

Parliament again rejects the Brexit deal

Second defeat for the UK Prime Minister as MPs vote against the deal by a majority of 149

12 March 2019

Eight weeks since the UK Parliament rejected the UK Government's negotiated Brexit deal by a historic margin, they have once again voted down the agreement – although with a significantly reduced majority. The Prime Minister responded by declaring that the Government will agree time to debate and vote on motions relating to no deal and on extending Article 50. Despite the defeat, it remains entirely possible that the Government would seek to bring the vote on the deal for a third time in due course.

In the following briefing, FTI Consulting provides our assessment of the developments in recent days in the Brexit process and the outcome of the second 'meaningful vote' on the Brexit deal. We also briefly assess what the potential next steps might be following the defeat. Whilst the vote has highlighted the continuing lack of support for the existing deal, the size of the defeat was significantly reduced. The Prime Minister reiterated her commitment to hold a vote on Wednesday 12 March that would ask Parliament to give its view on a "no deal" Brexit and a vote the following day on whether to extend Article 50.

Voting Outcome:

Ayes (supporting the deal)	– 242
Noes (opposing the deal)	– 391
Majority	– 149
<i>Conservative Rebels (Noes)</i>	– 75
<i>Labour Rebels (Ayes)</i>	– 3

legal weight. It also reiterates the commitment made by the European Commission that, should the future relationship deal require national ratification after the end of the transition period, it would be applied provisionally – negating the need for the backstop to enter into force. Furthermore, it commits the UK to ensuring that "social and employment standards" and "environmental standards" do not regress after the end of transition and reiterates Parliament's role in considering future changes following updates in EU law. Perhaps most importantly, the statement commits the EU to establishing a specific "negotiating track" on alternative arrangements – the progress of these talks would be discussed at the first high level council meeting envisaged under the Political Declaration. This last element was strongly welcomed by the Government and is a concession beyond what the EU had previously agreed.

Revised deal

Following an intense period of negotiations, the Prime Minister went to Strasbourg on Monday 11 March to finalise a revised Brexit deal with President Juncker. Late on Monday evening the details of the deal were announced, which focussed on three key areas.

The first element was a '[Joint Statement supplementing the Political Declaration](#)'. This document reiterates the link between the Withdrawal Agreement and the Political Declaration; reinforcing the fact that the Political Declaration – whilst not a legally binding treaty – does hold

The second document to be agreed was a new '[Instrument relating to the Withdrawal Agreement](#)' concerning the arbitration mechanism. Specifically, the document states that both sides will use "best endeavours" to reach an agreement by 31 December 2020 and that it would be against their obligations for either party to "act with the objective of applying the [backstop] Protocol indefinitely."

It goes on to set out the arbitration mechanism available to both parties if either judges that the other was not using “best endeavours” to reach an agreement or did not act in “good faith” to supersede the backstop. The judgement by the arbitration panel would be legally binding on both sides. Critically, it states that if one party did not uphold the ruling of the arbitration panel, then the other party would “have the right to enact a unilateral, proportionate suspension” of the backstop. The suspension of obligations under the backstop would remain until the offending party complied with the ruling of the panel.

Thirdly, the UK published a '[unilateral declaration concerning the Northern Ireland Protocol](#)'. This declaration states that, “the objective of the Withdrawal Agreement is not to establish a permanent relationship between the [European] Union and the United Kingdom, and that the provisions of the Protocol are therefore intended to apply only temporarily”. It goes on to point out that, “the United Kingdom records its understanding that nothing in the Withdrawal Agreement would prevent it from instigating measures that could ultimately lead to disapplication of obligations under the Protocol”. This declaration, therefore, provides the UK with a legal basis to disapply the backstop if there is a breach of Article 5 of the Withdrawal Agreement (regarding good faith obligations) by the EU.

Despite these changes to the Brexit deal, the revised advice from the Attorney General, Sir Geoffrey Cox, stated that the legal risk of the UK remaining in perpetuity in the backstop is unchanged. He did concede that there is now a “reduced risk” of the UK being “indefinitely and involuntarily” trapped in the backstop. However, this is contingent on the ability to prove that the EU was not meeting its obligations to act in good faith and use best endeavours. The burden of proof for this remains relatively high. In addition, he concludes that if no future deal was agreed due to “intractable differences” rather than a failure to meet good faith obligations, the UK would have no lawful means of exiting the backstop.

He repeated some of these points when answering questions from MPs later in the day. He made the case that the UK could still subsist in the backstop Protocol if it is implemented, not through either party operating in bad faith, but due to negotiations being unsuccessful while the parties continued negotiations. However, Sir Geoffrey said that he thought it unlikely that this situation would arise. He argued that the question for MPs is whether, in light of these improvements, as a matter of political judgment the House should enter into those arrangements. He went on to say that the new documents represent “materially new legal obligations and commitments”.

Taken together, the new documents represent, “A substantive and binding reinforcement of the legal rights available to the United Kingdom”, he said, if the EU were to fail in its obligations of negotiating in good faith and using best endeavours.

Despite all of this, the key point in his advice remains; the UK could not unilaterally remove itself from the backstop at

a time of its choosing if the EU operated in good faith but negotiations simply didn’t lead to an agreement.

Position of MPs

As a result of these developments, in particular the Attorney General’s legal advice, MPs from key parliamentary factions have maintained overall hostility to the deal. Amendments had been tabled to the vote, particularly by the Liberal Democrats and by the Scottish National Party (SNP) – both of whom argued that there should be an extension to Article 50 and, in some amendments, that Brexit should be cancelled entirely. Unusually, the Speaker John Bercow chose not to select any of these amendments for debate and to be voted on as he deemed these not to be in order. Because of this, once the debate concluded MPs moved to the vote at 19.00.

The vote saw the Government’s supply and confidence partner, the Democratic Unionist Party (DUP), vote against the deal – and a significant number of Conservative pro-Brexit MPs in the European Reform Group (ERG) also voted against the deal. However, in the previous vote in January, only 196 Conservative MPs voted for the deal. On this occasion 39 more Conservative MPs supported the Government. No.10 will take this as a positive despite the overarching defeat.

Labour Party position

During the debate, the Leader of the Opposition Jeremy Corbyn reiterated his position that the deal would be damaging for the economy. He stated that the Prime Minister had ‘run-down’ the clock to try to force MPs into backing her deal. His position, that the UK should maintain permanent membership of the customs union and ‘close’ alignment with the Single Market, was outlined once again; where he stated that MPs should look seriously at the proposal as a compromise solution and a way to break the impasse in the House of Commons.

Other groups in Parliament

Throughout the debate the other main groups in Parliament made their positions clear, which were largely anti-Brexit in nature. The SNP made the case that the Scottish Parliament has voted to soften Brexit at the very least; whilst the principal SNP position remains that the UK should cancel Brexit.

The new group of MPs known as The Independent Group, made of 8 former Labour MPs and 3 Conservatives, are seeking a second referendum to give the public an opportunity to vote to remain in the EU. This group of MPs did table an amendment asking for a “public vote” by the latest 30 September – however, as mentioned above, this was not selected. It is certain that this group will attempt to table a similar amendment for the next series of votes (see below for further information).

Other MPs outside of these groups also universally voted against the deal – with the exception of 4 of the independent MPs who are no longer affiliated with a given Party.

Next steps

Following the vote, the Prime Minister made a statement to the House. She stated that she will provide MPs the opportunity to vote on a motion regarding no deal. For that motion the Government will allow their own MPs a free vote. As for the wording, the Government will note that no deal still remains the default option unless a deal is agreed. However, the PM did state that she would be voting against a no deal situation, citing the threat of no deal to the integrity of the UK and the economic impact this would have. In addition, she committed to bring forward a vote later in the week on extending Article 50. She concluded her brief statement by outlining the choices available to the House – including revoking Article 50.

Remaining options

As a result of the defeat, the Government is now facing the prospect of needing to request an extension to Article 50, which MPs will likely vote for later this week. However, deciding on the length of that extension is challenging. President Juncker yesterday stated that an extension until 26 May (the final day of EU elections) would be acceptable if the deal has been agreed and if further time is needed for ratification purposes. However, if an extension is sought for continued negotiations, this would require a longer time-period – potentially up to a year.

In this scenario of a longer extension, it is almost certain that the UK would need to participate in the EU elections. This will create issues because the EU has already allocated the UK's seats to other Member States, who will vote for these additional MEPs that then may not be able to take their positions in the European Parliament if UK MEPs are present. In addition, there will need to be a debate about what role UK MEPs can have – for example, will they be able to vote or be nominated for Chairs of Committees? These sorts of questions would need to be addressed before the EU agreed to an extension beyond the May elections. Fundamentally, the EU are also indicating that the defeat of the deal will precipitate an acceleration of the EU's no deal preparations.

Next week the EU Council meets and a discussion will be held via the Article 50 Taskforce on the state of Brexit. Mrs May will no doubt seek to use this opportunity to extract further concessions from the EU in order for the deal to, potentially, be put back to MPs for a third occasion. In part this is contingent on the outcome of the votes later this week. However, in the main MPs will want to see significant changes to the existing deal, specifically on the time-limited nature of the backstop Protocol, before being willing to shift their positions.

Nonetheless, if as anticipated MPs vote against a no deal and then vote for an extension to Article 50, this might be enough to persuade reluctant Conservative MPs and the DUP to support the deal. The alternatives could be a longer extension, which the Government would have to agree to if MPs had rejected a no deal outcome, and may include additional financial contributions to the EU. This could lead to the imposition of a second referendum or a cross-Party consensus on a far softer form of Brexit along the Norway model – which would also need to include membership of the customs union.

MPs may take this opportunity to reflect on the impact of the decision today. Immediately prior to the vote, YouGov released a snap poll in which a majority of Leave voting respondents wanted the deal to be accepted (45% to 31%) and an even higher percentage of Conservative voters (54% to 26%). This should give MPs food for thought as the prospect of a lengthy extension or a potential revocation of Article 50 becomes ever more stark.



EXPERTS WITH IMPACT™

About FTI Consulting

FTI Consulting is an independent global business advisory firm dedicated to helping organisations manage change, mitigate risk and resolve disputes: financial, legal, operational, political & regulatory, reputational and transactional. FTI Consulting professionals, located in all major business centres throughout the world, work closely with clients to anticipate, illuminate and overcome complex business challenges and opportunities.

The views expressed in this article are those of the author(s) and not necessarily the views of FTI Consulting, its management, its subsidiaries, its affiliates, or its other professionals.

www.fticonsulting.com

Mike Archer
Director
Public Affairs, Strategic
Communications
London
+44 (0) 2037271503
mike.archer@fticonsulting.com

Gavin Rice
Senior Consultant
Public Affairs, Strategic
Communications
London
+44 (0) 2037271770
gavin.rice@fticonsulting.com