



BRIEFING PAPER

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The Strasbourg package

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1. The 'Strasbourg package'



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Summary

On the evening of 11 March, the Prime Minister returned from Strasbourg after a final round of negotiations with the EU having secured a package of interpretations and clarifications on the Withdrawal Agreement and Political Declaration that were agreed between the UK and the EU in November 2018. The UK Government then published six documents that form the latest negotiated settlement on the UK's withdrawal from the European Union:

- 1 A statement that political agreement has been reached;
- 2 The Political Declaration (unchanged);
- 3 The Withdrawal Agreement (unchanged);
- 4 A Joint Interpretative Instrument on the Withdrawal Agreement;
- 5 A Joint Statement on the Political Declaration; and
- 6 A unilateral declaration by the UK

The European Commission released a Communication summarising the negotiations so far and endorsing the Joint Interpretative Instrument ('the Instrument') and the Joint Statement, subject to the House of Commons approving the package. President of the Commission, Jean-Claude Juncker, wrote to the President of the European Council, Donald Tusk, recommending the Council endorse the Instrument and Joint Statement at the European Council meeting on 21-22 March, subject also to receiving the approval of the House of Commons.

On 12 March the Attorney General wrote a letter to the Prime Minister updating his legal opinion of the Withdrawal Agreement and Political Declaration in light of the new assurances contained in these documents.

Despite the new assurances secured in the 'package', on the same day, the House of Commons rejected the motion to approve the negotiated settlement by 391 votes to 242, the second time the Government has failed to secure backing in a 'meaningful vote' on the Withdrawal Agreement.

On 13 March the House of Commons will vote on whether to leave the EU without a deal on 29 March 2019. If it votes against leaving without a deal, then the House will vote on 14 March on whether to extend the Article 50 period.

The EU have indicated that they would consider a request by the UK to extend the Article 50 period, but it would want a 'credible justification' for doing so.

1. The 'Strasbourg package'

On the evening of 11 March, the Prime Minister returned from Strasbourg after a final round of negotiations with the EU having secured a package of interpretations and clarifications on the Withdrawal Agreement and Political Declaration that were agreed between the UK and the EU in November 2018. The UK Government then published six documents that form the latest negotiated settlement on the UK's withdrawal from the European Union:

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1.1 Statement that political agreement has been reached

A statement that agreement has been reached is required for the purposes of section 13 of the [European Union \(Withdrawal\) Act 2018](#). Section 13 requires the following steps take place for the Withdrawal Agreement be ratified:

- (1) The withdrawal agreement may be ratified only if—
 - (a) a Minister of the Crown has laid before each House of Parliament—
 - (i) a statement that political agreement has been reached,
 - (ii) a copy of the negotiated withdrawal agreement, and
 - (iii) a copy of the framework for the future relationship,
 - (b) the negotiated withdrawal agreement and the framework for the future relationship have been approved by a resolution of the

House of Commons on a motion moved by a Minister of the Crown,

(c) a motion for the House of Lords to take note of the negotiated withdrawal agreement and the framework for the future relationship has been tabled in the House of Lords by a Minister of the Crown and—

- (i) the House of Lords has debated the motion, or
- (ii) the House of Lords has not concluded a debate on the motion before the end of the period of five Lords sitting days beginning with the first Lords sitting day after the day on which the House of Commons passes the resolution mentioned in paragraph (b), and

(d) an Act of Parliament has been passed which contains provision for the implementation of the withdrawal agreement.

The Government released a two-page [statement](#) that political agreement had been reached, which referenced the Instrument, the Joint Statement and the Unilateral Declaration.

The Government has yet to introduce the Bill that would implement the Withdrawal Agreement, should it achieve Parliamentary approval.

1.2 The Joint Interpretative Instrument to the Withdrawal Agreement

What does it say?

The document called [the Instrument](#) is in effect a joint statement made by the UK and the EU on how they intend for the Withdrawal Agreement, and specifically the Protocol on Ireland/Northern Ireland, to be interpreted as it is set out in the Agreement. It follows on from the [exchange of letters](#) between Donald Tusk and Theresa May on 14 January 2019, and reiterates the interpretations set forth in those letters.

The majority of the provisions in the Instrument merely reiterate aspects of the Withdrawal Agreement and the Protocol. A few provisions in the Instrument, however, supplement what is in the Withdrawal Agreement, by setting out in more detail just what the UK and the EU mean by their “best endeavours to conclude by 31 December 2020... an agreement which supersedes” the Protocol (in whole or in part), as committed to in Article 2(1) of the Protocol. In brief:

- Paragraph A.5 sets out that negotiations on the future relationship should commence as soon as possible; should be “conducted as a matter of priority; and efforts to reach agreement should be redoubled if they are not concluded within 1 year of the UK’s withdrawal from the EU”.
- Paragraph A.6 sets out that both parties commit to embark on ‘preparations’ for the future relationship negotiations as soon as the Withdrawal Agreement is signed. These preparations are described as “setting up their respective negotiation structures” and “discussing logistical arrangements”.

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- Paragraph A.7 specifically commits to fast-tracking negotiations on replacing customs and regulatory alignments in goods in the Protocol with alternative arrangements. This includes commitments to consider customs cooperation, facilitation and technological solutions.
- Paragraph A.8 commits to high level conferences every six months from the UK's withdrawal from the EU to consider how negotiations on the future relationship is progressing. Alternative arrangements to replace the backstop will be reviewed at every of these meetings. Paragraph A.9 makes provision for further high-level conferences to be called if needed by either party at any time.
- Paragraph A.10 makes clear that an agreement covering 'alternative arrangements' to the backstop could stand alone, or be part of a wider package of future relationship agreement – making clear that if the future relationship negotiations themselves are taking longer than the transition period, the 'backstop' replacement will be able to stand alone and be activated "very rapidly after the end of the transition period".
- This is reinforced by paragraph A.18, which makes clear that the territorial scope of the 'future relationship' negotiations is not connected to the territorial scope of the Withdrawal Agreement itself. Though this statement may also be there to reassure Spain that its preference that the issue of the Gibraltar's future relationship with the EU be settled through separate agreements with the UK, rather than being wrapped up in a comprehensive future relationship deal, is still possible.¹
- Paragraph A.11 indicates that if an agreement on 'alternative arrangements' is reached, then it should become law "as soon as possible" –, and "if necessary and appropriate" provisional application can be used, thus avoiding the need for the 'backstop' altogether.

Paragraphs A.12-14 state that where the EU or the UK find that 'best endeavours' or 'good faith' are not being observed, by a party acting with the objective of applying the Protocol indefinitely the dispute settlement as set out in the Withdrawal Agreement becomes possible.

The final paragraphs reiterate that the Withdrawal Agreement and the Protocol are not intended to affect the Good Friday/Belfast Agreement; that any new EU law that falls within the scope of the Protocol but is not already listed in its annexes cannot automatically apply to Northern Ireland under the Protocol, but needs agreement from the UK in the Joint Committee; that Northern Ireland's representatives will be able to participate in the Northern Ireland-relevant committees under the Withdrawal Agreement.

These clarifications are formalising in part some of the UK government's unilateral commitments it made in a [paper](#) published in January 2019,

¹ For more detail see Section 9.2 'Protocol on Gibraltar' in Commons Library Briefing Paper, '[The UK's EU Withdrawal Agreement](#)'.

that set out guarantees that Northern Ireland's devolved institutions would have a 'strong' role if the backstop came into operation.²

What are its effects?

Despite being more detailed on certain points, the Instrument does not fundamentally change the nature of the Protocol as set out in the Withdrawal Agreement. The 'backstop' can continue to come into force; there is no introduction of a 'time limit' on the backstop; nor does the Instrument introduce a unilateral right for the UK to terminate the backstop.

What the Instrument stresses is that where the UK finds that the EU is refusing to cooperate with replacing the backstop, or failing to act with what the Withdrawal Agreement calls 'good faith' in Article 5 of the Agreement itself and 'best endeavours' in Article 2(1) of the Protocol, the UK would be able to contest this.

The Protocol offers a few examples of what breaches of 'best endeavours' might look like: paragraph A.4 indicates that "a systematic refusal to take into consideration adverse proposals or interests" would violate Articles 5 and 2(1). Paragraph A.12 similarly notes that either party acting "with the objective of applying the Protocol indefinitely" would be inconsistent with these provisions.

Paragraph A.14 stresses that the Protocol itself could be suspended if an arbitration panel agrees with the UK that the EU is acting with "the objective of applying the Protocol indefinitely".

Provided that the EU continues to negotiate with the UK and continues to countenance UK proposals for 'alternative arrangements', it appears very unlikely that a claim of a violation of Article 5 or 2(1) would succeed. Even if it does, however, it is difficult to see how the UK choosing to 'suspend' the Protocol fits with its commitment to avoid any physical infrastructure at the border between Ireland and Northern Ireland, as this would be the logical consequence if Northern Ireland stopped adhering to some, or all, of the Single Market regulations and the Union's Custom Code that will apply to the territory under the backstop.

Regardless, a suspension of obligations would have to be proportionate and temporary under the terms of the Withdrawal Agreement, meaning that as soon as the EU resumed using its 'best endeavours' and acting in good faith, the Protocol (or what parts of it were suspended) would become binding on the UK again.

Is it legally binding?

The recitals to the Instrument state:

Note that this instrument provides, in the sense of Article 31 of the Vienna Convention on the Law of Treaties, a clear and unambiguous statement by both parties to the Withdrawal Agreement of what they agreed in a number of provisions of the Withdrawal Agreement, including the Protocol on

² For more detail see Section 8.4 in Commons Library Briefing Paper, '[The UK's EU Withdrawal Agreement](#)'

Ireland/Northern Ireland. Therefore, it constitutes a document of reference that will have to be made use of if any issue arises in the implementation of the Withdrawal Agreement. To this effect, it has legal force and a binding character.

In brief, when the Withdrawal Agreement is interpreted, the parties have agreed that that interpretation must refer to the Instrument as adopted. While it does not change the contents of the Withdrawal Agreement, it can affect its interpretation in the case of a dispute.

The Government's commitments to avoiding a hard border made in the December 2017 [Joint Report](#) could also be used to interpret the party's obligations under the Withdrawal Agreement and the Instrument. Article 32 of the Vienna Convention on the Law of Treaties allows for supplementary elements such as the preparatory work for treaties to be used to help interpret treaties and 'side-agreements' like the Instrument.³

1.3 The Unilateral Declaration by the UK

What does it say?

Alongside the Instrument, the UK has produced a declaration concerning the Northern Ireland Protocol. This is a unilateral declaration – the EU is not a party to it – setting out in slightly more detail that the UK understands the Protocol to be intended to be temporary. Specifically, the UK states that “if, contrary to the intentions of the parties, it is not possible for them to conclude an Agreement which supersedes the Protocol in whole or in part”, the Protocol would cease to be a “temporary” measure, and there is at that stage “nothing in the Withdrawal Agreement” that would prevent the UK from “ultimately” suspending its obligations under the Protocol – “under the proviso that the UK will uphold its obligations under the 1998 Agreement in all its dimensions and under all circumstances and to avoid a hard border on the island of Ireland”.

What are its effects?

In technical terms, the Declaration sets out that failing to come to 'alternative arrangements' within an unspecified time, would be understood by the UK as failing to negotiate with 'best endeavours' - as per Article 2(1) – and then the Protocol could be suspended by the UK, in whole or in part. This goes further than the Instrument which characterises “a systematic refusal to take into consideration adverse proposals or interests” and “the objective of applying the Protocol indefinitely” as contravening 'good faith' and 'best endeavours'.

However, this is solely a UK interpretation of the Withdrawal Agreement—and so it does not preclude the EU from taking action against the UK for – as a hypothetical example – suspending the Protocol because it has not yet been replaced with a new agreement in April 2021, or April 2022, etc.

³ These preparatory works (*travaux préparatoires*) can be used to 'confirm' the meaning resulting from the application of Article 31. See A. Aust's 'Modern Treaty Law and Practice', 3rd Ed, pp 217-220.

As noted above, it is also unclear how suspending the Protocol (and so the 'backstop') could be achieved in tandem with a commitment to avoid a 'hard border' in the absence of 'alternative arrangements'.

Is it legally binding?

No. The legal form of the unilateral declaration is also generally treated by the EU as not being binding, as we know from Ireland's experience in [ratifying the Lisbon Treaty](#).

Ireland, following a rejection of the Lisbon Treaty at a first referendum, agreed a number of '[guarantees](#)' with the other Member States. Those that were treated as binding were included in a Protocol that eventually became a binding part of the Treaties. However, Ireland also issued a [stand-alone declaration on defence](#) that was associated with its instrument of ratification – with the European Council only noting that it had taken 'cognisance' of that declaration. Steve Peers noted at the time this could potentially be an interpretative aid if the CJEU chooses to use it as one, but confirmed they were not legally binding.

The International Law Commission's (ILC's) [Guide to Practice on Reservations to Treaties](#), sets out how reservations and 'interpretative declarations' should be treated in international law.

The UK's unilateral declaration is an example of the latter- an interpretative declaration.⁴

4.7.1 Clarification of the terms of the treaty by an interpretative declaration

1. An interpretative declaration does not modify treaty obligations. It may only specify or clarify the meaning or scope which its author attributes to a treaty or to certain provisions thereof and may, as appropriate, constitute an element to be taken into account in interpreting the treaty in accordance with the general rule of interpretation of treaties.

2. In interpreting the treaty, account shall also be taken, as appropriate, of the approval of, or opposition to, the interpretative declaration by other contracting States or contracting organizations.

Other parties to the treaty can approve, oppose, or provide their own 're-characterization' of such a declaration. For a bi-lateral treaty such as the Withdrawal Agreement the ILC's Guide says that if the other party accepts the declaration, then it will constitute "an authentic interpretation of that treaty".⁵

The Attorney General's latest legal opinion referred (Paragraph 13) to the Unilateral Declaration, saying he understood that the EU "has agreed it will not object [to the Declaration]".

The ILC Guide makes clear that "an approval of, or an opposition to, an interpretative declaration shall not be presumed".⁶ Neither of the two

⁴ A reservation, according to the guidance is where a state "purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State". Paragraph 1.

⁵ International Law Commission's (ILC's) [Guide to Practice on Reservations to Treaties](#), Paragraph 1.6.3.

⁶ *Ibid* Paragraph 2.9.8.

documents released by the EU: the [Communication to the Commission](#), or the [letter](#) from Jean-Claude Juncker to Donald Tusk mention the UK's unilateral declaration.

The ILC Guide states that "an approval of an interpretative declaration shall not be inferred from the mere silence of a State or an international organization".⁷

Without an explicit written declaration by the EU endorsing the UK's Declaration, therefore, it will remain a unilateral interpretative declaration that would neither provide an 'authentic interpretation' of the Withdrawal Agreement, nor be legally binding upon the EU.

1.4 The Attorney General's Legal Opinion

Attorney General Cox issued a [legal opinion](#) on the Instrument and the Unilateral Declaration on 12 March 2019. Key excerpts are below, with emphasis added:

4. The Joint Instrument essentially puts the commitments in the letter from Presidents Tusk and Juncker of 14 January 2019 into a legally binding form and provides, in addition, useful clarifications, amplifications of existing obligations and some new obligations, which in certain significant respects would facilitate the effective enforcement of the UK's rights in the event of a breach of the good faith and best endeavours obligations by the EU.

...

7. In my view, these provisions of the Joint Instrument extend beyond mere interpretation of the Withdrawal Agreement and represent materially new legal obligations and commitments, which amplify its existing terms and make time of the essence in replacing the backstop. Therefore, provided the United Kingdom can clearly demonstrate in practice that it is effectively organised and prepared to maintain the urgent pace of negotiations that they imply, the EU could not fail to match it without being at risk of breaching the best endeavours obligation.

8. Furthermore, given the legally binding acceptance that the provisions of the Protocol need not be replicated and the connected heavy emphasis on alternative arrangements, including the discrete negotiating track for their use in replacing the regulatory and customs alignment elements of the Protocol, it would be unconscionable and a potential breach of the duties of good faith and best endeavours were the EU to decline to adopt any practicable alternative arrangements of the type described if they helped to avoid a hard border on the island of Ireland and did not require it to make unreasonable adjustments of its interests.

...

13. This Unilateral Declaration, to which I understand the EU has agreed it will not object, further confirms the advice I have given at paragraphs 4-10 above.

...

14. For these reasons, **there is no doubt, in my view, that the clarifications and amplified obligations contained in the**

⁷ Paragraph 2.9.9

Joint Instrument and the Declaration provide a substantive and binding reinforcement of the legal rights available to the United Kingdom in the event that the EU were to fail in its duties of good faith and best endeavours.

However, as paragraph 17 stresses, the finding that the “clarifications and amplified obligations” make it less likely that the UK will become trapped in the ‘backstop’ is limited to those scenarios wherein the EU *does* fail to show best endeavours and/or act in good faith. The Attorney-General’s overall conclusions regarding the Protocol are thus unchanged:

19. 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.**

1.5 The Joint Statement on the Political Declaration

What does it say?

The majority of the Joint Statement reiterates the content of the Political Declaration itself. Insofar as new material is contained in the Joint Statement, it is more ‘process’-oriented than it is ‘outcome’-oriented: there are no new inclusions as to what is to be covered by the future relationship negotiations, but rather the format of those negotiations themselves are set out in more detail, specifically in paragraph 6. The content of paragraph 6 reflects on the content of the Instrument: a dedicated track of negotiations will be devoted to ‘alternative arrangements’, etc.

The one paragraph worth noting as commenting on the substance of the future relationship, or at least on the UK’s relationship with EU law, is paragraph 5:

...and in the context of open and fair competition, the Union notes the United Kingdom’s intention to ensure that its social and employment standards and its environmental standards do not regress from those in place at the end of the transition period, and to provide its Parliament the opportunity to consider future changes in Union law in these areas.

This is effectively a concretisation of the existing commitment made by the UK to not lower standards on social, employment and environmental issues for the sake of gaining competitive advantage.

What are its effects?

The Joint Statement makes clearer how the future relationship negotiations are intended to proceed and is in that sense an organisational step forward.

Is it legally binding?

No. The Political Declaration is part of a ‘package’ with the Withdrawal Agreement, but is itself not legally enforceable, and demonstrates a

political commitment of travel at most. Any amendments to the Political Declaration are, as a consequence, also not binding.

1.6 The Commission's Communication on Strasbourg

What does it say?

The [Commission Communication](#) on the events at Strasbourg provides a summary of the Article 50 process to date, with the most recent updates as such:

Following the meeting between President Juncker and Prime Minister May of 20 February 2019, discussions resumed and intensified on three strands: possible guarantees with regard to the backstop that underline once again its temporary nature and give the appropriate legal assurance to both sides; the process for the European Commission and the United Kingdom will follow when working in detail on the role alternative arrangements could play in replacing the backstop in future; and whether additions or changes to the Political Declaration could be made.

Discussions between the Commission and United Kingdom negotiators continued between 21 February and 10 March 2019. They resulted in an agreement, at technical level, on an Instrument relating to the Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, as well as on a Joint Statement supplementing the Political Declaration setting out the framework for the future relationship between the European Union and the United Kingdom of Great Britain and Northern Ireland.

Following this, the Commission effectively asks itself to, as the negotiator under Article 50, endorse the Instrument and the Joint Statement, and to seek endorsement of the documents from the European Council (when meeting for Article 50 purposes, which will next happen on 21-22 March) if the House of Commons votes in favour of the Withdrawal Agreement before then.

What are its effects?

This is a political commitment to the agreements made, carrying endorsement of the EU's negotiator in the Article 50 process and recommending that it also carry the European Council's endorsement.

Is it legally binding?

No. Commission Communications are a form of EU soft law, and are not legally binding.

1.7 Reaction to the Package and next steps

None of the opposition parties changed their opposition to the Withdrawal Agreement in the light of the 'Strasbourg package' of agreements.

Although some MPs who voted against the Government in the previous 'meaningful vote', including prominent Brexit supporters such as David Davis, did say they would now endorse the Withdrawal Agreement, the

DUP and many members of the hard-Brexit-supporting Conservative European Research Group (ERG) group, said the changes secured as part of the 'package' were insufficient to change their minds.

Many of the deal's opponents cited the Attorney General's legal advice as part of their reasoning, saying the package had not fundamentally changed his opinion that the UK had no way of unilaterally exiting the backstop.⁸

On the 12 March the Government's motion endorsing the Withdrawal Agreement and Political Declaration was defeated by 391 votes to 242. This was a lesser margin than the previous 'meaningful vote' on January 15 when the Government lost 432 votes to 202, but still an historic loss.

The Prime Minister immediately after the vote [expressed](#) "profound regret" at the House's decision, and reiterated her view that:

I continue to believe that by far the best outcome is that the United Kingdom leaves the European Union in an orderly fashion with a deal, and that the deal we have negotiated is the best, and indeed the only, deal available.

The Prime Minister confirmed that the Government would table a motion to be debated on 13 March, on whether the UK should leave the EU without a deal. The motion will be

That this House declines to approve leaving the European Union without a Withdrawal Agreement and a Framework on 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.

Mrs May announced that should the House vote to leave without a deal on 29 March, then the Government would implement that decision. If the House rejects leaving with 'no deal', then the Government will bring forward a motion on 14 March to seek approval for the UK to request an extension of the Article 50 period.

The Government have not indicated they have stopped supporting the Withdrawal Agreement it has negotiated with the EU.

A spokesperson for Donald Tusk, President of the European Council, released a statement after the vote expressing disappointment at the outcome, that there was little more the EU thought it could offer, and while it was open to considering an extension of Article 50, it would expect a "credible justification" for doing so:

We regret the outcome of tonight's vote and are disappointed that the UK government has been unable to ensure a majority for the withdrawal agreement agreed by both parties in November.

On the EU side we have done all that is possible to reach an agreement. Given the additional assurances provided by the EU in December, January and yesterday, it is difficult to see what more we can do.

If there is a solution to the current impasse, it can only be found in London.

⁸ See for example '[Chance of no-deal Brexit has 'significantly increased', says EU – as it happened](#)', *The Guardian*, 12 March 2019.

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The EU, for its part, continues to stand by the withdrawal agreement, including the backstop, which serves to prevent a hard border in Ireland and preserve the integrity of the single market unless and until alternative arrangements can be found.

With only 17 days left to 29 March, today's vote has significantly increased the likelihood of a no-deal Brexit. We will continue our no-deal preparations and ensure that we will be ready if such a scenario arises.

Should there be a UK reasoned request for an extension, the EU27 will consider it and decide by unanimity.

The EU27 will expect a credible justification for a possible extension and its duration. The smooth functioning of the EU institutions will need to be ensured.⁹

It remains the case that ultimately, beyond revoking Article 50 and remaining in the EU, the only way for the UK to definitively remove the possibility of 'no deal', is for Parliament to approve a Withdrawal Agreement with the EU and pass the necessary legislation to implement it.

⁹ ['Chance of no-deal Brexit has 'significantly increased', says EU – as it happened'](#), *The Guardian*, 12 March 2019.

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