit is to happen, many businesses will be pleased that the Withdrawal Agreement offers at least a foundation for moving forward. Other commentators are critical of the “half-way house” set out in the Withdrawal Agreement and doubt whether Theresa May’s strategy can hold. EU negotiations typically go right to the wire but the political state in the UK remains volatile while this plays out and there can be no certainty of outcome.

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