



Brexit snapshot

BREXIT: WHERE DO WE GO FROM HERE?

FEBRUARY 2020

The UK general election which took place on 12 December 2019 was a pivotal moment in the long-running Brexit saga. Boris Johnson's primary objective in calling the election (or, more to the point, given the parliamentary super-majority required to call an early general election, managing to prevail on the other political parties to agree to one) was to break the parliamentary stalemate on Brexit. His rallying cry of "*Get Brexit done*" plainly resonated with the electorate, and the Conservative Party was returned with a resounding 80-seat majority.

Before the election, Boris Johnson had been attempting to force Brexit through parliament with a wafer-thin majority, and then with a minority government once he had withdrawn the Conservative whip from those MPs who had voted in favour of delaying Brexit until 31 January 2020, rather than face a no-deal departure on 31 October 2020¹.

Once the scale of his parliamentary majority became clear, obtaining parliamentary approval for the revised Withdrawal Agreement which Boris Johnson had negotiated with the EU in October 2019, and of passing the legislation to embed the Withdrawal Agreement into UK domestic legislation, became a foregone conclusion. Demonstrating the scale of Boris Johnson's victory, the European Union (Withdrawal Agreement) Bill passed through parliament without a single amendment (the House of Lords proposed five separate amendments, but these were all rejected by the House of Commons) on its way to becoming the European Union (Withdrawal Agreement) Act 2020². As part of the parliamentary stages of creating the new Act, the House of Commons voted to undertake the Committee stage and Third Reading stage of the bill in three days, a move described by the [Hansard Society](#) as "*an extraordinarily reduced amount of scrutiny for a bill of the WAB's complexity and constitutional importance*", and which reflects the speed and flexibility with which many parliamentary events can take place when a government commands a significant House of Commons majority.

As a result of the new parliamentary landscape, the stage was set for the UK to finally depart the EU, which it duly did on 31 January 2020 – although it continues to be treated as part of the EU until the end of the transition period – the so-called "Implementation Period" – which is currently scheduled to take place on 31 December 2020.

The purpose of the transition period is to allow time for the parties to agree the terms of their future trading arrangements – something which Boris Johnson promised voters would be signed, sealed and delivered by the end

¹ In early September 2019, parliament (with the help of votes from a number of Conservative MPs opposed to a no-deal Brexit) voted to block a no-deal Brexit taking place on 31 October 2019 by passing legislation (the European Union (Withdrawal) (No 2) Act 2019 – known as the "Benn Act" after the MP who had introduced it) which required the prime minister to seek a three-month extension from the European Union (EU) if a Brexit deal had not been agreed by 19 October 2019. Such a letter was duly sent, and on 28 October 2019, the EU announced that it had granted an extension until the end of January 2020. The very next day the House of Commons voted for a general election to take place on 12 December 2019, the first December general election in almost 100 years.

² See the table on page 2 of this document for a summary of the main provision of the European Union (Withdrawal Agreement) Act 2020, including details of how it differs from the version which was tabled in October 2019, when Boris Johnson had been attempting to woo wavering MPs to vote for it.

of 2020 – despite the revised Withdrawal Agreement including an option to mutually agree an extension of up to two years.

European Union (Withdrawal Agreement) Act 2020

Main Provisions

The European Union (Withdrawal Agreement) Act 2020 (the 2020 Act), much of which is set out in the form of amendments to the earlier Brexit withdrawal legislation, the [European Union \(Withdrawal Agreement\) Act 2018](#) (the 2018 Act):

- Confirms that the European Communities Act 1972 is repealed on "exit day": 11.00pm GMT on 31 January 2020
- Enshrines the Withdrawal Agreement agreed between the UK and the EU in domestic law, including the financial settlement and agreement on citizens' rights
- Legislates for a transition period (described as an implementation period (IP)), with "IP completion day" being defined as 11.00pm GMT on 31 December 2020
- Makes provisions for changes to EU law to be legally binding in the UK during this transition period

In addition, Paragraph 1 of Schedule 5 to the 2020 Act sets out the general rule that EU exit SIs, made before exit day under any 2018 Act provision (or any provision made under any such provision), or under any other enactment, will come into force by reference to IP completion day instead of by reference to exit day. This defers their effect, so that UK law does not diverge from EU law during the transition period. Subordinate legislation can expressly dis-apply this general rule where required.

As described above, the 2020 Act also fetters the UK government's ability to seek an extension of the Brexit transition period beyond 31 December 2020, with Section 33 containing a new provision prohibiting any extension of the implementation period, which is inserted in the 2018 Act, as follows:

"15A Prohibition on extending implementation period

A Minister of the Crown may not agree in the Joint Committee to an extension of the implementation period."

Section 26 of the 2020 Act also gives new powers to British judges to depart from previous rulings of the European Court of Justice (ECJ) in relation to EU law which is retained in UK law post-Brexit – so-called "retained EU law". Under the 2018 Act, the power to depart from ECJ rulings when interpreting retained EU law had been reserved to the Supreme Court and the High Court of Justiciary in Scotland. However, the 2020 Act now allows the lower courts to also depart from such rulings, if instructed to do so by a regulation made by a government minister before IP completion day setting out the circumstances in which the lower courts may do so, and the test that must be applied in so departing. Crossbench peer Lord Pannick QC, who acted for businesswoman Gina Millar in her two Supreme Court cases against the government over its handling of Brexit, cautioned against the measure, saying that it would "*cause very considerable legal uncertainty*".

In addition, provision which had been included in the October 2019 version of the European Union (Withdrawal Agreement) Bill to ensure that workers' rights were not weakened after Brexit no longer featured in the post-election version of the bill, which went on to become the 2020 Act.

So what can we expect in the coming months in terms of Brexit?

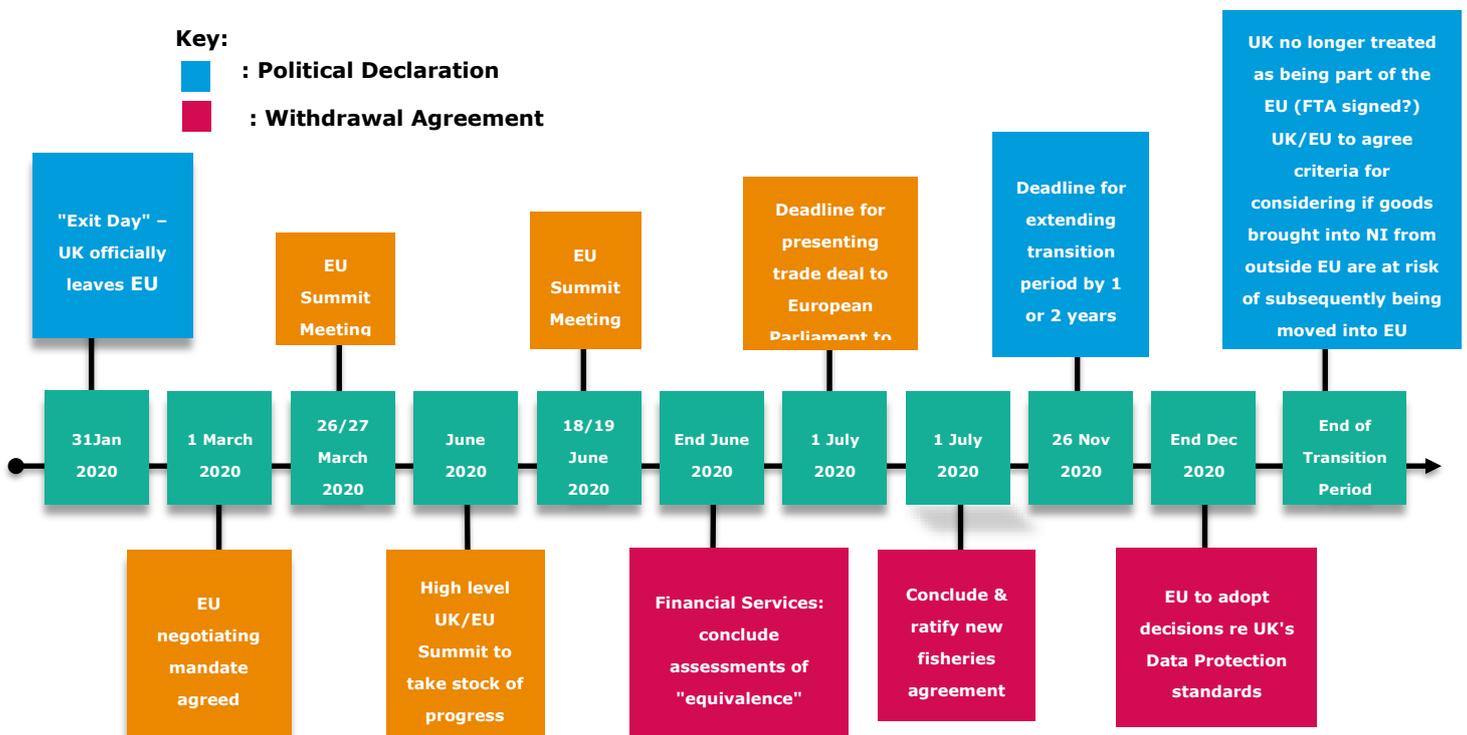
The possible routes are as follows:

- the UK negotiates a trade agreement with the EU by no later than (approximately) the end of October 2020 to allow sufficient implementation time for ratification by the UK and EU parliaments, and for the new arrangements to be put in place on the ground so that the Brexit transition period can end on 31st December 2020;

- the UK and the EU fail to agree and ratify a future trade deal, and the UK departs the EU at the end of the transition period on 31st December 2020 meaning that it must revert to trading on World Trade Organisation (WTO) terms; or
- the UK and the EU fail to agree a future trade deal in the coming months. To avoid the UK leaving the EU without a trade agreement in place (and therefore having to trade on WTO terms instead) the UK and the EU agree to extend the transition period beyond 31st December 2020. Note, however, that the European Union (Withdrawal Agreement) Act 2020 includes a new provision (i.e. one which was not in its previous incarnation when the Bill was previously published in October 2019) explicitly prohibiting any UK government minister from agreeing an extension of the transition period – despite the fact that Article 132 of the new Withdrawal Agreement includes an option for extending the transition period by up to 2 years.

The new President of the European Commission, Ursula von der Leyen, has made clear her reservations surrounding Boris Johnson's plan to conclude negotiations on the future relationship between the UK and the EU by the end of this year. Speaking at the London School of Economics in January 2020, she said: *"Without an extension of the transition period beyond 2020, you cannot expect to agree on every single aspect of our new partnership"*, adding that the UK could face difficult trade-offs between market access and regulations: *"Without a level playing field on environment, labour, taxation and state aid, you cannot have the highest quality access to the world's largest single market"*. The EU's chief Brexit negotiator, Michel Barnier, in a speech delivered in Stockholm shortly afterwards, reiterated this message, referring to the *"hugely challenging timescale"* being proposed by the UK. According to the Guardian newspaper: *"A scrappy, relatively unambitious, low-alignment trade deal is arguably the most plausible landing zone, in contrast to a deal that keeps both sides economically close and the UK locked into the EU's regulatory orbit"*.

Diagram 1 – Outline timeline of events during Brexit transition period



So, how likely is it that the parties manage to agree a free trade agreement by the end of the year? Table 1 above sets out the indicative timeline during the Brexit transition period.

On 10th November last year, Boris Johnson [tweeted](#) that he was planning to negotiate at **"super-Canada-plus free trade agreement"** with the EU – and also that he had ruled out an extension to the transition period beyond the end of 2020.

On 3rd February 2020 the EU published its [draft negotiating guidelines](#) (which require sign-off by the Council of the European Union, expected later in February, before the European Commission can begin the formal negotiation stage). As anticipated, M. Barnier repeated the EU's mantra highlighting the UK's and EU's geographical proximity and economic interdependence, and then went on to say:

"First, we need to make sure competition is and remains open, and fair. We have already agreed with Prime Minister Johnson that our future partnership will prevent, and I quote, "unfair competitive advantages". We must now agree on specific and effective guarantees to ensure a level playing field over the long term. That means mechanisms to uphold the high standards we have in social, environmental climate, tax and state aid matters today, and in their future developments.

Second, our free trade agreement must include an agreement on fisheries. This agreement should provide for continued, reciprocal access to markets and to waters with stable quota shares."

The reason why the EU is so insistent on the "level playing field" commitment described above is because it fears that a deregulated UK (a so-called "Singapore-on-Thames") virtually on its doorstep could have enormous adverse consequences for its economies. Indeed, M. Barnier specifically referred to this in his speech on 3rd February, saying: *"We don't want that divergence [being followed by the UK] to become an instrument for unfair competition, whereby there would be disadvantages for EU industry. I can't get embroiled in the details of the mechanism - that will all be discussed in the negotiation - but we're going to be paying very close attention, and be very demanding, when it comes to the quality and the credibility of this level playing field mechanism."*

The UK is due to publish its own negotiating mandate by mid-February, but there have already been a number of comments made by Boris Johnson, Dominic Raab, the Foreign Secretary and the Chancellor of the Exchequer, Sajid Javid, to the effect that the UK will no longer be a "rule taker" once it leaves the EU. This position was confirmed in a [speech](#) delivered by Boris Johnson at Greenwich Naval College, also on 3rd February, in which he set out his "opening bid" on whether the UK would continue to abide by EU rules, stating: *"There is no need for a free trade agreement to involve accepting EU rules on competition policy, subsidies, social protection, the environment, or anything similar any more than the EU should be obliged to accept UK rules."* And on fishing rights, he said that he would be willing to allow EU boats access to UK waters – but only on condition that such arrangements were reviewed annually, rather than the long-term arrangement involving "stable" quota shares which the EU is seeking.

The UK's negotiating position on future compliance with EU rules has caused considerable disquiet to those British businesses (such as car manufacturing, pharmaceuticals and food & drink suppliers) which rely heavily on compliance with the EU regulatory landscape in order to sell their products into the EU. Whereas ensuring "frictionless trade" with the EU was totemic for Theresa May, Boris Johnson appears much less wedded to this – although this may be a negotiating ploy. Another possible negotiating ploy could be the rumours emanating from Whitehall that the UK would even be prepared to accept tariff barriers on some goods as the price for diverging from EU standards. This has concerned officials in Brussels, with the Guardian newspaper quoting an unnamed EU official as saying: *"If we start talking about tariffs, there is no chance of a trade deal by the end of the year, as it becomes a very complicated discussion among the member states"*.

The pound fell sharply in the light of Boris Johnson's speech, which renewed fears of the UK leaving the transition period at the end of the year without a trade deal. All businesses, but particularly those which rely on importing goods and materials from the EU (or on exporting to the EU) therefore need to have business continuity plans in place to deal with the very significant disruption and cost implications, both short-term and long-term, which this outcome could bring.³

³ Note that the British Chambers of Commerce have produced a useful "Business Brexit Checklist" to assist business planning at both operational and board levels: see <https://www.britishchambers.org.uk/page/brexit-hub> for further details.

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