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# Brexit Countdown – Trade in Goods and Services

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UK Prime Minister May and the political leaders of the EU-27 have endorsed the draft Withdrawal Agreement that is intended to end the UK's membership of the EU on 29 March 2019. They have also indicated their support for the Political Declaration on the framework for the future relationship between the UK and the EU-27, including on trade, that will apply after the end of a transition period, at the latest by December 2022.

UK and EU leaders have rejected the possibility of re-negotiating these agreements.

However, they remain subject to approval by the UK and the EU Parliaments. The prospect of their approval by the UK Parliament is uncertain. If the UK Parliament rejects both of these agreements and the acceptability of a “no deal” outcome, there is political speculation in the UK about the possibility of a new referendum on the UK's withdrawal from the EU. However, in the absence of further intervention by both the UK and the EU, EU-UK trade would revert to WTO rules from 30 March 2019, in what would be a “hard Brexit” scenario.

## Elements of the draft Withdrawal Agreement

### Transition period – April 2019 to December 2020/2021/2022

The draft Withdrawal Agreement provides for a transition period until 31 December 2020, during which the UK will remain in the EU Single Market and Customs Union and continue to apply all EU trade law under the jurisdiction of the European Court of Justice. This will postpone the impact of Brexit on the UK's trade with both the EU and third countries for 21 months. Article 132.1 of the draft Withdrawal Agreement permits an extension of the transition period for up to one or two years, ending no later than December 2022.

The transition period is dependent on Parliamentary approval of the Withdrawal Agreement. If it were rejected, there would be no transition period – a “hard Brexit” would ensue on 30 March 2019.

However, assuming the Withdrawal Agreement is approved, during the transition period “Union law shall be applicable to and in the United Kingdom”.

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This would cover all EU trade law, including customs and trade regulations as well as trade remedies, state aid and public procurement. New EU trade regulations and directives that enter into force would also apply to the UK during the transition period, but the UK would no longer have a voice in their adoption.

The UK and the EU would negotiate their new, long-term trade agreement during the transition period based on the mandate contained in the framework for the EU-UK future relationship that accompanies the Withdrawal Agreement.

During the transition period, the UK would be able to negotiate and ratify trade agreements with third countries, but the agreements cannot enter into force until the transition period ends.

### **The Irish “backstop”**

In order to avoid a hard border between Northern Ireland and the Republic of Ireland, the draft Withdrawal Agreement contains a Protocol with the so-called Irish “backstop” solution applicable if a new EU-UK trade agreement has not been reached by the end of the transition period. The backstop would see the EU and UK becoming part of a “single customs territory”. However, this is not the same as the UK remaining in the EU Customs Union.

Customs tariffs would not apply to trade in goods between the EU and the UK, but certain customs formalities would apply. In particular, if the EU and UK cannot agree detailed provisions relating to their bilateral goods trade by 1 July 2020, UK exporters to the EU will have to start presenting to customs a “UK Movement Certificate” to show that the goods are in “free circulation” and that EU tariffs and commercial policy measures have been complied with in respect of the goods being traded.

With respect to product regulations, Northern Ireland would continue to apply EU rules and the UK authorities would be responsible for ensuring that goods exported from mainland UK to Northern Ireland comply with those rules.

The UK would be free to negotiate and enter into trade agreements with third countries as long as it does not apply a tariff which is lower than the EU’s Common External Tariff and does not apply or grant any quotas, tariff-rate quotas or duty suspensions without prior agreement of the EU. It is the potential for the EU unilaterally to influence UK trade post-Brexit, which has proven to be one of the more politically sensitive aspects of the Withdrawal Agreement in the UK.

A detailed White & Case analysis of the effects of Withdrawal Agreement on trade in goods regarding the transitional period and the Irish “backstop” arrangement can be found [here](#).

### **A new UK-EU trade agreement**

The mandate for negotiations on a permanent agreement on trade and economic cooperation is contained in the Political Declaration on the framework for the future EU-UK relationship. The new agreement would end the UK’s transitional membership of the EU Customs Union and Single Market and avoid the Irish “backstop” arrangement by obviating the need for a physical Irish border.

The mandate for negotiations is aspirational and sets out broad principles and objectives. Turning these into operational provisions and a legally-binding trade agreement will be a matter for negotiation during the transition period. In the past, the EU has cited its Comprehensive Economic and Trade Agreement with Canada (CETA) as a potential model for a future UK-EU FTA. The UK (in the “Chequers plan”) aimed to go further and make post-Brexit trade with the EU as frictionless as possible through “a free trade area for goods” with a “common rulebook” for most industrial and agri-food products that would eliminate the need for regulatory controls at the border. For services, the UK proposed close regulatory cooperation with the EU and recognition of different regulatory systems that are “equivalent” in effect. Neither of those outcomes seem to have been ruled out entirely in the Political Declaration.

With regard to trade in goods, the UK and the EU envisage a free trade area combining deep regulatory and customs cooperation underpinned by a level playing field for open and fair competition. It should be tariff and quota free across all sectors, with ambitious customs arrangements that, *inter alia*, avoid the need for checks on rules of origin. The UK and the EU will have regulatory autonomy but will seek to avoid unnecessary regulatory barriers to trade. The UK will consider aligning with EU rules in relevant areas; the extent to which it

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does so is likely to impact the extent to which the EU will require customs and regulatory checks and controls. UK and the EU will explore cooperation for their respective medicines, chemicals and aviation agencies.

With regard to trade in services and investment, the agreement will be based on host state rules and respect each other's right to regulate. Sectoral coverage should be substantial, covering all modes of supply and avoiding substantially all discrimination. Unnecessary regulatory requirements should be avoided through disciplines on domestic regulation and a framework for voluntary regulatory cooperation. Assessments to recognise regulatory equivalence will be pursued as a priority for financial services, with the aim of concluding the assessments by June 2020. There will be "transparency and appropriate consultation" on the adoption, suspension and withdrawal of equivalence decisions.

## New UK Free Trade Agreements

The EU has agreed that the UK can negotiate and ratify trade agreements during the transition period but those agreements cannot enter into force until the transition period ends.

About 40 FTAs in which the UK participates by virtue of its EU membership will cease to apply to the UK as soon as it leaves the EU. These account for over 15% of UK exports. Some are of considerable commercial value, particularly the FTAs with Switzerland, Singapore, Canada, and South Korea. The UK and the EU have agreed that during the transition period the UK will continue to be bound by the obligations of these FTAs. The other FTA parties will no longer be obliged legally to provide preferential access to the UK once it ceases to be an EU member state. The UK Government claims to be confident that they will agree to do so, since in practice the FTAs would continue functioning exactly as they do today, but that cannot be taken for granted. Long-term, the UK must agree new FTAs with these countries if it wants to keep preferential access to their markets.

UK negotiations on FTAs with other countries, such as the United States, can therefore begin from 30 March 2019. Most countries are likely to want to know the terms of the new UK-EU trade agreement before they are willing to strike deals with the UK. Recent interventions by President Trump are illustrative of the challenges the UK may face in that regard.

After March 2019, the UK will be able to apply to join existing trade and investment agreements, such as the Trans-Pacific Partnership (TPP).

## UK Obligations in the World Trade Organisation (WTO)

The UK will become an independent Member of the WTO as soon as it withdraws from the EU in March 2019. Most of its WTO obligations will remain unchanged, but its government procurement obligations and parts of its market access schedules need to be re-negotiated.

The UK must accede to the WTO Government Procurement Agreement (GPA) before it leaves the EU or it could lose preferential access to the procurement markets of its main trading partners. The timeline for doing this is tight because of the GPA accession procedures. The UK has now agreed with other GPA Parties on improved access to its public procurement market and a formal decision approving its GPA accession is expected before the end of 2018. The UK must then pass domestic legislation confirming what is in its GPA schedule and notify the WTO that it has ratified the GPA at least 30 days before its withdrawal from the EU.

It is equally important, although less urgent, for the UK to secure approval ("certification") of its Most-Favoured-Nation (MFN) market access obligations. The UK is proposing to adopt, as closely as possible, the MFN schedules that it already applies as an EU member state.

It is not anticipated that most WTO member countries will find fault with leaving unchanged the UK's MFN tariff schedule for manufactured goods and its schedule of specific commitments on market access for services, although some are expected to demand additional concessions before being willing to agree to certify the UK schedules.

Reaching agreement on the UK's MFN schedule for agricultural products is more complicated. The UK cannot duplicate the EU schedule because it includes over 100 tariff rate quotas that affect imports of certain meat and dairy products, cereals, fruits and vegetables that have been set on an EU-wide basis. The UK and the EU have proposed using historical market shares to split the quotas between them. That is a recognised WTO methodology, but several countries have objected to its use in this case, on the grounds that splitting the

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quotas would prevent them from shifting exports between the UK and EU27 to take account of market conditions. The UK has now agreed to enter full negotiations with all relevant trading partners to allocate the quotas. The negotiations are likely to be drawn out because a solution must satisfy the UK and the EU as well as the third countries involved.

Business can expect day-to-day trade with the UK to continue uninterrupted while negotiations to certify its MFN market access schedules take place. There is no time limit for that process, which could take years to complete and which could result in the UK needing to lower its MFN duties. In the meantime, the UK's proposed ("uncertified") market access schedules will be included in UK legislation and will have full legal effect under WTO rules.

## Legislative Preparations for Brexit

The UK is preparing new legislation to implement UK trade policy after the European Communities Act 1972 is repealed in March 2019. UK trade law will remain fully aligned with EU law and the Union Customs Code during the transition period. The status quo should effectively continue until December 2020 at least, assuming that the Withdrawal Agreement is approved by both parties. Thereafter, in the UK the current, unified framework of EU trade law will be replaced by an interface between UK and EU trade law underpinned by WTO law. For business, managing this change will be complex, and additional uncertainty could result from negotiation of the terms of the new UK-EU trade agreement in areas such as the introduction of customs controls and trade facilitation practices, the treatment of product regulations and standards, and rules of origin.

From 30 March 2019, the European Union (Withdrawal) Act will convert EU Regulations into UK law and will preserve existing UK trade laws that derive from EU Directives in a new category of "retained EU law".

In some areas, additional legislation is needed since the Withdrawal Act cannot be used to impose or increase taxation, including customs and excise duties and VAT. The Trade Bill (Trade Act 2018) and the Customs Bill (Taxation (Cross-Border Trade) Act 2018) are awaiting approval in Parliament. They will create the authority for the UK Government to: (i) set and collect customs duties; (ii) implement trade and customs regulations, including ensuring that the Customs and Excise Management Act 1979 continues to have effect; (iii) implement UK trade agreements with countries that already have FTAs with the EU; (iv) implement UK legal obligations in the WTO; and (v) establish the UK Trade Remedies Authority and impose trade remedy measures consistently with WTO rules. Additional legislation will be needed at a later stage to implement the results of negotiations with the EU and with other FTA partners.

Business will also have to deal with issues of devolution where legislation involves powers which have been granted to Northern Ireland, Wales and Scotland. The bottom line will be a proliferation of new law in the UK, governing trade with the EU and trade with other third countries in goods and services.

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