



BRIEFING PAPER

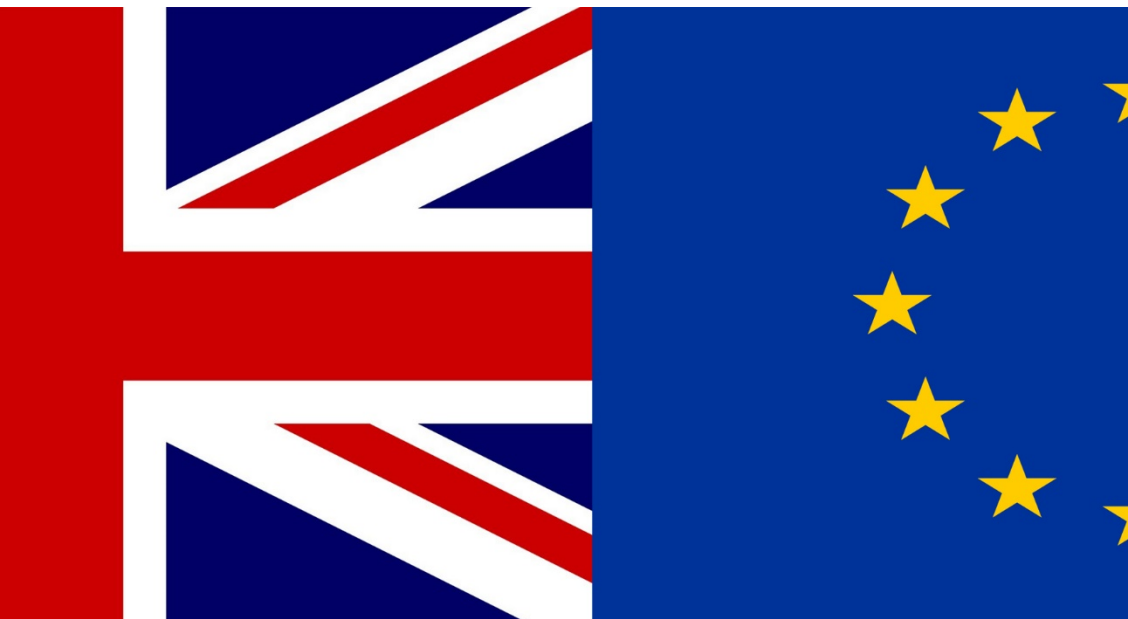
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EU assurances to the UK on Brexit

By Vaughne Miller,
Stefano Fella, Sylvia de
Mars, John Curtis

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Summary

The Brexit negotiators – Michel Barnier’s Article 50 Task Force for the EU and the UK Government – reached agreement on a Withdrawal Agreement on 14 November 2018, and the 27 other EU Member States endorsed it on 25 November. The *Treaty on European Union* sets out the exit process in Article 50, including how the EU institutions ratify such an agreement. UK ratification involves a vote on the negotiated text before a Bill is introduced in Parliament which will pave the way for its ratification.

The so-called ‘meaningful vote’ on the Withdrawal Agreement was held on 15 January – postponed from 11 December – and as most had predicted, Parliament voted against the Withdrawal Agreement (by 432 votes to 202). One of the main obstacles for the UK Parliament is the Protocol on Ireland/Northern Ireland which provides for a ‘backstop’. The ‘backstop’ is a series of measures intended to ensure goods can move across the border between Ireland and Northern Ireland without checks and the associated physical infrastructure that are the norm at international borders outside the EU.

Other objections from MPs to the negotiated Withdrawal Agreement include the payment to the EU of £39 billion, the loss of UK control over EU legislation that it would be required to implement during a 21-month (or possibly longer) transition period, and new UK trade agreements with third countries not being allowed to enter into force until after the transition period.

The Prime Minister has sought ‘clarifications’ and ‘assurances’ from the EU that the backstop would not or could not become permanent. The European Council stated in Conclusions in December 2018, and is willing to give further assurances, that the backstop is not intended to be permanent and that the aim is to agree a future relations agreement as soon as possible which will enter into force after the end of the transition/implementation period. This is already set out in the Protocol itself and elsewhere in the Withdrawal Agreement.

Letters were sent by the UK and the EU, setting out UK concerns and EU responses with assurances on the intention behind the use of the backstop respectively. The EU also agreed to consider the provisional application of parts of the future relations agreement if one has not been concluded or fully ratified in time. Theresa May made a statement to the Commons on 14 November setting out what the EU letter had clarified. The Attorney General also confirmed that European Council Conclusions had legal force in international law.

But there are still UK concerns that the EU assurances do not equate to legally binding guarantees, and that the backstop could enter into force and remain indefinitely.

The European Commission has said it will not re-open negotiations or change the negotiated text. The text of the Withdrawal Agreement and Political Declaration have already been sent to the European Parliament for its consideration.

But can or will the EU offer the UK more to facilitate their approval by the UK Parliament? In theory, the EU can offer the UK whatever it wishes – but is unlikely to change its mind about the current text. It will not agree to a time-limited backstop, because a backstop that expires before it is replaced by a permanent structure is not actually a ‘backstop’. What the EU might offer, apart from further assurances along current lines, is a short extension of the Article 50 negotiating period. But this would be purely to give the UK more time to settle internal differences rather than to re-open the negotiated Agreement. An Article 50 extension could also be sought for a General Election to be held. A longer

extension would be required in order to stage another referendum. However, this would cause complications given that it would most likely run past the European Parliament elections in May, which are currently being planned without UK participation.

After the rejection of the Withdrawal Agreement by the UK Parliament, Michel Barnier told the European Parliament plenary that the risk of 'no deal' was now much greater and more preparations were needed.

The EU has continued to insist that the WA is the best agreement possible, but there are indications that it may change its position on the content of the WA if the UK changes its 'red lines'.

1. A Withdrawal Agreement is negotiated

1.1 Ratifying the Withdrawal Agreement in the EU and the UK

The UK's exit from the EU will take effect either when a withdrawal agreement enters into force, or two years after notifying the European Council of the intention to withdraw (i.e. on 29 March 2019, two years to the day after the Prime Minister triggered Article 50 of the *Treaty on European Union* - TEU), unless the European Council decides to extend this period by a unanimous decision of the EU27 in response to a request from the UK Government.¹

Article 50 specifies how the EU ratifies the Agreement but UK ratification procedures are a matter for the UK.

The EU and UK negotiators agreed the texts of the Withdrawal Agreement (WA) and the Political Declaration (PD) setting out the framework for the future EU-UK relationship on 14 November 2018 and these were endorsed by the European Council of the EU27 on 25 November. This meant a significant part of the Article 50 process was accomplished: "the Union shall negotiate ... an agreement ... setting out the arrangements for [the withdrawing State's] withdrawal, taking account of the framework for its future relationship with the Union".

EU ratification Council

The special meeting of the European Council bringing together EU27 leaders on 25 November 2018 issued a [statement](#) endorsing the WA. On this basis it said:

the European Council invites the Commission, the European Parliament and the Council to take the necessary steps to ensure that the agreement can enter into force on 30 March 2019, so as to provide for an orderly withdrawal.

The procedure for EU approval of the WA in Article 50 TEU provides that once a withdrawal agreement is agreed between the EU and the departing Member State, it will be approved by the Council of the EU, acting by a super qualified majority, after obtaining the consent of the European Parliament.

A "super-qualified majority" is defined as at least 72% of the members of the Council representing Member States comprising at least 65% of the population of the EU.² This means at least 20 Member States will need to approve the WA.

¹ The Article 50 process is described in some detail in Commons Library Briefing Paper CBP7551, [Brexit: how does the Article 50 process work?](#) 16 January 2017.

² This is a higher threshold than the normal Council qualified majority voting (QMV) threshold of at least 55% of the participating members of the Council, comprising at least 65% of the population of these States. Article 50 states that for the

The Council must authorise the signature of the WA, before sending it to the European Parliament for its consent. The vote of approval in the Council will take place once the Parliament has given its consent.

European Parliament

The European Parliament (EP) vote will be by a simple majority and UK Members of the EP will be able to participate in the vote.

The EP has set aside time in its plenary session of 11 to 14 March 2019 to debate and vote on the WA. However, this could also take place in the plenary session of 25 to 28 March if the WA has not been approved in the UK in time for the earlier March plenary. The Council [decision](#) to refer the negotiated Withdrawal Agreement to the EP for ratification was made on 11 January 2019.

Prior to the plenary, the Agreement will be scrutinised by the EP's Committee on Constitutional Affairs ([AFCO](#)), which has responsibility for drafting a report and motion on the WA on the basis of which the EP will vote or not for consent.

The EP is not expected to refuse consent, as the WA is in line with its priorities for an agreement previously set out in its [resolutions](#) on the negotiations. Although it is possible that the EP could seek clarification on aspects of it or refer it to the Court of Justice of the EU (CJEU), sources in the EP have indicated that it will approve the WA by a large majority.

The EP also has a Steering Group on Brexit, separate from AFCO, co-ordinated by former Belgian Prime Minister, Guy Verhofstadt, and including representatives of the leading political groups in the EP as well as the AFCO chair. The Steering Group has had weekly meetings with EU chief negotiator Michel Barnier on the progress of the negotiations, which has helped to ensure that the EP's views have been taken into account in the negotiation process.

Mr Verhofstadt welcomed the "positive progress" made on the WA in a [statement](#) on 14 November 2018, and said it was "a milestone towards a credible and sustainable future relationship between the EU and the UK" which "should ensure an orderly withdrawal".

EP President Antonio Tajani has suggested the EP could still examine, vote on and approve the WA, even if the UK Parliament rejects it.

UK ratification

In the UK, under [section 13](#) of the *European Union (Withdrawal) Act 2018*, Parliament must approve the negotiated WA before a Bill can be introduced to put its provisions into UK law and enable it to be ratified.

purposes of decisions under it a QM will be defined in accordance with Article 238(3)(b) TFEU which states that "when the Council does not act on a proposal from the Commission or from the High Representative of the Union for Foreign Affairs and Security Policy, the qualified majority shall be defined as at least 72% of the members of the Council representing Member States comprising at least 65% of the population of these States".

However, for some time it has looked unlikely that Parliament will approve the text. For many opponents the main reason is that the Irish Protocol setting out the 'backstop'³ provisions is unacceptable in spite of references to the intentions of the parties to agree a future relationship agreement and to the intended transience of the backstop in the event that it must enter into force.

Other objections to the WA from different sides in the Brexit debate include:

- The UK has not 'taken back control' in a number of areas;
- The financial settlement ('exit bill') of £39 billion and continuing payments into the EU budget;
- The 21-month transition period which may be extended by up to two more years;
- UK acceptance of EU law during the transition period with no say over decision-making;
- No new UK trade agreements during the transition period can enter into force (unless authorised by the EU);
- The Political Declaration is vague and not legally binding.

The UK parliamentary vote is postponed

The Prime Minister decided to postpone the so-called 'meaningful vote' on the negotiated text, which was due to be held on Tuesday 11 December 2018 after five days of debate. Theresa May said in a [statement](#) on 10 December:

We have now had three days of debate on the withdrawal agreement setting out the terms of our departure from the EU, and the political declaration setting out our future relationship after we have left. I have listened very carefully to what has been said, in the Chamber and out of it, by Members on all sides. From listening to those views, it is clear that while there is broad support for many of the key aspects of the deal, on one issue, the Northern Ireland backstop, there remains widespread and deep concern. As a result, if we went ahead and held the vote tomorrow, the deal would be rejected by a significant margin. We will therefore defer the vote scheduled for tomorrow, and will not proceed to divide the House at this time.

³ For an explanation and analysis of the 'backstop', see section 8 of Commons Briefing Paper 8453, [The UK's EU Withdrawal Agreement](#), 4 December 2018.

2. UK and EU clarifications

2.1 Prime Minister's expectations of EU assurances

Theresa May said in her December statement that her focus in the coming days would be to “secure additional reassurance on the question of the backstop” and that “it is now for me and this Government to go back to Europe, and to make the point that those assurances have not been sufficient for Members of this House”. She thought it was “entirely reasonable to ask the EU to give **further clarification about that temporary aspect of the backstop and the ability to bring it to an end**”.

In the debate that followed her statement, Theresa May was asked whether she would be “clear that she is seeking an exchange of letters of reassurance with the EU, not a change to the text of the withdrawal agreement”. The Prime Minister replied that there was “**a range of ways in which I believe we can find assurances** for Members of this House. The task is to find sufficient reassurance that gives the confidence to Members of this House that the backstop will not be indefinite”.

Anne Main was concerned that “any reassurances or assurances given will only be subject to legal challenges down the road if they are not legally binding”. Mike Gapes referred to the possibility of “an aspirational addendum to the political declaration”. Theresa May said later on in the debate: “What people have been saying is that they want to ensure that the backstop can be brought to an end, and **there are various ways in which we can do that**”. She reiterated that her aim was to negotiate to ensure that the backstop was “not permanent or indefinite and can only be temporary”. Other questions about how the Prime Minister could get an assurance that was legally binding were countered with the answer that the Government was looking to negotiate something that would be “**sufficient to give confidence**” to Parliament about “the backstop not being able to be indefinite”.

2.2 EU will not re-open negotiations

But what sort of assurances and what “range of ways” are there on the backstop beyond those already set out several times in the Protocol on Ireland/Northern Ireland itself on its intended transience, should it have to come into force as a last resort?

The EU has been adamant since November 2018 that the Agreement reached is the only one on offer. After the European Council summit on 25 November, Commission President Jean-Claude Juncker [said](#) he was “totally convinced that this is the only deal possible”.

On 29 November, Michel Barnier [told](#) the European Parliament: “Given the difficult circumstances of this negotiation and given the extreme complexity of all the issues of the British withdrawal, the treaty that is on the table is the only deal possible”.

On 30 November, European Council President Donald Tusk said the deal agreed was “the only possible one”. Speaking at the G20 summit in Argentina, Mr Tusk [said](#): “If this deal is rejected in the Commons we are left with, as was already stressed a few weeks ago by Prime Minister May, an alternative – no deal or no Brexit at all”.

Donald Tusk [tweeted](#) on 10 December 2018 that he would “not renegotiate” anything, “including the backstop”, but would discuss how the UK can facilitate ratification.

The [Conclusions](#) after the European Council (Article 50) meeting on 13 December confirm that “The Union stands by this agreement and intends to proceed with its ratification. It is not open for renegotiation”. The EU27 sought to reassure the UK of the intended temporariness of the backstop should it need to come into force:

3. The European Council underlines that the backstop is intended as an insurance policy to prevent a hard border on the island of Ireland and ensure the integrity of the Single Market. It is the Union’s firm determination to work speedily on a subsequent agreement that establishes by 31 December 2020 alternative arrangements, so that the backstop will not need to be triggered.

4. The European Council also underlines that, if the backstop were nevertheless to be triggered, it would apply temporarily, unless and until it is superseded by a subsequent agreement that ensures that a hard border is avoided. In such a case, the Union would use its best endeavours to negotiate and conclude expeditiously a subsequent agreement that would replace the backstop, and would expect the same of the United Kingdom, so that the backstop would only be in place for as long as strictly necessary.

Commission President, Jean-Claude Juncker, also insisted the EU would not renegotiate the November Agreement. Neither would he speculate as to what the EU would do if the UK Parliament voted against the Agreement on 15 January. He too said that “there cannot be renegotiation, there can be clarification”, that he was “discussing with Downing Street what these clarifications might amount to”, but that this “should not be confused with renegotiation particularly as regards to the backstop”.⁴

The EU’s position has not changed since the WA was endorsed by the EU27 in November 2018. Neither could Donald Tusk or Jean-Claude Juncker unilaterally amend that text; the EU27 would have to agree to any amendment to the negotiated text.

2.3 How can the Irish backstop be ‘clarified’?

Given that the EU will not agree to re-open the negotiations or change the text of the negotiated WA, how could the backstop provisions be clarified?

⁴ [Politico Pro Brexit Files](#), 11 January 2019

Withdrawal Agreement makes clear the backstop is intended to be temporary

The Preamble to the Protocol on Ireland/ Northern Ireland,⁵ the Protocol itself⁶ and the Political Declaration on the framework for future EU-UK relations⁷ already make clear that the 'backstop' is intended to be temporary.

Article 1(4) of the Protocol states:

The objective of the Withdrawal Agreement is not to establish a permanent relationship between the Union and the United Kingdom. The provisions of this Protocol are therefore intended to apply only temporarily, taking into account the commitments of the Parties set out in Article 2(1). The provisions of this Protocol shall apply unless and until they are superseded, in whole or in part, by a subsequent agreement.

Article 2(1) states that the EU and the UK "shall use their best endeavours to conclude, by 31 December 2020, an agreement which supersedes this Protocol in whole or in part".

The [Political Declaration](#) also refers to the parties' intention to conclude a future relations agreement by the end of the transition period:

138. In setting out the framework of the future relationship between the Union and the United Kingdom, this declaration confirms, as set out in the Withdrawal Agreement, that it is the clear intent of both Parties to develop in good faith agreements giving effect to this relationship and to begin the formal process of negotiations as soon as possible after the United Kingdom's withdrawal from the Union, such that they can come into force by the end of 2020.

Concerns about the backstop

Some of the WA's opponents want the backstop removed completely, and a greater number want the backstop amended to allow the UK to exit it unilaterally or for it to be time-limited.

The EU has made clear it will not accept an agreement without a backstop. For one, this is an issue of EU solidarity – one of its Members, Ireland, has made clear the backstop is in its vital national interest. The EU shares the view of Ireland that the backstop is necessary to guarantee an open border and that peace and security are maintained in the region.

Secondly, for the EU the backstop also achieves the UK's expressed goals (which the EU shares): to address the unique circumstances on the island of Ireland to uphold the Good Friday Agreement and maintain an

⁵ "RECALLING the Union's and the United Kingdom's intention to replace the backstop solution on Northern Ireland by a subsequent agreement that establishes alternative arrangements for ensuring the absence of a hard border on the island of Ireland on a permanent footing".

⁶ Article 1(4),

⁷ Paragraph 19: "The Parties recall their determination to replace the backstop solution on Northern Ireland by a subsequent agreement that establishes alternative arrangements for ensuring the absence of a hard border on the island of Ireland on a permanent footing".

open border in all circumstances. These are the commitments that both parties signed up to in the December 2017 Joint Report.

A unilateral exit from the backstop?

The EU also argues that a unilateral exit, or defining a fixed date for it to end, defeats the point of the backstop – it would no longer guarantee an open border in all circumstances.

A unilateral exit would suggest the UK was proposing a future relationship that would see the UK insufficiently aligned to EU standards so that regulatory checks would need to be imposed on goods crossing the Irish border, and/or that any 'alternative arrangements' the UK proposes to replace checks with technological solutions, or do them away from the border, would be unacceptable to the EU. The EU will not accept arrangements that will, in their view, see the integrity of their internal market compromised.

The EU Presidents suggested in their letter of 14 January (see section 3 below) that discussions on alternative arrangements, including "facilitative arrangements and technologies", would be given "priority" alongside negotiations on the future relationship. However, the EU believes at present that no arrangements exist that can take the place of checks on goods at the borders, which is why the regulatory alignment for Northern Ireland provided for in the backstop is a necessary guarantee.

3. Exchange of letters

On 7 January 2019 there were reports that the Government was considering a “formal exchange of letters between the EU and the UK” with assurances on the temporary nature of the Irish backstop.⁸

Three letters were published on 14 January: [one](#) from the EU (Donald Tusk and Jean-Claude Juncker), [one](#) the UK Prime Minister and [one](#) from the Attorney General, Geoffrey Cox.

3.1 UK Prime Minister’s letter to the EU

The Prime Minister set out how the EU could help reassure the UK Parliament with regard to the Irish backstop:

In order to reinforce this joint commitment to getting the future relationship settled energetically and quickly we should:

- Agree that exploratory talks focused on delivering it can begin as soon as the Withdrawal Agreement is signed, which could in turn be immediately after the UK Parliament has voted in favour of the deal;
- Recognise that these talks should cover all strands of the relationship in parallel, giving particular urgency to discussion of ideas, including the use of all available facilitative arrangements and technologies, for replacing the backstop with permanent arrangements that ensure its underlying objectives continue to be met. These ideas need not replicate the provisions of the Protocol in any respect, and the UK is ready to work ambitiously and creatively with the EU on this. [...]
- Confirm the legal connection between the Withdrawal Agreement and the Political Declaration, and making that link clear in the way we present the documents; and
- Agree that if we are in a situation where we have negotiated a new agreement, but the backstop risks coming into force because ratification is not complete, we in the UK will do what is necessary to apply the new agreement provisionally pending ratification, rather than default to the backstop, and we expect the Commission to make the appropriate recommendations in relation to the EU too. Such provisional application is, of course, normal in trade agreements.

3.2 EU’s letter to Theresa May

The letter from Presidents Juncker and Tusk sought to reassure the Prime Minister of the legal weight of the December 2018 European Council Conclusions in which it had emphasised the EU’s intention to conclude a future relations agreement quickly, so that the backstop

⁸ The Irish Times, [Backstop letters between London and Brussels to be scrutinised](#), 7 January 2019

“would only be in place for as long as strictly necessary”. The authors sought to clarify the legal status of European Council Conclusions:

In this context, it can be stated that European Council conclusions have a legal value in the Union commensurate to the authority of the European Council under the Treaties to define directions and priorities for the European Union at the highest level and, in the specific context of withdrawal, to establish, in the form of guidelines, its framework. **They may commit the European Union in the most solemn manner.** European Council conclusions therefore constitute part of the context in which an international agreement, such as the Withdrawal Agreement, will be interpreted.

Status of European Council Conclusions

Is having a “legal value” the same as being legally binding? The answer is probably ‘no’. The general evaluation of the nature of European Council Conclusions is that they are not legally binding but constitute a political commitment on the part of Member States.

The Prime Minister said in her [press statement](#) on 14 December 2018 on the ‘clarifications’ in the European Council Conclusions: “As formal conclusions, these commitments have legal status and therefore should be welcomed”. She also said something very similar in her [statement](#) to the Commons on 17 December.

This position was confirmed by the Attorney General, Geoffrey Cox, in his [letter](#) on 14 January. He agreed that in the light of the EU’s response to the Prime Minister’s letter:

... the Council’s conclusions of 13 December 2018 would have legal force in international law and thus be relevant and cognisable in the interpretation of the Withdrawal Agreement, and in particular the Northern Ireland Protocol, albeit they do not alter the fundamental meanings of its provisions as I advised them to be in 13 November 2018.

Publication in Official Journal underlines legal value

The EU letter also seeks to underline what it interprets as the importance of the Political Declaration (presumably Article 138 in particular) by stating that the WA and the PD will be “published side by side in the Official Journal in a manner reflecting the link between the two as provided for in Article 50”.

EU will set up negotiating structures swiftly

The EU letter pledges to establish the Commission negotiating structure for the future relations agreement “directly after signature” of the WA “to ensure that formal negotiations can start as soon as possible after the withdrawal” of the UK.

Provisional application of future relations agreement

Article 25 of the *Vienna Convention on the Law of Treaties* allows negotiating parties to apply some or all of the provisions of a treaty provisionally before its entry into force. In the EU, Article 218(5) of the *Treaty on the Functioning of the European Union* (TFEU) provides for a

Council decision on the provisional application of an international treaty to be taken simultaneously with the Council decision to sign the treaty. A European Parliament Research Service briefing on EU treaty procedures describes the timing of such a decision:

In theory, under Article 218(5) TFEU, the decision on provisional application can take place even before the treaty is concluded at EU level, i.e. before the EP gives its consent and the Council adopts the decision to conclude the treaty in accordance with Article 218(6). However, in practice (since the South Korea FTA), provisional application is enforced only after hearing the European Parliament's position on the agreement or even only after the European Parliament has given its consent to conclusion. Consequently, the Commission normally submits the draft decisions to the Council simultaneously: the draft decision to sign, that to provisionally apply the treaty and one for the conclusion of the treaty.

The provisional application of mixed agreements negotiated by the EU takes place, however, before the completion of ratification procedures at the Member State level. This makes sense as the entire rationale of provisional application is to allow for application while waiting for the completion of the ratification procedure. However provisional application under Article 218(5) TFEU can only be granted for provisions relating to EU competence and cannot include Member State competences unless all the Member States have agreed to it separately. Decisions on the provisional application of a mixed agreement in its entirety usually include a statement clarifying that Member States have given their agreement with respect to their competences.⁹

The EU-UK future relations agreement is likely to be a 'mixed' agreement (containing provisions in areas of EU and national competences), requiring ratification by the EU27. National ratification procedures can take years, especially if it involves sub-state ratification as in Belgium, and might even entail a referendum in some Member States. But the EU-only competences or trade elements of such agreements can often be provisionally applied after signature until full ratification is complete.¹⁰

The EU letter states that provisional application of parts of a future relationship agreement would be possible:

Should national ratifications be pending at that moment, the Commission is ready to propose provisional application of relevant parts of the future relationship, in line with the legal frameworks that apply and existing practice. The Commission is also ready to engage with you on a work programme as soon as the United Kingdom Parliament has signalled its agreement in principle to the Withdrawal Agreement and the European Parliament has approved it.

⁹ EPRS, [A guide to EU procedures for the conclusion of international trade agreements](#), Laura Puccio, October 2016

¹⁰ For example, the EU-Ukraine Association Agreement has been partly provisionally applied since 2014 and the provisional application of the commercial part of the Association Agreement began on 1 January 2016. The Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada entered into force provisionally in September 2017.

But the two EU leaders do not guarantee that provisional application would prevent the backstop from taking effect. The main question would be: which parts of the WA could be applied provisionally?

Backstop activation is 'suboptimal' for all concerned

The letter confirms a "shared commitment" with the UK to not seeing the backstop enter into force, since "it would represent a suboptimal trading arrangement for both sides".

No change to Good Friday Agreement

The EU emphasises the "shared understanding" with the UK that the WA and Protocol on Ireland/Northern Ireland:

- "do not affect or supersede the provisions of the Good Friday or Belfast Agreement of 10 April 1998 in any way whatsoever", followed by particular reassurances that:
- "North-South cooperation in areas within their respective competences are matters for the Northern Ireland Executive and Government of Ireland to determine";
- "Do not extend regulatory alignment with European Union law in Northern Ireland beyond what is strictly necessary to avoid a hard border on the island of Ireland and protect the 1998 Agreement";
- Do not prevent the UK from facilitating "the participation of Northern Ireland Executive representatives in the Joint Committee, the Committee on issues related to the implementation of the Protocol on Ireland/Northern Ireland, or the joint consultative working group, in matters pertaining directly to Northern Ireland".

Commission work programme will prioritise proposals that help avoid the backstop

The EU letter confirms that the Commission "is determined" to prioritise in its work programme discussion of proposals "that might replace the backstop with alternative arrangements", possibly using "facilitative arrangements and technologies". Arrangements superseding the Protocol would not have to "replicate its provisions in any respect, provided that the underlying objectives continue to be met".

Extension of transition period if needed

The EU letter also envisages a possible extension of the transition period if needed, and a redoubling of Commission efforts (reciprocated by the UK) in order to conclude a future relations agreement "very rapidly".

Role for high level conference

The letter reiterates the earlier EU commitments to making any backstop period "as short as possible", and to support this would make "best use of the high-level conference foreseen in the Political Declaration to meet

at least every six months to take stock of progress and agree the appropriate actions to move forward”.

Timing

Mr Juncker and Mr Tusk make clear that they would be ready to sign the WA “as soon as the meaningful vote has passed” in the UK Parliament, to “allow preparations for the future partnership with the United Kingdom immediately thereafter to ensure that negotiations can start as soon as possible” after UK withdrawal.

3.3 What is the legal status of letters?

Does this exchange of letters amount to *new* commitments made in law or merely political promises? The answer to that question depends on an assessment of what a ‘letter’ is under EU law, and what binding effects ‘letters’ have.

Treaty-based legal forms?

The legal forms that the EU institutions can adopt are set out in Article 288 TFEU. In short, these are: regulations, directives and decisions.

Where any of these are produced by any of the EU institutions, they are published on the EU’s legislative websites and in the Official Journal of the European Union. All of these legal forms are legally binding; they are generally binding in the case of regulations and directives, and binding on those addressed in the case of decisions.

Article 288 TFEU also specifies that the EU institutions can adopt ‘recommendations and opinions’, but stresses that these “shall have no binding force”.

Written notifications

What, then, in EU law terms is a ‘letter’? It is not in this list of legal forms that the EU institutions can adopt, but it is also not without precedent. Certain Articles in the EU Treaties make allowances for different types of documents to be used in set circumstances – and occasionally these can have significant consequences, even if in and of themselves they are not legally binding forms. A clear example is the ‘notification’ provided for in Article 50 TEU: the letter notifying the European Council of the UK’s intention to withdraw acted as a trigger for extensive (and legally binding) processes for both the UK and the EU.

The concept of ‘notification’ is more common in the EU Treaties; for example, Article 331 TFEU makes clear that Member States wishing to participate in ‘enhanced cooperation’ projects under the EU banner must notify their intention to the Council and the Commission, or to the Council, the High Representative and the Commission if this ‘enhanced cooperation’ is in the area of Common Foreign and Security Policy. Similarly, Protocol 15 to the Treaties in Article 9 makes clear that the UK “may notify the Council at any time of its intention to adopt the euro”. All of these references to ‘notification’ imply a written document of some kind—presumably a letter—being used to communicate intention between relevant institutions (e.g. the Member States and the relevant EU institutions), and this intention will then result in changed legal

commitments once the established Treaty processes has been followed. Notifications thus work as ‘triggers’ for legally binding commitments as set out in the Treaties.

Letters

The only references to a ‘letter’ as a prescribed documentary form in the EU Treaties is found in Protocol 3 to the Treaties.¹¹ Protocol 3 sets out the Statute of the Court of Justice of the European Union and makes clear that CJEU judges can resign by a ‘letter of resignation’. This is a very distinct event from any correspondence sent from an EU institution to a Member State and does not form a helpful analogy to an exchange of letters between the EU and the UK.

Letters between the UK and the EU are not legally binding in the sense that they could be said to add any supplementary legal obligations to the text of the WA itself. But they could be said to have ‘soft’ force because they could be considered as contextual material for legal interpretation of the WA in the future (like *travaux préparatoires*). But it is also clear that they could not support any interpretation which conflicts with the actual text of the negotiated Agreement.

For any further commitments to be legally binding they would either have to be added to the text of the WA (which the EU is determined it will not do) or be set out in some other international legal instrument (not an EU instrument) between the EU and the UK. The EU has used various devices in the past, such as the [Edinburgh Decision](#) of the Heads of States of December 1992 (an international legal instrument, not an EU Decision) in the case of the Danish Maastricht Referendum. But this sort of international legal mechanism does not appear to be on offer in this instance.

To summarise, unless the correspondence received from an EU institution is explicitly termed a ‘decision’ or is supplied in response to a Treaty-based request to ‘notify’ a course of action, it will not have legally binding consequences and its value will be political in nature.

Exchange of letters in international law

The United Nations Treaty Collection [glossary](#) describes the status of an Exchange of Letters as follows:

States may express their consent to be bound by an “exchange of letters/notes”. The basic characteristic of this procedure is that the signatures do appear not on one letter or note but on two separate letters or notes. The agreement therefore lies in the exchange of both letters or notes, each of the parties having in their possession one letter or note signed by the representative of the other party. In practice, the second letter or note, usually the letter or note in response, will typically reproduce the text of the first. In a bilateral treaty, letters or notes may also be exchanged to indicate that all necessary domestic procedures have been completed.

¹¹ The [Wightman](#) ruling, however, has confirmed that ‘notification’ or ‘revocation of notification’ needs to be in writing (para 74), presumably meaning a letter of some form.

The EU-UK exchange does not conform to this rubric. For an example of a conforming Exchange of Letters, see the [Exchange of Letters](#) between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Kingdom of Belgium amending the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Kingdom of Belgium relating to the Delimitation of the Continental Shelf under the North Sea between the Two Countries, done at Brussels on 29 May 1991, as amended by the Exchange of Letters of 21 March and 7 June 2005, Brussels, 25 June and 12 August 2013.¹²

3.4 Prime Minister's statement in the Commons

Theresa May made a [statement](#) in the Commons on 14 January on the EU's clarifications. She explained why the EU would not agree to a time-limited backstop (c 825):

I have explained this to the EU and tested these points in negotiations, but the EU would not agree to this because it fears that such a provision could allow the UK to leave the backstop at any time, without any other arrangements in place, and require a hard border to be erected between Northern Ireland and Ireland.

The Prime Minister explained what the EU had agreed to. She reiterated the view that the letters have legal force and ensure that the backstop is not a trap. She also acknowledged that the EU letter did not go far enough for some MPs. Several MPs noted that nothing had changed.

3.5 Prime Minister's statement following defeat in the parliamentary vote

After suffering a large defeat (by 230 votes) in the [vote](#) on the Withdrawal Agreement, the Prime Minister acknowledged that the House had spoken and the Government would listen. She continued:

It is clear that the House does not support this deal, but tonight's vote tells us nothing about what it does support; nothing about how, or even if, it intends to honour the decision the British people took in a referendum that Parliament decided to hold. People, particularly EU citizens who have made their home here and UK citizens living in the EU, deserve clarity on these questions as soon as possible.

She then confirmed that if the official Opposition tabled a confidence motion under the *Fixed-term Parliaments Act 2011*, the Government would make time to debate that motion on 16 January.

¹² Treaty Series No. 14 (2016).

4. EU response to the UK vote

The EU has responded to the outcome of the vote by insisting that the WA is the best agreement possible, that the ball is now in the UK's court and the UK should set out what it wants. But the EU is unwilling to change its position on the content of the WA, unless the UK is willing to change its 'red lines'.

Below are some initial EU comments on the UK vote.

4.1 Commission

Jean-Claude Juncker

In a [statement](#) on 15 January on the outcome of the UK vote, the Commission President took note "with regret" of the Commons vote but said the EU ratification process would continue. He described the WA as a "fair compromise and the best possible deal" and "the only way to ensure an orderly withdrawal". He said the EU had shown "creativity and flexibility" and had "demonstrated goodwill again by offering additional clarifications and reassurances" in the letters of 14 January. UK negotiators had accused the EU of not being creative or flexible.

Mr Juncker said there was now an increased "risk of a disorderly withdrawal", which the EU did not want, but for which it was continuing to make contingency preparations. He ended by urging the UK "to clarify its intentions as soon as possible" because "time is almost up".

Michel Barnier

At the EP plenary in Strasbourg on 16 January, Michel Barnier emphasised the increased risk of a no-deal Brexit and EU preparations for this eventuality.¹³ He continued to insist that the negotiated Withdrawal Agreement represented the "best possible compromise", the result of "constructive work" and a "constructive attitude" which the EU would "maintain until the end: calm, unity, dialogue and transparency". He too said it was now for the UK "to clarify how it wishes to proceed".¹⁴

He said ratification of the Withdrawal Agreement was "a requirement to create mutual trust between us, in view of our second negotiation, which must begin as soon as possible, on our future relationship".¹⁵ This confirms what the Commission and European Council Presidents said in their letter to Theresa May. Mr Barnier added that if the UK chose "to change its red lines, and to be more ambitious and go beyond a simple free trade deal in our future relationship, then the EU would be ready to immediately support this evolution and respond

¹³ Michel Barnier, [speech to EP](https://multimedia.europarl.europa.eu/en/opening-statements_1166570_03-V_rv), 16 January 2019. Opening statements available at https://multimedia.europarl.europa.eu/en/opening-statements_1166570_03-V_rv.

¹⁴ Ibid

¹⁵ Ibid

favourably”.¹⁶ But he insisted that the backstop “must remain a backstop and it must remain credible”.¹⁷

Frans Timmermans

Commission Vice-President Frans Timmermans emphasised to the EP plenary the harm Brexit would do to the UK and the EU and the obligation of politicians to “limit the harm to the absolute minimum possible”. He thought the negotiated WA “delivered on that obligation”.¹⁸

4.2 European Parliament

The EP debated the outcome of the UK vote on 16 January. The EP’s Brexit Coordinator Guy Verhofstadt said the EU would not allow “the mess in British politics” to again be “imported into European politics”, continuing: “While we understand the UK could need more time, for us it is unthinkable that article 50 is prolonged beyond the European Elections”.¹⁹ In his opening speech in the EP, Mr Verhofstadt spoke about the “cat fight inside the Conservative party” becoming “an existential problem of Britain, of Britain’s future and of Britain’s souls”. He said it was “time for cross party cooperation in Britain”.²⁰

4.3 European Council

Donald Tusk

President Tusk asked the question: “If a deal is impossible, and no one wants no deal, then who will finally have the courage to say what the only positive solution is?”²¹ This was interpreted as a hint that the UK should consider staying in the EU.²²

Romanian Presidency

Opening the EP debate, Romanian European Affairs Minister Melania Ciot for the Council Presidency said the vote was “not the end of the game” and that while a renegotiation of the WA was not on the cards, the EU “should stand ready to act” once the UK Government had clarified what the result means and what the next steps should be.²³

4.4 Other EU Member States

According to reports on 16 January, Commission President Juncker was “in contact with all political leaders”²⁴ about the outcome of the UK vote. Other EU governments intend to continue with the WA ratification process (in the Council) as well as their preparations for a no-deal Brexit.

¹⁶ Speech to EP

¹⁷ Speech to EP

¹⁸ Frans Timmermans, [speech to EP](#), 16 January 2019

¹⁹ Guy Verhofstadt, [Twitter](#), 15 January 2019

²⁰ Europarl, [UK’s withdrawal from the EU: extracts from the debate](#), 16 January 2019

²¹ Donald Tusk, [Twitter](#), 15 January 2019

²² [EurActiv, 16 January 2019](#)

²³ [Europarl](#), 16 January 2019

²⁴ Nick Gutteridge, [Twitter](#), 16 January 2019

Germany

German Chancellor Merkel thought there was still time to negotiate but “we’re now waiting on what the prime minister proposes”.²⁵ The German foreign minister, Heiko Maas, said Britain had to “bring clarity to the chaos” and that MPs had “not made it known what they want, only what they don’t want”.²⁶ He was opposed to any renegotiation, maintaining that compromises had already been made on both sides.

Ireland

The Taoiseach Leo Varadkar said his Government cannot “shift on the issue of there being no hard border between Ireland and Northern Ireland” and a “guarantee with a time-limit is not a guarantee”. If the UK moved on its ‘red lines’ of ruling out membership of the customs union and Single Market, Mr Varadkar said the “EU position would also evolve”.²⁷

Simon Coveney, the Irish Deputy Prime Minister, said Ireland would not object if the UK asked for an extension to article 50, but that the onus was on the British Parliament and Government “to provide an alternative that is viable if we are going to avoid a no-deal Brexit”.²⁸

France

President Emmanuel Macron thought there was little scope to improve the terms of the WA and he expected the UK to ask for more time.²⁹

The French Europe Minister, Nathalie Loiseau, told *France Inter* that the WA was the “only agreement possible” and that it was for the “British to decide what they want”. She thought British politicians did not realise what being in the EU meant and that there had been “massive disinformation” during the referendum campaign. She supported the view that the WA cannot be renegotiated and that the EU “had other things to do” besides Brexit, warning: “We aren’t going to unknit the European Union because the UK wants to leave”.³⁰

Austria

Chancellor Sebastian Kurz said there would be no renegotiation and the ball was in the UK’s court.³¹

²⁵ [BBC News, 16 January 2019](#)

²⁶ [Guardian live, 16 January 2019](#)

²⁷ [Irish Times, Ireland cannot shift on hard border after Brexit – Varadkar](#), 16 January 2019

²⁸ [Guardian live, 16 January 2019](#)

²⁹ [Reuters, Macron - Britain would be biggest loser in case of no-deal Brexit](#), updated 16 January 2019

³⁰ [Guardian live, ibid](#)

³¹ Sebastian Kurz, [Twitter](#), 15 January 2019

5. Extending Article 50?

In evidence to the House of Commons Liaison Committee on 29 November 2018, the Prime Minister warned that an Article 50 extension could lead to further uncertainty. She [said](#): “What is clear is that any extension to article 50, anything like that, reopens the negotiations, reopens the deal. And at that point the deal can go, frankly, in any direction”.

5.1 The EU might agree to extend Article 50

There were [reports](#) in early January 2019 that UK and EU officials were discussing the possibility of extending Article 50. This appeared to be in order to give the UK Government more time to get the WA approved by Parliament and prevent the UK leaving the EU with no deal (although the Government [denied](#) the claims).

On 13 January, *The Guardian* [reported](#) that the EU was expecting a request from the UK for an extension to Article 50 and would be prepared to agree to one at least to July, and that a special European Council meeting would be convened should a UK request for extension be received.

The report cited EU sources saying that the length of the prolongation of the negotiating period would be determined based on the reason put forward by Mrs May for the delay. This could be a shorter period in which to give the Prime Minister more time to get the Withdrawal Agreement through Parliament, or a longer period in order for a general election or referendum to be held.

On 12 January, *The Independent* [reported](#) that a Cabinet Minister had suggested a short extension of Article 50 would be required even if the Agreement was approved by Parliament, in order to get the necessary legislation to implement the Agreement and other necessary legislation to prepare for Brexit through Parliament by 29 March. There has also been [speculation](#) that EU leaders would be prepared to extend Article 50 in order to re-open talks if there was a major shift in the UK position, for example in favour of a new relationship with the EU similar to that of [Norway](#) (involving continuing membership of the Single Market as a non-EU Member of the European Economic Area).

5.2 Could an alternative deal be negotiated?

It is important to note that the WA does not set the detailed terms of the future relationship and is concerned mainly with provisions to separate the UK from the EU, arrangements for a transition period while negotiations take place on a future relationship, and the Protocol providing for a backstop arrangement if no new arrangements are in place at the end of transition that would prevent a hard border emerging on the island of Ireland.

The Political Declaration on the framework for a future UK-EU relationship also agreed on 25 November set some parameters for the

future negotiations (for example, it refers to ending free movement of people, which would rule out a principal criterion of Single Market membership and make a Norway/EEA-type relationship difficult to achieve). However, the PD is non-binding and there would be nothing to stop the UK and EU in the future from going beyond these parameters.

It is possible therefore that even if the UK shifted its position in the negotiations, for example if a parliamentary vote or a change of government led to the adoption of a new negotiating position in favour of a Norway/EEA style relationship, the EU might insist that the terms of the WA remain unchanged. For example, the EU could insist that the terms of the Protocol on Ireland/Northern Ireland remain in place, as a backstop may still be needed while the future relationship is negotiated, even if the UK declared itself in favour of a Norway-style relationship (to prevent a hard border emerging on the island of Ireland, this might necessarily entail a 'Norway plus' arrangement involving both EEA membership and a customs union with the EU).³²

5.3 How long would an extension be required for?

It is difficult to know how long an extension would be required for, as it would depend on the reason it had been requested. Would this be to get the current Withdrawal Agreement and implementing legislation through Parliament or because of a change in the UK negotiating position? (and if the latter, would this be due to the calling of another referendum or a general election?). It might also depend on what kind of commitments the EU would require from the UK in order to countenance an extension of Article 50 and to alter the WA. For example, would the EU require negotiations on a future relationship to be completed in order to assess whether the WA backstop was still needed, or would it want negotiations to have reached a certain level, or would it simply seek a new set of commitments from the UK, possibly amending the Political Declaration?

5.4 Extension of Article 50 in order to hold a general election

Article 50 would most likely need to be extended if a General Election were to be held before the scheduled date for leaving the EU. Under the *Fixed-term Parliaments Act 2011*, an early election can be called if there is a vote by two-thirds of MPs to trigger one or if the Government is defeated on a motion of no-confidence. There must be 25 Parliamentary sitting days between the dissolution of Parliament and the staging of a General Election (at least five weeks). However, if the Government is defeated on a no-confidence vote, there is a period of 14 calendar days during which an alternative Government can be formed and confirmed (two weeks). If an alternative Government is not

³² For further information on the 'Norway plus' arrangement, see Commons Briefing Paper 8129, [The European Economic Area](#), updated 21 December 2018.

confirmed, then the Prime Minister can recommend a suitable polling day to the Crown (taking into account the 25 sitting days from the dissolution requirement). This means a period of at least seven weeks would be required (if going through the 'no confidence' route), although there may be Parliamentary business which the Government wishes to see completed, potentially extending further the period before dissolution. For example, if the Government loses a no confidence vote in the second half of January and Parliament is dissolved on 6 February, then a General Election could not take place until 14 March (presuming that it would be held on a Thursday). Alternatively, dissolving Parliament on 13 February could lead to an election on 21 March.

Once a General Election is held, a new Government would most likely need additional time to discuss the Withdrawal Agreement and Political Declaration and possible revisions to them with the EU. This means that even if a General Election were held before the end of March 2019, an extension of Article 50 might be required to allow a new negotiating period with the EU.

For further analysis of the requirements of the *Fixed-term Parliaments Act 2011*, and no confidence motions under it, see House of Commons Library Insight [No confidence motions and early general elections](#), 18 December 2018.

5.5 Extension of Article 50 in order to stage a new referendum

If an extension were to be requested pending the staging of another referendum, this could require an extension until at least June 2019 or possibly later (depending on the question). Legislation would first need to be passed by both Houses of Parliament. There is no set time as to how quickly a Bill can be passed through Parliament. It depends on the length and complexity of the Bill, how many amendments are tabled, whether it has broad cross-party support or whether it is controversial.

Bills can be programmed in the House of Commons if a programme motion is agreed by the House but there are no equivalent programming provisions in the House of Lords.

The Electoral Commission then has a statutory duty set out in [Political Parties, Elections and Referendums Act 2000](#) (PPERA) to [assess any referendum question](#) proposed in legislation for its 'intelligibility': are the options clear, simple and neutral?

There is a minimum campaign period for referendums held under the framework set out in PERA. This must be 10 weeks and comprises three stages. The first four weeks is the period for registered campaigners to apply to be the lead campaign groups. The next two weeks are the period in which the Commission assesses applications to be lead campaign groups for each possible outcome and designates those groups. In the final four weeks, the designated lead campaigns can utilise the benefits of designation – which include a grant of up to £600,000 and higher spending limits than other registered campaigners.

For further analysis of the rules relating to staging another referendum see House of Commons Library Insight, [A second Brexit referendum? The rules explained](#), 19 December 2018.

The [Constitution Unit](#) of University College London produced a report in October 2018 which outlined a possible timetable for another referendum. It estimated that it would take at least 22 weeks to hold a referendum, following Parliament's initial decision. This is required for passing legislation, question testing by the Electoral Commission, and preparing and holding the campaign. An extra six weeks might be needed if a three-option question were used (i.e. the government's deal vs no deal vs remaining in the EU). If Parliament took a decision in late January 2019 to hold another referendum, according to this timetable polling day could occur at the earliest in late June for a two-option question ('deal' versus 'remain') or early August for a three-option vote. Additional time would then be needed if a renegotiation was needed under Article 50.

5.6 Complications in extending Article 50: European Parliament elections

One complication of extending Article 50 beyond May 2019 is that European Parliament elections are due to take place on 23-26 May 2019 and current plans are based on the UK not taking part. According to [Jean-Claude Piris](#), former head of the legal service of the Council of the EU, if Article 50 was extended until the end of June 2019, then there would be no need for EP elections to take place in the UK. However, if Article 50 is extended beyond 1 July, then the UK would need to participate in the elections as the new EP sits for the first time on 2 July.

Extending Article 50 beyond this point could result in MEPs being elected from the UK for a short period of time before the UK then leaves the EU, and the EU might be reluctant to allow this to occur, particularly as it has adopted [legislation](#) reallocating some of the UK's EP seats to 14 other Member States. However, this legislation includes a clause stating that the new distribution will only come into effect if the UK has left the EU by the time the new EP term starts. Nevertheless, having already begun preparations for the elections on the basis of an increased number of MEPs, [some countries](#) may be reluctant to countenance an Article 50 extension that disrupts these plans.

Another possible scenario would be a [derogation](#) excluding the UK from the election if there was certainty that the UK would be leaving shortly after.

Conservative MEP Charles Tannock has [suggested](#) that the EU would grant an Article 50 extension "for the purposes of democratic ratification of the Brexit process, which could either be a general election or a second referendum". Mr Tannock said there was "a school of thought" that UK participation in the European elections could be postponed with a catch-up election if the UK then decided to remain in the EU (for example following the result of another referendum).

However, this would require the election to be held in time for the first sitting of the EP on 2 July, meaning Article 50 could only be extended until the end of June. Whether or not UK participation in the European election could be deferred in this way could require clarification from the Court of Justice of the EU.

Richard Corbett MEP, leader of the Labour party group in the EP and former adviser to the President of the European Council on constitutional issues, has also suggested a scenario could occur with UK participation in the European election deferred pending a decision on whether the UK was reversing its decision to leave the EU. However, Mr Corbett said that this might be subject to a legal challenge from voters arguing that they have a right to elect their representatives.³³ Nevertheless, any extension of Article 50 beyond 1 July would require the UK to participate in the European elections.³⁴

Following the election of the new European Parliament there will be a process to appoint a new President of the European Commission and other Commissioners. The new Commission will not take office until the beginning of November 2019. This could delay things further if Article 50 negotiations go beyond 1 July.

5.7 Would new UK legislation be required?

[Section 20 of the *European Union \(Withdrawal\) Act 2018* \(EUWA\)](#)

provides that Brexit will take place at 11.00pm on 29 March 2019. However, a Minister may by regulations amend the definition of “exit day” “to ensure that the day and time specified in the definition are the day and time that the Treaties are to cease to apply to the United Kingdom”. This means that a change in the day of exit from the EU could be made through regulations under the EUWA, but this would have to reflect a Treaty change, i.e. an agreement reached by the UK and EU to extend Article 50. An [article](#) on the UK Constitutional Law Association blog by Robert Craig of Durham University Law School argues that while regulations under the EUWA can be used to amend exit day in domestic law, at the international level the UK can extend Article 50 (if agreed by the EU) by using the Royal Prerogative.

³³ Under Article 20 (2b) EU citizens have the right to vote and to stand as candidates in elections to the European Parliament and in municipal elections in their Member State of residence, under the same conditions as nationals of that State.

³⁴ See Lorna Hutchinson, [Article 50 extension could see UK participation in European elections](#), *The Parliament Magazine*, 10 January 2019.

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