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BREXIT UPDATE

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An t-Ionad Fiosrachaidh

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The Scottish Parliament
Pàrlamaid na h-Alba

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CONTEXT

On 25 November 2018, EU leaders endorsed the [Withdrawal Agreement \(setting out legal arrangements for the UK's departure from the EU\) and a Political Declaration \(on the UK-EU future relationship\)](#) negotiated between the UK and the EU. Ratification of the Withdrawal Agreement and Political Declaration requires:

- approval by the UK Parliament
- approval by the European Parliament
- implementing legislation in the UK

Following the House of Commons rejection of the Withdrawal Agreement and Political Declaration on the 15 January 2019, the Prime Minister has sought to re-negotiate aspects of the deal with the EU.

This SPICe Brexit Update #82 describes the outcome of the UK's re-negotiations with the EU, recent debates and votes in the Scottish and UK Parliaments on Brexit and recent no-deal preparations.

JOINT SCOTTISH-WELSH DEBATE

On 5 March, the Scottish Parliament and National Assembly for Wales both conducted debates on Brexit.

The motion [supported by the Scottish Parliament](#) (for 87, against 29, abstentions 1) read:

That the Parliament reiterates its opposition to the damaging EU exit deal agreed by the UK Government; agrees that a no deal outcome to the current negotiations on EU withdrawal would be completely unacceptable on 29 March 2019 or at any time; calls on the UK Government to take immediate steps to prevent the UK leaving the EU without a deal, and agrees that the Article 50 process should be extended so that agreement can be reached on the best way forward to protect the interests of Scotland, Wales and the UK as a whole.

Following the vote the First Ministers of Scotland and Wales made a [joint statement](#):

- ” Today, for the first time in the 20-year history of devolution, the National Assembly for Wales and the Scottish Parliament, voted simultaneously to oppose a damaging no deal Brexit. The vast majority of Members across both Chambers voted in agreement that a no deal outcome would be completely unacceptable and that an extension to Article 50 is the best way forward to protect Wales, Scotland and the UK as a whole.

...we have come together to set out our clear opposition to the actions being taken by the UK Government. Next week the Prime Minister and the UK Parliament must show they have listened, rule out no deal at any time and request an immediate extension of Article 50.

UK RE-NEGOTIATIONS WITH THE EU

15 January 2019, the House of Common’s rejected the Withdrawal Agreement and Political Declaration in the first so-called “meaningful vote” by 202 votes to 432. Following this, on 29 January, the Prime Minister committed to re-negotiating the Northern Ireland backstop provisions with the EU.

Outcome of the re-negotiations

On the evening of 11 March, the UK and EU concluded negotiations. A set of documents was published and the Prime Minister, Theresa May and European Commission President, Jean-Claude Juncker held a joint press conference in Strasbourg.

At the press conference, the [Prime Minister made a statement](#):

“ Last November... I agreed a Brexit deal with the EU...But there was a clear concern in Parliament over one issue in particular: the Northern Ireland backstop.

Having an insurance policy to guarantee that there will never be a hard border in Northern Ireland is absolutely right – it honours the UK’s solemn commitments in the Belfast/Good Friday Agreement. But if we ever have to use that insurance policy, it cannot become a permanent arrangement and it is not the template for our future relationship. The deal that MPs voted on in January was not strong enough in making that clear – and legally binding changes were needed to set that right. Today we have agreed them.

She then described three new documents agreed during the re-negotiations:

First, a joint instrument with comparable legal weight to the Withdrawal Agreement will guarantee that the EU cannot act with the intent of applying the backstop indefinitely. If they do, it can be challenged through arbitration and if they are found to be in breach the UK can suspend the backstop. The joint instrument also gives a legal commitment that whatever replaces the backstop does not need to replicate it. And it entrenches in legally-binding form the commitments made in the exchange of letters with Presidents Tusk and Juncker in January.

Second, the UK and the EU have made a joint statement in relation to the Political Declaration. It sets out a number of commitments to enhance and expedite the process of negotiating and bringing into force the future relationship. And it makes a legal commitment that the UK and the EU will begin work immediately to replace the backstop with alternative arrangements by the end of December 2020. There will be a specific negotiating track on alternative arrangements from the very start of the next phase of negotiations. It will consider facilitations and technologies – both those currently ready and emerging. The UK’s position will be informed by the three domestic groups announced last week – for technical experts, MPs, and business and trade unions.

Third, alongside the joint instrument on the Withdrawal Agreement, the United Kingdom Government will make a Unilateral Declaration that if the backstop

comes into use and discussions on our future relationship break down so that there is no prospect of subsequent agreement, it is the position of the United Kingdom that there would be nothing to prevent the UK instigating measures that would ultimately dis-apply the backstop. Unilateral Declarations are commonly used by states alongside the ratification of treaties.

President [Jean-Claude Juncker made a statement](#) describing the joint instrument:

“ ... the Prime Minister and I have agreed on a joint legally binding instrument relating to the Withdrawal Agreement. This Instrument provides meaningful clarifications and legal guarantees on the nature of the backstop.

The backstop is an insurance policy – nothing more, nothing less. The intention is not for it to be used like with every insurance policy. And if it were ever to be used, it will never be a trap. If either side were to act in bad faith, there is a legal way for the other party to exit.

The Instrument which sets out these details has legal force while fully respecting the Guidelines the European Council has unanimously agreed. It complements the Withdrawal Agreement without reopening it. My team and I have been in constant contact with our Irish friends over the past days and over the last hours. The Taoiseach would be prepared to back this approach in the interests of an overall deal.

He went on to say that there will be no further interpretations on the EU side:

“ There will be no further interpretations of the interpretations; and no further assurances of the re-assurances – if the meaningful vote tomorrow fails. Let us be crystal clear about the choice: it is this deal or Brexit might not happen at all... I hope and I trust that today's meaningful legal assurances will be meaningful enough for the meaningful vote tomorrow.

An evening [statement on the same topic](#) was also made in the House of Commons by Minister for the Cabinet Office, David Lidington.

The documents: instrument, statement & declaration

The three documents representing the outcome of the re-negotiations (and referred to by the Prime Minister in her statement at the Strasbourg press conference) were published by the UK Government on 11 March:

- [Joint instrument relating to the agreement on withdrawal](#)
- [Joint statement supplementing the Political Declaration](#)
- [Unilateral declaration by the UK Government concerning the Northern Ireland Protocol](#)

On the same day, new versions of the [Withdrawal Agreement](#) and [Political Declaration](#) were published with “minor technical corrections” and formatted in the “EU’s standard template for international treaties”.

Finally, a new “[statement that political agreement has been reached](#)” was published. This is in line with procedures laid down in section 13 of the European Union (Withdrawal) Act 2018 and describes some procedural matters. The statement says:

“ The Government’s intention is to sign the [withdrawal] agreement after it is approved by the House of Commons under section 13(1)(b).

All of these documents are available [in a set from the UK Government website](#).

Attorney General’s legal opinion

On 12 March, the Attorney General published his [legal opinion on the Joint Instrument and Unilateral Declaration](#).

This three page letter sets out the legal status and effect of these two documents in the opinion of the UK Government’s law officer and chief legal adviser.

The conclusion of the letter reads:

“ I now consider that the legally binding provisions of the Joint Instrument and the content of the Unilateral Declaration reduce the risk that the United Kingdom could be indefinitely and involuntarily detained within the Protocol’s provisions *at least in so far as that situation had been brought about by the bad faith or want of best endeavours of the EU*.

It may be thought that if both parties deploy a sincere desire to reach agreement and the necessary diligence, flexibility and goodwill implied by the amplified duties set out in the Joint Instrument, it is highly unlikely that a satisfactory subsequent agreement to replace the Protocol will not be concluded. But as I have previously advised, that is a political judgment, which, given the mutual incentives of the parties and the available options and competing risks, I remain strongly of the view it is right to make.

However, the legal risk remains unchanged that if through no such demonstrable failure of either party, but simply because of intractable differences, that situation *does* arise, the United Kingdom would have, at least while the fundamental circumstances remained the same, no internationally lawful means of exiting the Protocol’s arrangements, save by agreement.

On the same day, the Attorney General gave a [statement on his legal opinion](#) to the House of Commons and answered questions.

SECOND MEANINGFUL VOTE

Rejected for a second time

On 12 March, the UK Government brought a second debate to the House of Commons under the “meaningful vote” provisions of the European Union (Withdrawal) Act 2018.

The motion tabled by the Prime Minister [read](#):

“ That this House approves for the purposes of section 13(1)(b) of the European Union (Withdrawal) Act 2018 the following documents laid before the House on Monday 11 March 2019:

It then listed the following documents: Withdrawal Agreement, Political Declaration, joint instrument, unilateral declaration and the joint statement, as described in *The Documents* section above.

Ten amendments [were tabled](#) to the motion, but none were selected for debate by the Speaker.

The Prime Minister [opened the debate](#). The Secretary of State for Exiting the European Union, Stephen Barclay closed.

The result of the vote on Prime Minister’s motion was Ayes: 242 Noes: 391. This means that the motion was defeated and the House of Commons declined to approve the Withdrawal Agreement, Political Declaration and other documents.

Immediately following the vote the Prime Minister confirmed that the UK Government would, the following day, bring a vote to test whether the House of Commons supports leaving the European Union without a deal on 29 March. She further confirmed that if the Commons rejected leaving the EU without a deal, the UK Government would bring a vote on 14 March on extending Article 50.

Scottish Government’s position

Ahead of the second meaningful vote the Scottish Government [issued a statement](#) from the Cabinet Secretary for Government Business and Constitutional Relations, Michael Russell:

“ It is time MPs from all parties respected the decision of the Scottish Parliament, which overwhelmingly rejected the Prime Minister’s deal. This deal must be defeated tonight. The clock must be stopped on Brexit to prevent this disaster and enable another referendum on EU membership to be held - with remain on the ballot paper.

NO-DEAL VOTE

Motion to reject no-deal agreed

On 13 March, the UK Government brought a debate to the House of Commons on a no-deal Brexit.

The motion tabled by the Prime Minister [read](#):

- ” That this House declines to approve leaving the European Union without a Withdrawal Agreement and a Framework for the Future Relationship on 29 March 2019; and notes that leaving without a deal remains the default in UK and EU law unless this House and the EU ratify an agreement.

Six amendments [were tabled](#) to this motion. The Speaker selected two:

Amendment (a) - Dame Caroline Spelman

Line 1, leave out from “House” to end and add “rejects the United Kingdom leaving the European Union without a Withdrawal Agreement and a Framework for the Future Relationship.”

Amendment (f) - Damian Green

At end, add “; notes the steps taken by the Government, the EU and its Member States to minimise any disruption that may occur should the UK leave the EU without an agreed Withdrawal Agreement and proposes that the Government should build on this work as follows:

1. That the Government should publish the UK’s Day One Tariff Schedules immediately;
2. To allow businesses to prepare for the operation of those tariffs, that the Government should seek an extension of the Article 50 process to 10.59pm on 22 May 2019, at which point the UK would leave the EU;
3. Thereafter, in a spirit of co-operation and in order to begin discussions on the Future Relationship, the Government should offer a further set of mutual standstill agreements with the EU and Member States for an agreed period ending no later than 30 December 2021, during which period the UK would pay an agreed sum equivalent to its net EU contributions and satisfy its other public international law obligations; and
4. The Government should unilaterally guarantee the rights of EU citizens resident in the UK.”.

The Secretary of State for Environment, Food and Rural Affairs, Michael Gove [opened the debate](#).

The results of the votes were:

Amendment (a)	Agreed (Ayes: 312 Noes: 308)
Amendment (f)	Defeated (Ayes: 164 Noes: 374)
Motion as amended by (a)	Agreed (Ayes: 321 Noes: 278)

The agreed motion therefore [read](#):

That this House rejects the United Kingdom leaving the European Union without a Withdrawal Agreement and a Framework for the Future Relationship.

This motion has no legal effect.

WHAT NEXT? - FUTURE BREXIT SCENARIOS

Today (14 March) the House of Commons will hold a debate and vote on extending Article 50. The [motion tabled for debate](#) by the Prime Minister reads:

That this House:

(1) notes the resolutions of the House of 12 and 13 March, and accordingly agrees that the Government will seek to agree with the European Union an extension of the period specified in Article 50(3);

(2) agrees that, if the House has passed a resolution approving the negotiated withdrawal agreement and the framework for the future relationship for the purposes of section 13(1) (b) of the European Union (Withdrawal) Act 2018 by 20 March 2019, then the Government will seek to agree with the European Union a one-off extension of the period specified in Article 50(3) for a period ending on 30 June 2019 for the purpose of passing the necessary EU exit legislation; and

(3) notes that, if the House has not passed a resolution approving the negotiated withdrawal agreement and the framework for the future relationship for the purposes of section 13(1)(b) of the European Union (Withdrawal) Act 2018 by 20 March 2019, then it is highly likely that the European Council at its meeting the following day would require a clear purpose for any extension, not least to determine its length, and that any extension beyond 30 June 2019 would require the United Kingdom to hold European Parliament elections in May 2019.

If the House of Commons fails to request an extension to the Article 50 period or if the EU Member State Governments refuse such a request, the default position is that the UK will leave the EU on 29 March, irrespective of whether a Withdrawal Agreement has been finalised.

Despite [Jeremy Corbyn's statement that the current Withdrawal Agreement is "clearly dead"](#), at this stage there is nothing to stop the Prime Minister bringing forward a third meaningful vote. Given the EU response to the second meaningful vote suggested there was no more it could do on the Withdrawal Agreement, it is unlikely the substance of

the Agreement is going to change at this stage. The only way it might change is if the UK Government indicates a willingness to change its red lines [as was discussed in the SPICe blog published after the first meaningful vote](#).

If an extension to the Article 50 period is requested, a consideration will be the length of time of any extension – as recognised by the Prime Minister’s motion. European Commission President Jean-Claude Juncker [wrote that the UK’s withdrawal should be complete before the European Elections on 23-26 May 2019](#). The implication of the Commission President’s position appears to be that failure to leave before this time would mean the UK would need to participate in those elections. The Prime Minister’s motion recognises this but indicates the UK Government believes that the deadline is actually 30 June 2019.

However, [others have suggested the EU would prefer a longer extension period – possibly to the end of 2020](#). At this stage EU Member State Governments have yet to formally discuss a request for an Article 50 extension. It is therefore not clear whether such an extension would be granted, or what conditions might be placed on such an extension.

The EU’s consideration of an Article 50 extension will also include considering the purpose of any extension. For example, would it be to allow the UK to seek a different approach, potentially involving a change to its red lines or would it merely be playing for time? A short extension for instance might not allow for any substantive change to the UK approach and might in effect just move the possibility of a no-deal Brexit two or three months into the future. In this scenario it’s possible the Prime Minister might seek to bring her Withdrawal Agreement back to the House of Commons for another vote at some point before the UK again potentially leaves the EU with no-deal.

In contrast, an extension for a longer period might allow the UK Government to pursue other options such as a referendum or allow for a general election to take place.

A final option open to the UK Government would be to revoke Article 50 and revert to remaining in the EU. This possibility was confirmed by the [European Court of Justice ruling in December 2018 that Article 50 could be unilaterally revoked by the UK Government](#).

PREPARING FOR THE EUROPEAN COUNCIL

The next European Council of EU leaders is scheduled for 21-22 March – one week before exit day. Brexit is on [the agenda](#) for the EU27 on 21 March.

The joint statement and instrument agreed as part of the UK’s re-negotiation require European Council endorsement, as would any request from the UK for an extension to Article 50.

On the 11 March at the conclusion of re-negotiations with the UK, European Commission President, [Jean-Claude Juncker wrote](#) to European Council President Donald Tusk recommending that:

” the European Council endorses [the joint statement and instrument] at its meeting of 21-22 March, subject to a prior positive vote in the House of Commons on the Withdrawal Agreement.

This “prior positive vote” has not yet happened - as described above, the Withdrawal Agreement was rejected in the second meaningful vote.

On 13 March, the European Parliament held a debate on [Preparation of the European Council meeting of 21 and 22 March 2019 and UK’s withdrawal from the EU](#).

During the debate the European Commission’s chief negotiator, [Michel Barnier said](#):

” I would like to simply recall to everybody : if the United Kingdom still wants to leave the European Union and leave it in an orderly fashion, then this treaty that we negotiated with Theresa May’s government over the past year and a half remains the only treaty available.

On the possibility of a no-deal Brexit, he said:

” We are in a very serious moment because the risk of no deal has never been higher, including an accidental no deal. I recommend that nobody underestimates this risk or its consequences. Together, we call on all persons concerned to prepare. And on our side, we are preparing.

NO-DEAL PREPARATIONS

Ireland/Northern Ireland border (UK Government)

On the morning of 13 March, the UK Government [issued guidance](#) in relation to the unilateral approach it would take to avoid a hard border with Northern Ireland.

The guidance describes a unilateral and temporary approach with no new checks or controls on goods at the land border (from the UK); but a small number of strictly necessary measures would be in place. The guidance recognises the “challenge posed by organised criminals seeking to exploit any new system”.

- More details and specific measures are available in the [guidance note](#) and [press release](#).

Customs duty on imports (UK Government)

On the morning of 13 March, the UK Government issued [information on the UK’s temporary tariff regime](#) in a no deal scenario.

The UK Government states it would set temporary rates for up to 12 months and has published these temporary rates. 87% of total imports to the UK by value would be eligible for tariff free access.

Categories of goods imported into the UK which would be subject to tariffs and/or quota include:

- beef, lamb, pork, poultry and some dairy
- finished vehicles
- certain ceramics, fertiliser and fuel
- a set of goods from developing countries, including bananas, raw cane sugar, and certain kinds of fish

Goods crossing from Ireland into Northern Ireland are exempt from the temporary import tariffs. The UK Government say the regime would apply equally to all other trading partners except where a free trade agreement is in place and “around 70 developing countries that will benefit from preferential access to our market”.

- More information is available in the UK Government’s [press release](#).
- The Department for Exiting the European Union provided a [list of trade agreements and their status in a no-deal Brexit](#) on 7 March.

The Scottish Government responded to the temporary tariff regime with the following statement from the Cabinet Secretary for Government Business and Constitutional Relations, Michael Russell:

“ Today’s announcement – made with no prior consultation with Scotland or the other devolved administrations – presents further evidence of the UK Government’s reckless approach to Brexit.

First of all, there is simply not enough time to put the necessary arrangements in place to pass these measures. Had the UK Government acted in good time then that would not be the case.

Secondly, if we leave the EU with ‘no deal’ then it will have to impose the same tariffs on us as they do on other third countries. That would make trade with our European neighbours far more expensive and problematic than at present. The UK Government has itself conceded that this could mean a loss of almost £2 billion annually to the UK’s food and drink sector.

Of course, were Scotland to remain with the EU customs union, we would continue to enjoy minimal delays to trade or tariffs as well as reaping the benefits of other preferential economic agreements which EU members enjoy. Any type of Brexit will have a negative impact on Scotland’s economy – and what is becoming increasingly apparent is that a ‘no deal’ Brexit would be disastrous.

The [BBC report](#) that European Commissioner for Agriculture & Rural Development, Phil Hogan commented:

“ We don’t even know if it’s legal and compatible with WTO (World Trade Organization rules), it beggars belief the contradictions in this proposal... I think this is an ill-thought out proposal to change the news cycle in London, in the event of no-deal I don’t believe these issues are relevant.

International agreements (UK Government)

On 7 March, the UK Government published information on [international agreements that the UK currently participates in as a member of the EU](#). This information

1. lists the international agreements by policy area
2. outlines whether each agreement or arrangement be in place by 29th March 2019 in a no deal scenario

The following devolved (or partly devolved) policy areas are included:

- [Environment](#)
- [Fisheries](#)
- [Food & Drink](#)
- [Justice & Home Affairs](#)
- [Livestock](#)

Health and medicine supply (Scottish Government)

On 11 March, the Minister for Public Health, Sport and Wellbeing, Joe FitzPatrick attended a “four nations” EU Exit meeting of health ministers in London.

Ahead of the meeting the Scottish Government issued a [press release](#) stating:

- ” Many of the practical issues connected to medicine supply in the event of a no-deal Brexit are outside the control of the Scottish Government, such as stockpiling by pharmaceutical companies or entry and customs controls at the UK border. The UK Department of Health and Social Care provided information relating to medical supplies and the Scottish Government is now working very closely with NHS Scotland to assess and prepare for any no-deal outcome.

Business preparedness (Scottish Government)

On 13 March, the Scottish Government announced a change to the grants it has made available to support businesses:

- ” The Brexit Support Grant, administered by Scottish Enterprise, will now be available to help small and medium sized businesses manage a wide range of Brexit impacts with funding of up to £4000 each. The grant, previously only open to exporters, is now available to SME’s in Scotland for a wider variety of Brexit preparation.

The grant can be accessed by businesses employing up to 250 staff and can be used for activities including consultancy support, professional fees, external training, and international market research.

More information for businesses is available on the [Prepare for Brexit website](#).

Summary of EU preparations

On 11 March, the European Commission [stated](#):

- ” To date, the Commission has tabled 19 legislative proposals of which 11 have been adopted or agreed by the European Parliament and the Council and 8 are advancing well. In addition to this, the Commission has adopted 19 non-legislative acts.

Details on the legislation and other information is available from the European Commission’s [Brexit preparedness pages](#).

SCOTTISH PARLIAMENT ROUND-UP

UK immigration policy

On 28 February, the Minister for Europe, Migration and International Development, Ben Macpherson made a ministerial statement on [United Kingdom immigration policy after leaving the European Union: impacts on Scotland’s economy, population and society](#).

UK settled status scheme

On 7 March, Annabelle Ewing brought a members’ business debate on the [settled status scheme for European Union citizens in Scotland](#).

Future fisheries

On 12 March, the Cabinet Secretary for the Rural Economy, Fergus Ewing made a ministerial statement on [managing Scotland’s fisheries in the future](#).

SCOTTISH AFFAIRS COMMITTEE

Report published on Scotland, Trade and Brexit

The Scottish Affairs Committee concluded its trade inquiry by [publishing a report](#). Its recommendations include urging the UK Government to:

- ” Explore the option of establishing an international trade sub-committee at the Joint Ministerial Council to ensure devolved administrations have a role in setting UK trade mandates; [and]

Commit to including representatives from the devolved administrations in the UK negotiating team for future trade agreements, with the understanding that devolved ministers will not deviate from the UK Government negotiating position;

Michael Russell gives evidence in Westminster

Concluding the evidence-taking phase of its inquiry into [the relationship between the Scottish and UK Governments](#), the Scottish Affairs Committee [heard](#) from the Cabinet Secretary for Government Business and Constitutional Relations, Michael Russell on 11 March.

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About this publication

This regular paper produced by SPICe sets out developments in the UK's negotiations to leave the European Union, the process for which formally begun following the Prime Minister's triggering of Article 50 on 29 March 2017.

The updates provide information on the UK Government's approach to leaving the EU including the domestic legislation necessary to ensure a smooth transition in terms of the UK statute book, along with details of the positions of the Scottish Government and the other Devolved Administrations. The updates also provide information on developments within the EU with regard to the UK's departure. Finally, the updates will provide information on the key issues likely to be at play during the negotiations and in developing the UK's future relationship with the European Union.

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