

Brexit: an agreed deal

What does it mean for business?

This brief guide explains what the UK Parliament has just approved and what this means for businesses.

What has happened?

The European Union (Withdrawal Agreement) Bill 2019-20 was approved by the House of Commons on 9 January 2020 and by the House of Lords on 22 January 2020. The Bill became law when it was granted Royal Assent by the Queen on 23 January 2020. The Bill provides formal approval of the Withdrawal Agreement between the UK and the EU.

As a matter of formality, the European Parliament ratified the Withdrawal Agreement on 29 January 2020.

What does this mean?

The UK will now enter the so called 'implementation' or 'transition' period on the date on which it leaves the EU, being 11pm GMT on 31 January 2020.

The transition period is intended to allow the UK more time to negotiate the terms of its future relationship with the EU and enables businesses to prepare for the changes which they need to make post Brexit.

The transition period is expected to end on 31 December 2020. There is a possibility to extend the transition period for up to a further two years, but this is unlikely to be a viable option given the UK political optics of another delay. At the present time if there is to be an extension this must be requested by the UK by 30 June 2020.

What does the Withdrawal Agreement provide?

The Withdrawal Agreement provides a basic framework for the UK's exit from the EU. Its main provisions cover the transition period, financial settlement and citizen's rights.

So what happens now is:

1. With effect from 31 January 2020, the UK ceases to be an EU member state.
2. However, so far as current law is concerned, not much will change until 31 December 2020. All existing EU legislation as at 31 January 2020 will automatically become UK law under the terms of the Withdrawal Agreement. During the transition period, the UK will also remain subject to and bound by the obligations of EU law and the judgments of the Court of Justice of the European Union.
3. The UK will also continue to remain part of the EU single market and the customs union. Therefore, the rights of individuals and businesses will remain for the most part the same throughout this interim period, and free movement of goods, capital, services, and people will continue at least until the end of the transition period. Indeed individuals will be able to travel freely within the EU/EEA and UK.

4. The UK will also contribute to the EU budget during this transition period and this will reduce the amount of any financial settlement. What happens after the transition period will be dependent on what, if any, free trade and other deals the UK and EU negotiate and agree.
5. The UK will lose some of its political rights in the EU. For example, the UK will no longer be represented at EU institutions, committees and agencies and will not have voting rights on new legislation or agreements.

It is the intention of the UK government that during the transition period, the UK will enter into and negotiate new trade agreements with the EU. The UK will be able to ratify new international agreements in its own name, provided that any new agreement does not apply until after the transition period ends.

If a trade deal with the EU is not agreed before the transition period ends there is a material risk that the UK will be forced to trade with the EU under the World Trade Organisation rules and therefore various checks and tariffs will apply to UK exports and EU imports.

6. The current Withdrawal Agreement envisages a new customs and regulatory border between England, Scotland and Wales (together, Great Britain) and Northern Ireland. Such border is to come into effect from 1 January 2021 if alternative measures are not agreed in the trade deal to be negotiated before the end of the transition period. If this customs and regulatory border is implemented, certain goods passing through the border will be subject to tariffs which will or will not be recoverable, depending on whether the goods are destined for the Republic of Ireland or Northern Ireland. The virtual border between Great Britain and Northern Ireland will necessitate documentation being created before goods can pass between the borders of Northern Ireland and Great Britain. Under this approach Northern Ireland and Great Britain will become the only member of the G7 which imposes controls on moving goods within its own borders.

The very nature of the border between Northern Ireland and Republic of Ireland is such that it can be expected that it will be a gateway for goods to be smuggled into and from the EU. However, the approach suggested in the Withdrawal Agreement replaces the previously considered 'backstop' which would have created a hard border between Northern Ireland and the Republic of Ireland.

What the Withdrawal Agreement fails to address

The Withdrawal Agreement provides that the UK can continue to be treated as an EU member state during the transition period in respect of international agreements made by the EU. The international agreements include trade agreements which the EU has made with about 70 countries including Japan, South Africa and South Korea.

Although the EU is notifying these countries that the UK should be "treated as a member state" of the EU until 31 December 2020, there is uncertainty as to whether these countries will do so.

If they fail to do so, UK goods exported to these countries will not benefit from preferential and cheaper access to these markets. As at 29 January 2020 the UK's Department for International Trade was unable to confirm which overseas countries would continue to treat the UK as a member state of the EU for the purposes of such agreements.

The Political Declaration

The Political Declaration is a non-legally binding document which sets out some of the aspirations of the UK and EU Member States in relation to the future relationship between the UK and the EU post-Brexit. The Political Declaration was considered and agreed at the European Council on 17 October 2019.

Although the Political Declaration provides a framework for a possible trade deal, negotiations for this post-transition deal cannot begin until after 31 January 2020. As a result, the content of the Political Declaration provides only a basic skeleton of what any deal could possibly look like.

The Declaration contains plenty of aspirations involving shared interests, close partnerships and ambitious co-operation, but many of the details required in any deal are still to come. What is included in the Declaration is:

1. Trade in goods. The Declaration states that the UK and EU “*envisage having an ambitious trading relationship on goods on the basis of a Free Trade Agreement, with a view to facilitating the ease of legitimate trade*”.
2. Trade in services. The Declaration provides that both the EU and UK should respect each regime’s right to regulate and start assessing and implementing equivalence regimes for regulatory and supervisory bodies and regimes.
3. Customs. The Declaration states that the “*economic partnership should through a Free Trade Agreement ensure no tariffs, fees, charges or quantitative restrictions across all sectors, with appropriate and modern accompanying rules of origin, and with ambitious customs arrangements that are in line with*” the EU and UK’s objectives and principles.
4. Digital Commerce. Provision is made for both parties to ensure they facilitate and address any “unjustified barriers to trade” by electronic means, in respect of both services and goods.

It is also the case that the Declaration indicates an intention to seek an “adequacy decision” from the European Commission during the transition period to address EU to UK data transfers from 1st January 2021. There is, however, no guarantee that the UK will obtain an adequacy decision from the European Commission in time, or at all.

If an adequacy decision has not been made by the end of the transition period, then organisations in the EEA which are transferring personal data to the UK will need to ensure that they have in place an “appropriate safeguard” for the data. In the majority of cases, the most appropriate lawful mechanism for transfers will be for the parties to enter into the appropriate EU approved “standard contractual clauses” (“SCCs”).

5. Security. The Declaration contains statements on the intended levels of co-operation in respect of both internal police co-operation and on broader foreign policy and defence matters.
6. Disputes and courts. The Declaration envisages a dispute resolution system with a joint committee and an arbitration panel. However, final word on matters of EU law will rest with the European Court of Justice.

7. Financial Services. Each of the EU and the UK has agreed to assess the other for “equivalence”. These assessments will start in February 2020, and the parties have agreed to “*endeavour ... to conclude [them] before the end of June 2020*”. The EU and UK will be exactly equivalent at the end of the transitional period. It should therefore be possible for each of the EU and UK to find the other “equivalent” when they carry out their 41 equivalence assessments. However, the UK has made it clear that it wants to depart from the EU’s regulatory framework; and the UK financial services regulators are keen to use their new freedom in some areas. So, if the EU is willing to treat the UK as equivalent in all 41 areas (and that cannot be guaranteed), that equivalence might not last for very long.
8. Freedom of movement. Whilst the Declaration notes that the principle of free movement of persons will end, other mobility arrangements should be made (with the idea of visa-free travel for short-term visits likely being what is envisaged). It is worth noting that this should be read in conjunction with the wider changes to the immigration system expected to be announced by the UK Government.

In particular, there is no guarantee as to the status of those arriving after the end of the transition period. In fact, there is also no guarantee whether there will be exemptions of any nature from the new immigration system for EU/EEA nationals coming to the UK or British citizens going to EU/EEA post Brexit.

Conclusion

Whilst the Withdrawal Agreement is intended to provide some degree of certainty and security to individuals and businesses in the UK, the full terms and arrangements of the “divorce” with the EU are still yet to be negotiated.

However, there remains the possibility that come 31 December 2020 a deal may still not have been agreed resulting in great uncertainty.

Our Brexit team contacts include:



Stephen Sidkin

Partner, Commerce,
competition and trade
sidsidkin@foxwilliams.com
+44 (0)20 7614 2505



Nigel Miller

Partner, Data protection
nmiller@foxwilliams.com
+44 (0)20 7614 2504



Chris Finney

Partner, Financial services
cfinney@foxwilliams.com
+44 (0)20 7614 2614



Sacha Schoenfeld

Partner, Immigration
sschoenfeld@foxwilliams.com
+44 (0)20 7614 2597

For more information: <https://www.foxwilliams.com/brexit-lawyers.html>

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