

Brexit Essentials - will this deal get Brexit done?

January 2020

The Withdrawal Agreement finalised between EU and UK negotiators on 17 October 2019 will be implemented in the UK by the EU (Withdrawal Agreement) Bill (“WAB”). The WAB received the approval of a comfortable majority on its second reading in the Commons in December. Subject to amendments, it is anticipated to complete its passage through Parliament and receive Royal Assent in time for “exit day” on 31 January.

The practical impact of the WAB and “exit day” for most businesses is minimal, given the UK will continue to be treated as an EU member state in almost all respects until the end of the implementation period on 31 December 2020. The real implications of Brexit depend on what happens after that date - on how much progress the EU and UK are able to make on the terms of their future relationship.

This Briefing outlines the key features of the Johnson deal, the WAB and the framework they provide for the next phase of negotiations.

The Johnson deal - what’s new?

The final versions of the [Withdrawal Agreement](#) and [Political Declaration](#) were published on 17 October 2019 following their approval by the European Council. They are currently in the process of being ratified in the UK.

The October deal was hailed as a “new” Brexit deal, but in fact, did not involve any substantive changes to Mrs May’s Withdrawal Agreement, other than to the Protocol on Ireland and Northern Ireland. The sections on citizens’ rights and other “separation issues” will be relevant to most businesses - in particular, should the UK leave the EU at the end of the implementation period with no deal. These, as well as the parameters of the implementation period, remain as summarised in previous [Brexit Essentials](#)¹.

Changes were made to the Political Declaration, which sets out the framework for the future relationship between the UK and the EU, to reflect Mr Johnson’s “Super-Canada” goals. Arguably the most significant was the deletion of the reference in Mrs May’s iteration to “close regulatory alignment” between the UK and the EU in relation to goods. The “level playing field” concept (that requires the UK to maintain a degree of alignment with, or not to regress from, EU rules in certain areas) was adjusted slightly but not, as some expected, diluted significantly. As discussed further below, the UK’s reluctance to commit to maintain regulatory alignment with the EU is anticipated to be a sticking point when negotiations commence.

¹ See [Edging Closer \(November 2018\)](#), [Implementing Transition \(March 2018\)](#) and [Phase II: Towards a Withdrawal Agreement \(March 2018\)](#).

Implementing the deal - the WAB

The UK's dualist legal system requires domestic legislation to implement international treaties. The WAB is the primary legislation implementing the Withdrawal Agreement in the UK on exit day. If the WAB achieves Royal Assent, that is the end of the ratification process in the UK. Its terms specifically supersede the "meaningful vote" requirements of the EU Withdrawal Act 2018 ("EUWA") and disapply the requirements of the Constitutional Reform and Governance Act 2010, such that the UK is able to fulfil its constitutional ratification requirements by 31 January in one legislative act.

What does the WAB say? Like much of the Brexit legislation, it is not an easy read, its contents broad ranging and highly technical. In addition to giving effect to the Withdrawal Agreement, it provides a framework for the detailed implementation of the UK's obligations under it, for example, to secure the rights of EU citizens in the UK at the end of the implementation period. The WAB, like the EUWA, therefore contains multiple secondary legislative powers. The contents of this secondary legislation, when made available, is likely to be of more interest to businesses than the WAB itself.

The WAB also makes multiple adjustments to the EUWA to cater for the application of EU law during the implementation period.

The law during the implementation period

"Exit day" signifies the start of the "implementation period" (formerly known as the transition period). During this period the UK is not an EU member state, but in terms of the application of EU law, it is treated as such, subject to very limited exceptions. Accordingly, until the end of the implementation period (the "IP Completion day" in the language of the WAB), EU law will continue to apply in the UK. The UK will also be subject to any new EU laws that are passed prior to IP Completion day.

It is considered important politically to repeal the European Communities Act 1972 on exit day, but doing so makes maintaining EU law in the UK during the implementation period quite complicated. In essence, the WAB constructs a new "conduit pipe" for the application of EU law in the UK. This will not affect the substance of the laws that continue to flow through the pipe. However, the change in their basis of application may prompt slight adjustments to the way EU laws are referred to in certain documentation, for example, in English law legal opinions.

Length of the implementation period

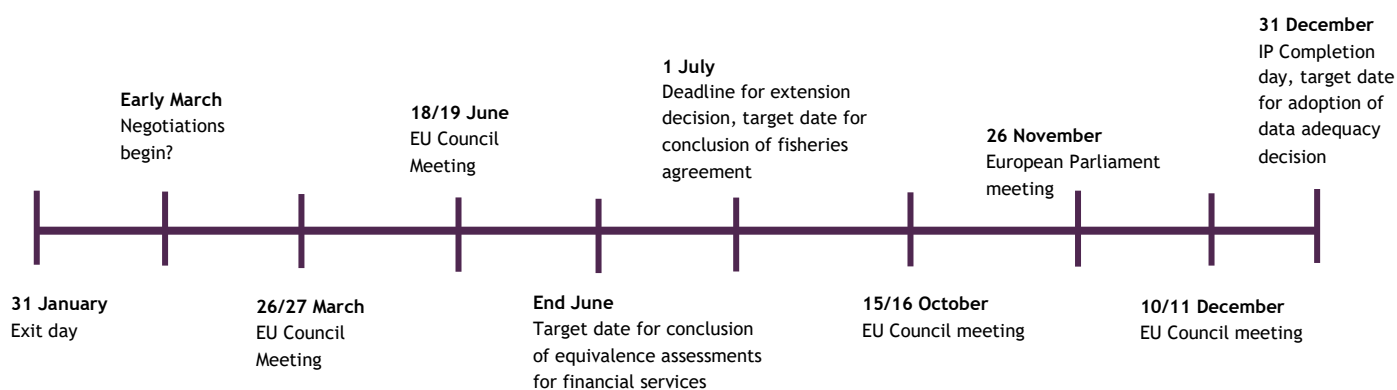
The Withdrawal Agreement does not shut the gate to the potential cliff edge of a WTO Brexit, but the implementation period gives the parties an opportunity to lower that cliff edge, if it provides sufficient time for agreement on a permanent trade and security agreement. The length of the implementation period is currently a key area of focus.

The Withdrawal Agreement provides for an initial implementation period ending on 31 December 2020. This can be extended for 1 or 2 years (to 1 July 2021 or 1 July 2022) by mutual agreement between the UK and the EU acting in Joint Committee. If either party wishes the Joint Committee to consider an extension to the IP Completion day, it will need to notify the Committee in time for the Committee to adopt a decision before the cut-off date specified in the Withdrawal Agreement, of 1 July 2020. This probably means that an extension request needs to be tabled for consideration (from either side) in time for the EU Council meeting on 18 June.

The UK Government made a manifesto commitment not to extend the implementation period. Its election mandate is to “Get Brexit Done” within that timeframe. This commitment is reflected in the WAB. Section 33 provides: “A Minister of the Crown may not agree in the Joint Committee to an extension of the implementation period”. The Government would therefore need to legislate further to enable an extension, should it change its mind. An extension would also require the UK to pay into the EU budget for a further period.

At the time of writing, a Labour party sponsored amendment proposes to add a clause to the WAB obliging the UK to make a request for the full 2 year extension in the absence of an agreed trade deal by 15 June, unless Parliament has passed a motion specifically approving the decision not to request an extension. The post-election balance of power in Parliament suggests that this amendment is unlikely to stand.

Timeline for 2020



Formal negotiations are not expected to begin until some weeks after exit day, with both sides yet to complete their preparatory work. The new Government and the EU have indicated they will finalise and approve their respective negotiating mandates for the broader trade talks during February, suggesting negotiations will not begin until March.

Assuming talks begin in early March, the first indications of progress are likely to follow the EU Council meetings scheduled for March 26 and June 18. As already noted, if progress is slow and the UK is unwilling to contemplate an extension of time, negotiators may have to narrow their ambitions. The June 18 Council meeting may therefore provide a crucial indicator of the Brexit outcome, falling just before the deadline for extending the implementation period.

The European Parliament is due to meet the week of November 26. It would seem likely that any agreed deal would need to be ready for their approval by that date if it is to be implemented by December 31.

With only a few months available for talks and no appetite for an extension on the UK side, time is of the essence if the UK and EU are to have a chance of concluding a comprehensive future relationship agreement of the type envisaged in the Political Declaration. The EU’s position is that achieving a comprehensive trade and security partnership - is unrealistic in the time available (“*virtually impossible*” according to Ursula von der Leyen, the new president of the Commission). If the UK remains wedded to the current timescale, the focus is likely to be on reaching agreement on what Michel Barnier has called the “*vital minimum*”.

Data adequacy, financial services and fisheries

The Political Declaration specifies target dates for post-exit day actions in three areas:

- **Data adequacy:** the adequacy of the UK's data protection framework will be assessed as soon as possible after exit day, the Commission "*endeavouring*" to adopt decisions by the end of 2020, "*if the applicable conditions are met*".
- **Financial services:** "*the Parties should start assessing equivalence with respect to each other under [their respective equivalence frameworks for third countries] as soon as possible after [exit day], endeavouring to conclude these assessments before the end of June 2020*".
- **Fisheries:** "*The parties will use their best endeavours to conclude and ratify their new fisheries agreement by 1 July 2020*".

The desired rulings in relation to data adequacy and financial services will require engagement from both sides in terms of making requests for and responding to requests for relevant information, but both are arguably within the gift of the grantor to deliver within the timeframe if there is political will to do so. Any decision by the EU to prioritise the UK's assessment beyond that of other third countries also seeking rulings will also inevitably be determined, at least in part, by politics.

Whilst the UK's data protection regime is simpler for the EU to assess than those of other countries due to the UK continuing to apply the GDPR, there are concerns as to the Government's surveillance powers, and previous adequacy decisions have taken much more than a year to complete the approval process. There are also concerns about how the number of other countries in the queue for EU data adequacy decisions might affect progress between the EU and the UK. The end of 2020 is therefore a tight timeframe for a positive adequacy decision from the EU. It is critical that the data adequacy discussion begins immediately after exit day if there is to be any chance of a decision being adopted by the end of the year.

For financial services, equivalence decisions are required in multiple areas and the target date for the conclusion of "assessments" is even shorter. There are certain decisions that are obvious priorities, for example, regarding the recognition of CCPs. How the process will be approached is as yet unclear. From the UK perspective, the temporary permissions regime will fill the gap for some time beyond exit day should formal equivalence rulings not be achievable in all areas by December.

Political Declaration - potential sticking points

A successful and timely conclusion to the negotiations seems set to depend primarily on the UK's willingness to maintain alignment with EU regulations. To achieve a free trade agreement that builds on WTO principles, cooperation and consensus on the parameters of good regulatory practice will be required across the board. Alignment (at least initially) seems the most obvious way to beat the clock to an agreement that secures comprehensive access to the single market for UK businesses.

This does not, however, accord with the Government's policy objectives. Mrs May's version of the Political Declaration stated that to promote trade in goods, "*the UK will consider aligning with Union rules in relevant areas*". This and other references to such alignment were deleted by the Johnson team. Following his meeting with Ms von der Leyen earlier this week, Mr Johnson said "*any future partnership must not involve any kind of alignment or ECJ jurisdiction*".

The Johnson team also sought to revisit the “*level playing field for open and fair competition*” in the October negotiations. As a result, the description of the level playing field was altered from the original May version. It still requires the parties to uphold “*common high standards*” in the areas of state aid, competition, social and employment standards, environment, climate change and relevant tax matters. However, this is subject to the qualification that the precise nature of those commitments should be commensurate with the “*scope and depth of the future relationship and the economic connectedness of the parties*”.

The level playing field is a sensitive issue for the EU. Over the last few weeks, it has been underlined at every opportunity by EU leaders and lead negotiators. On the day after the UK election, Council President Charles Michel’s first comments were that it is very important that the level playing field is guaranteed and the integrity of the single market, preserved.

Whether in practice (and in which areas) the stakeholders the UK Government represents wish to diverge from EU rules and standards is an issue that will come to the fore in the coming weeks and months. The Government’s policy since the referendum has been to “*take back control of our laws*”. A [CBI report](#) published in April 2018 suggested that in many industries there is limited appetite for de-regulation.

What is the “vital minimum”?

The Political Declaration establishes the parameters of an “*ambitious, broad, deep and flexible partnership across trade and economic co-operation with a comprehensive and balanced Free Trade Agreement at its core, law enforcement and criminal justice, foreign policy, security and defence and wider areas of co-operation*”. It scarcely needs to be repeated that this is a tall order in the 6 months or so available for talks.

The Political Declaration also specifies that the parties will agree a programme for the structure and format of the talks and a formal schedule. This will include the identification of areas likely to require “*the greatest consideration and the associated legal and technical issues*”. The bureaucratic difficulties of adjusting the EU’s negotiating mandate once set, could, as previously, allow the EU to take the lead in setting priorities.

Ursula von der Leyen has said that negotiations will need first to address key EU issues - trade in goods and fisheries. This means that key issues for the UK - such as improving EU market access for the full range of financial services activities - may not be prioritised. The UK Government will be under pressure to ensure that making the land and sea borders with Ireland and Northern Ireland as frictionless as possible is at the top of the agenda.

Any “sequencing” plans from the EU may also put forward issues within the EU’s exclusive competence first. The EU can conclude an agreement on areas of exclusive EU competence with the approval of the EU institutions. A “mixed” agreement, covering areas that extend beyond EU competence, for example, security and aviation, will require ratification by each EU member state in accordance with its own constitutional requirements. This is why the Canada-EU trade agreement took almost a year to ratify.

If it proves impossible to move through the whole sequence, it may be the case that a limited agreement takes effect on the IP Completion day, and that talks continue beyond that date on other issues. To quote the Political Declaration, the future relationship “*might evolve over time*”.

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Slaughter and May is equipped to help you across the full spectrum of legal issues triggered by Brexit.

Our team has advised and continues to advise clients in a range of sectors on issues arising out of the UK's departure from the EU. These include the effects of Brexit on M&A, financing transactions and other types of investment activity, its likely impact on the regulatory environment and on the cost of cross-border trade.

We are also able to assist with contingency planning, lobbying efforts and the formulation and implementation of restructuring options.

For further information on the contents of this Briefing or in relation to Brexit more generally, please visit www.slaughterandmay.com/brexit.

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