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Brexit Update

Three and a half years after the June 2016 referendum, the UK in all likelihood will leave the EU. While the departure date technically is January 31, 2020, in fact little will change on January 31 as the departure date will be followed by a transition period that is expected to end on December 31, 2020. During the transition period, the UK remains in the EU customs union and the single market, and remains subject to EU rules and the jurisdiction of the European Court of Justice. It does not participate in any of the political institutions and there will be no British members of the European Parliament. As early as February, British and EU negotiators will undertake perhaps the most arduous of the Brexit tasks – negotiating the future relationship between the UK and the EU. While any number of policy differences may surface, the overarching theme will be alignment – will the UK be willing to sacrifice optionality to retain access to the benefits of access to EU markets for goods and services (as the EU insists) or will Boris Johnson prevail in maintaining the optionality to diverge.

Recent Developments

The original departure date, set under Article 50, was March 31, 2019. That deadline was pushed back twice, first to May 22 and then to October 31, as MPs rejected the withdrawal deal that then Prime Minister Theresa May had negotiated with the EU. Theresa May's failure to get her deal through Parliament three times led her to resign in June and, following a Tory Party leadership contest, she was replaced by Boris Johnson in July. The withdrawal deal had fallen victim to the so-called Irish backstop, designed to ensure there would be no hard border between Ireland and Northern Ireland following Brexit should no satisfactory trade arrangement be reached with the EU.

Boris Johnson managed to extract a revised withdrawal arrangement from the EU (notwithstanding an EU27 red line that they would not reopen the agreement), but Parliament declined, during a rare Saturday session (on October 19), to vote on the revised withdrawal deal in the absence of passage of legislation that ensured the UK would not crash out of the EU. The Prime Minister was forced to seek a further extension to January 31, 2020 and he then called for a general election. Confident they could win, the opposition Labour Party agreed to that new election (a majority was needed, and by then the Tories, together with the Democratic Unionist Party, no longer commanded a majority). In a stunning defeat for Labour, Boris Johnson, campaigning in effect on a single platform of getting Brexit done and smashing the so-called "red wall" in the Midlands and the north of England that had been the bedrock of Labour support for generations, emerged with a formidable majority of 80 in the House of Commons.

Brexit will be given effect through a combination of:

- the EU (Withdrawal) Act 2018,¹ which received Royal Assent in June 2018, repeals the European Communities Act 1972 on “exit day” and, in effect, carries over all EU law (known as “retained EU law”) into domestic law. It also gives government ministers the power to make changes to primary and secondary legislation using “statutory instruments” in order to make adjustments necessary to reflect the fact that the UK will no longer be a part of EU institutions;
- the revised Withdrawal Agreement (agreed at a political level and dated October 19),² which will have the force of a legally binding treaty and needs to be ratified by the European Parliament before January 31;
- a revised non-binding Political Declaration (dated October 19),³ which is an annex to the Withdrawal Agreement and sets forth a framework for the future EU-UK relationship;
- a revised Protocol on Ireland/Northern Ireland (adopted October 17),⁴ which sets out the arrangements necessary to avoid a hard border between Ireland and Northern Ireland once the transition period ends; and
- the European Union (Withdrawal Agreement) Bill 2019-20 (“Withdrawal Agreement Bill”).⁵

Under the EU (Withdrawal) Act 2018, Parliament must pass further legislation before the UK can ratify the Withdrawal Agreement. That further legislation is the Withdrawal Agreement Bill, which gives legal effect to the Withdrawal Agreement under domestic UK law. The EU (Withdrawal) Act 2018 repeals the European Communities Act 1972 on “exit day,” but the Withdrawal Agreement Bill continues to give the European Communities Act 1972 (and therefore EU law and EU treaties) legal effect during the transition period. It also gives government ministers the power in certain policy areas, including issues covered by the Protocol on Ireland/Northern Ireland, to change the law through secondary legislation without a vote of Parliament.

The Withdrawal Agreement Bill no longer provides (as did the October version) for the right of Parliament to approve the negotiating objectives for the future trade deal with the EU or to approve the future

¹ [\(available here\)](#).

² [\(available here\)](#).

³ [\(available here\)](#).

⁴ [\(available here\)](#).

⁵ As introduced in the House of Commons on December 19 [\(available here\)](#). See also the European Union (Withdrawal) Bill Explanatory Notes [\(available here\)](#).

relationship with the EU. It also no longer contains a provision that the future trade relationship should be aligned with the Political Declaration.

In place of the toxic Irish backstop, the revised Protocol on Ireland/Northern Ireland contemplates a customs arrangement pending negotiation of a free trade agreement with the EU and, in effect, places the EU border in the Irish Sea. Goods entering Northern Ireland from the rest of the UK are subject to EU import taxes, which are to be refunded if the goods remain in Northern Ireland. The Brexit deal also addresses the rights of EU citizens in the UK and British citizens in the EU, and the divorce bill.

With a significant majority in the House of Commons and few of the Tory rebels who voted against the government during 2019 still in Parliament, on January 9, the Withdrawal Agreement Bill passed without amendment (330 to 231), paving the way for a negotiated departure on January 31, 2020, followed by an 11-month transition period. The Withdrawal Agreement Bill now goes to the House of Lords, before returning to the House of Commons in sufficient time to allow for the UK “to get Brexit done by January 31.” However, while that deadline will be met, Brexit will by no means be done at the end of January.

The Transition Period

The Withdrawal Agreement provides for a transition period (also referred to as an implementation period, which is the term preferred by the UK government). The Withdrawal Agreement contemplates the ability to extend the transition period for an additional 12 or 24 months, provided a request is made before July 1, 2020. However, the Withdrawal Agreement Bill prohibits the extension of the transition period beyond December 31, 2020, even if there is no free trade agreement in place with the EU.

As noted above, during the transition period the UK remains a member of the EU single market and the EU customs union. Freedom of movement remains in place, and the rights of UK citizens in the EU and EU citizens in the UK remain unchanged. The UK remains generally subject to EU laws and the rulings of the European Court of Justice. The UK no longer is represented in, and no longer has voting rights in, EU political institutions, and so cannot prevent changes in EU law that it must observe (subject to a few limited exceptions set forth in the Withdrawal Agreement) during the transition period. The UK also remains a part of the security cooperation arrangements with the EU. The UK is able during the transition period to negotiate with other countries as well, and many believe that the UK will seek to negotiate with the US and the EU in parallel, though trying to sign a free trade agreement with the US during an election year is unlikely to be successful.

At the end of the transition period, assuming a deal is reached, the relationship between the UK and the EU will be governed by the new agreements the parties will have entered into in respect of trade and possibly cooperation in other areas.

If there is no free trade agreement in place by the end of 2020 and there is no extension of the deadline, the UK would fall back on World Trade Organization terms, subjecting UK goods exported to the EU to tariffs. At this point, a four-year alignment between Northern Ireland and the EU under the Northern Ireland Protocol would commence. The UK would have carried over EU laws via the EU (Withdrawal) Act 2018; however, it could choose not to follow future changes in EU laws, it could diverge if UK courts interpret EU laws differently or it could diverge if new domestic laws are passed.

Fault lines

Negotiations are expected to begin early in February on the trade agreement covering goods and services, and cooperation in other areas. The EU's chief Brexit negotiator, Michel Barnier, has warned that access by the UK to EU markets for goods on a zero-tariff, zero-quota basis could be limited unless the UK agrees in effect to create a level playing field for UK and EU businesses, meaning the UK must maintain equivalence in terms of environmental, labor and social standards, taxation and rules on state aid (subsidies). Barnier also reiterated that the goal of achieving a free trade agreement by the end of 2020, particularly when one factors in the time needed for ratification by the EU27 and the European Parliament, was unrealistic.

New European Commission President Ursula von der Leyen made similar points in her first meeting with Boris Johnson as Prime Minister, referring to her goal of a trade deal with “no tariffs, no quotas and no dumping” and noting that an agreement addressing “every single aspect of our new partnership” was not achievable by the end of 2020. If the UK is prepared to remain fully aligned with EU rules, the negotiations will be far easier. However, if the UK wants the freedom to diverge from EU rules to accommodate arrangements it will reach with other countries or simply for the sake of flexibility, the negotiations become more complicated. To date, Boris Johnson has stated he will not agree to keep the UK aligned with EU regulatory standards.

Under the Political Declaration, by the end of June, the EU needs to decide on equivalence in respect of financial services in order for financial institutions in the UK, as a “third country,” to continue to provide services to EU clients. Ultimately, access will be granted on a case-by-case basis, and access technically could be withdrawn at any time.

An issue of greater political import is EU fishing rights in UK waters. The UK envisions negotiating access rights on an annual basis, while the EU is likely to try to negotiate access up front. Another open question is the ongoing role of the European Court of Justice.

Where are we?

For much of the past three and a half years, Brexit has dominated the headlines in the British press and many conversations, certainly in London. While stories of an ongoing civil war in the Conservative Party and of razor-thin margins in the House of Commons largely will disappear, questions (and concerns) about

the shape of the future relationship between the UK and the EU, and in fact the UK and the rest of the world, will not. The brinkmanship between UK and EU negotiators will continue. There is no certainty that a form of “crashing out of the EU” at the end of 2020 will not occur; if there is no trade deal (and no extension of the deadline), the effect on January 1, 2021 will be largely the same as a “no-deal exit.”

There are any number of questions and, as so often has been the case with Brexit, no easy answers: will the parties be willing to adopt a piecemeal approach to key issues, or will one side insist on a comprehensive agreement on trade in goods? Even if a deal can be achieved on trade in goods, deals on services and other matters way well need to be addressed later. The scope may begin to come into focus when the EU27 set out the negotiation mandate for its negotiators. European Commission President von der Leyen recently hinted that it would be necessary to prioritize sectors, suggesting that a sectorial approach might be acceptable. The EU27 will also have to agree on whether or not the new deal is a “mixed agreement”; if it is, then regional parliaments will have an approval right as well, on top of the 27 national parliaments – further complicating the timetable. Boris Johnson managed to get the EU27 to cross one significant red line; perhaps he can do so again. What is unlikely to change, though, in the words of von der Leyen, is the EU’s commitment to upholding “the integrity of the EU, its single market and its Customs Union.”⁶

Whatever the outcome, it is fair to say that the relationships between the UK and the EU, and between the EU and other trading partners, will never be the same. And, as has been the case since the referendum, many with significant personal, financial, business and other stakes in the outcome will be sitting on the sidelines over the coming months and hoping for the best.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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⁶ Speech at the London School of Economics (January 8, 2020) ([available here](#)).