

22 JANUARY 2019

How Brexit Works

An Overview of the Withdrawal Agreement,
Political Declaration, Norway Plus, No-Deal,
Votes of No Confidence and a Second Referendum

Introduction

On 25 November 2018 the UK Prime Minister and other EU leaders endorsed their Brexit Withdrawal Agreement (“**WA**”), together with a Political Declaration (“**Declaration**”) on the future long-term relationship of the UK and EU. Now both documents have to be approved by the UK and EU parliaments and the European Council and ratified in time for Brexit - currently set for 29 March 2019 (at 11pm UK time).

Many have commented on the length of the WA, although it is not the number of words but the structure of the document that makes it difficult to navigate. The contents of the WA (with page and article numbers) are listed in an appendix to this document, and should help readers find provisions of particular interest.

For an overview of the WA and the sequence of events that will unfold if it is ratified in time for Brexit, see the flowchart and explanation of individual stages below. These are followed by a description of the Declaration, a diagram showing the essential features of Norway Plus (a soft form of Brexit favoured by many) and brief guidance regarding a no-deal Brexit - now a distinct possibility. Finally, a chart explains the procedure in the Fixed-term Parliaments Act 2011 governing votes of no-confidence in the UK government.

For timings and the possible routes ahead, see our Brexit Timeline and flowchart: The Way Ahead?

Brexit terms are explained in our glossary: What Does It Mean?

Withdrawal Agreement - Brexit postponed

Part of the purpose of the WA is to deal with certain key matters up front, including:

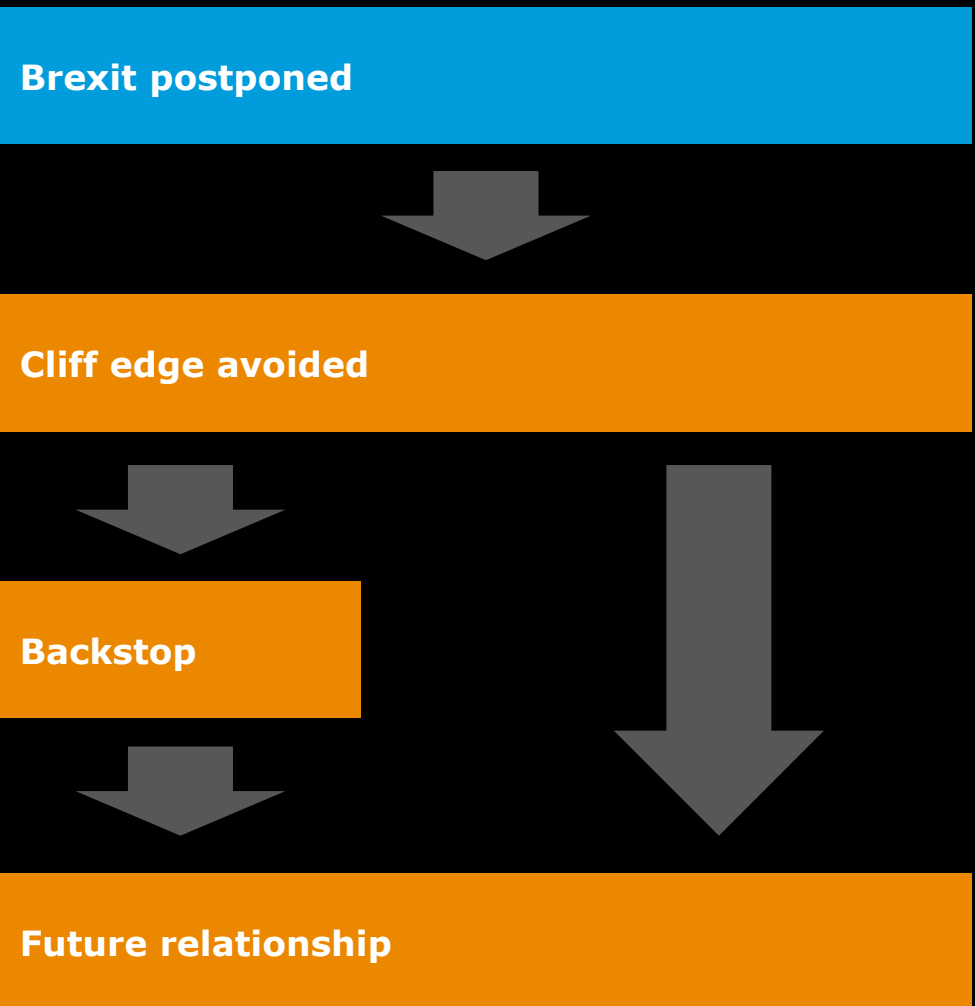
- the rights of EU **citizens** in the UK and vice versa
- the **money** that the UK will pay to the EU as part of the "divorce settlement".

These are dealt with in Parts 2 and 5 of the WA respectively.

The rights granted to citizens are remarkably broad, extending in some respects to family members too. However, there are limits. For example, a UK citizen resident in an EU Member State is not guaranteed the right to move freely to another Member State.

As has been widely discussed in the press, the money the UK will pay is expected to amount to at least GBP 39bn, depending on how the provisions of Part 5 are applied and how long the UK remains part of the EU's legal system.

Aside from these matters and the issue of the Irish border (see Backstop, below), the main purpose of the WA is to postpone Brexit, in effect, and then to ensure that a "cliff edge" is avoided when the UK ceases to be subject to EU rules. Postponement is achieved by means of the **Transition (or Implementation) Period** dealt with in Part 4. This is intended to last until the end of 2020, although Art 132 allows it to be extended (by agreement and once only) to a date no later than the end of 2022.



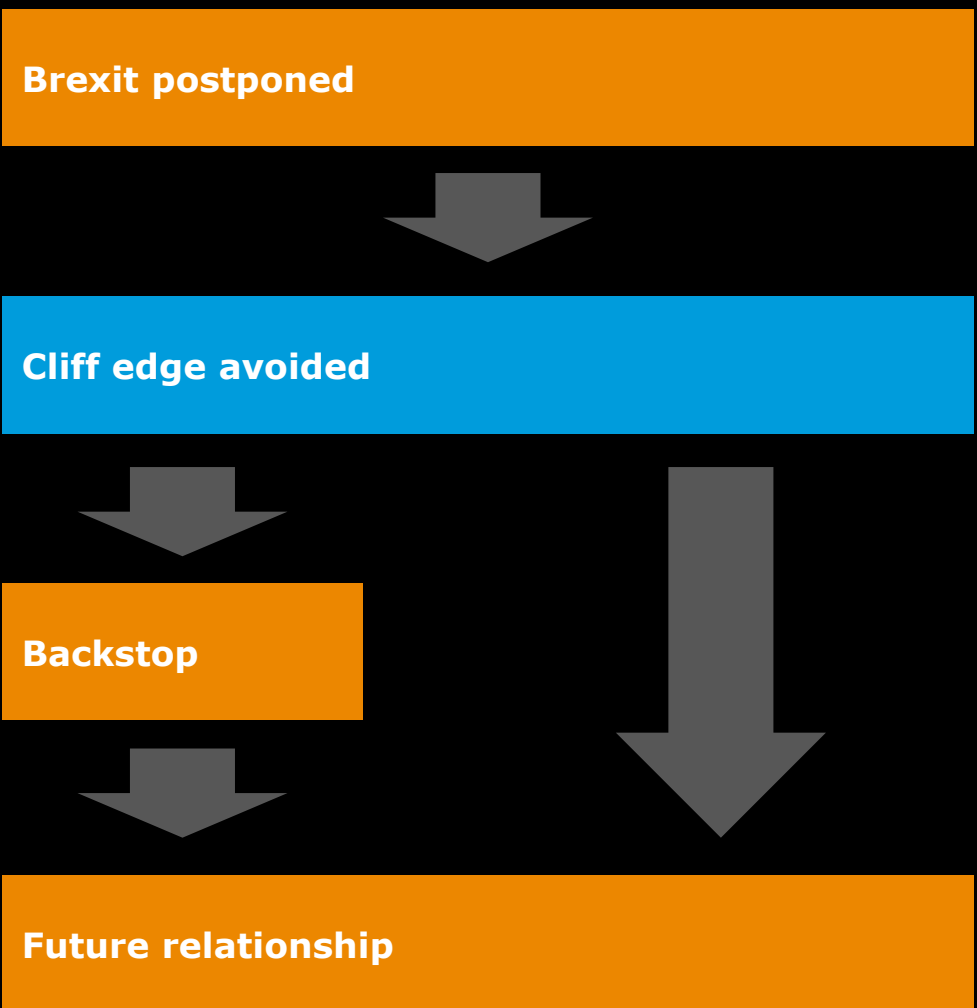
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Withdrawal Agreement - Cliff edge avoided

Part 3 (Separation) aims to smooth over the “cliff edge” effect of the UK ceasing to be subject to EU rules at the end of the Transition Period. So, for example, Art 41(1)(a) provides that “**Any good that was lawfully placed on the market** in the Union or the United Kingdom before the end of the transition period may ... be further made available on the market of the Union or of the United Kingdom and circulate between these two markets until it reaches its end-user”.

Similarly, Art 67(2)(a) states that **judgments given in civil and commercial cases** that are commenced before the end of the Transition Period will continue to be enforceable as they are now, regardless of when a judgment is made or enforcement proceedings begin.

Trade and court proceedings are not the only subjects covered, however. Separation provisions also deal with **customs, VAT and excise, IP, data protection, public procurement** and other matters. Because of the long “tail” of provisions like the ones cited above, Part 3 will continue to have a practical impact long after the end of the Transition Period, and this is one of the ways in which the WA impinges on the accompanying Declaration, which otherwise governs future UK-EU relations.



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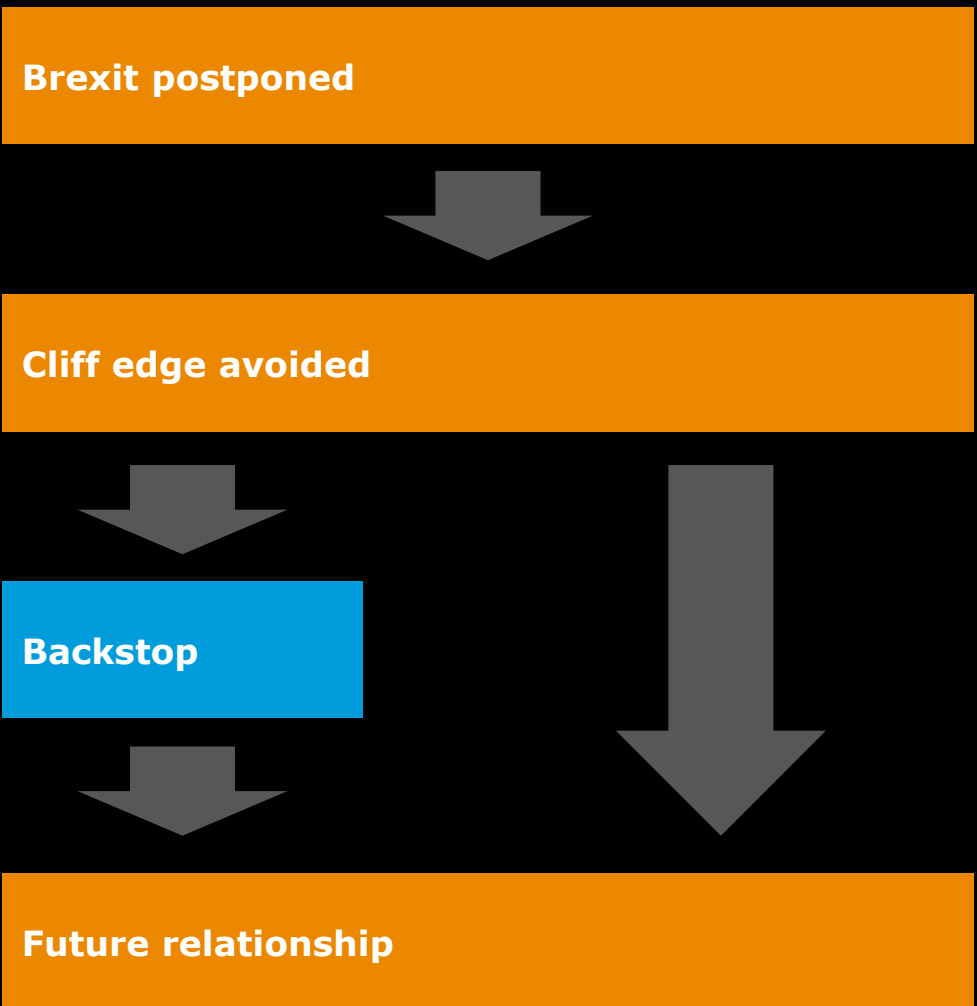
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Withdrawal Agreement - Backstop

It is possible that the UK will move directly from current arrangements to the long-term future relationship when the Transition Period ends. However, this is far from certain, given that the relationship envisaged by the Declaration is "ambitious", "broad" and "deep" (Introduction to the Declaration) and will take time to negotiate.

It is possible, then, that the UK will move first to the so-called backstop set out in the Protocol on Ireland. This ensures that no "hard border" will be erected between Northern Ireland and the Republic of Ireland, and no customs border will be created between Northern Ireland and Great Britain. These goals will be achieved by **Northern Ireland remaining in the EU's VAT area and single market for goods** after the Transition Period ends, and **the UK and the EU forming a bare-bones "single customs territory"** which will remove the need for tariffs, quotas and rules of origins checks at airports and ports. Meanwhile, Northern Ireland will remain subject to large parts of the EU acquis, and the UK will submit to extensive "level playing field" rules in areas such as the environment and state aid, to ensure fair competition between the UK and EU (Protocol on Ireland Arts 6 - 11 and Annexes 4 - 7).

In theory, the backstop should fall away entirely when the future relationship becomes a reality. However, this may not happen if the relationship would otherwise require a hard border in Ireland (Protocol on Ireland Arts 1 and 20).



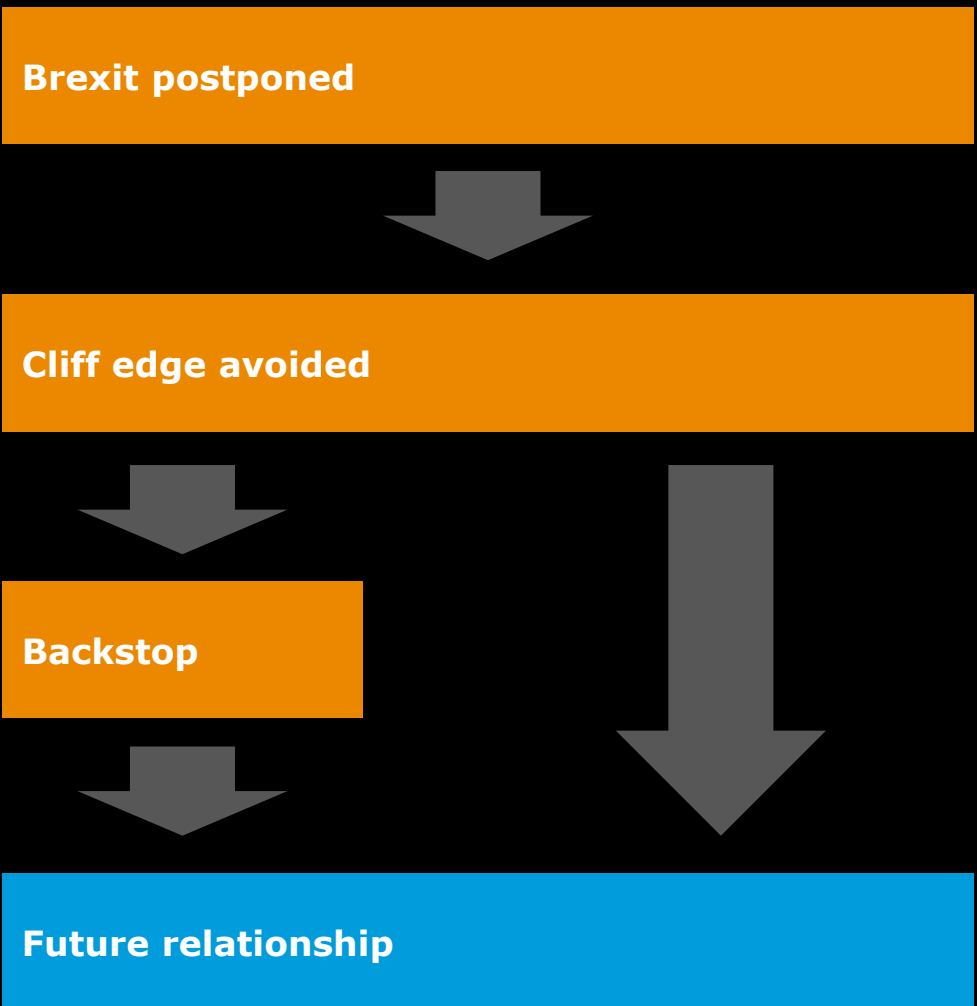
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Withdrawal Agreement - Future relationship

The future relationship between the UK and EU is referred to in the WA, but explained in the Declaration. Unlike the WA, the Declaration is not a binding document. This means that either party can ignore it if the political weather changes - a distinct possibility after the European Parliament elections (and change of European Commission) in 2019.

Added to this, the Declaration is deliberately vague in its wording, which provides flexibility but also leaves a great deal to be negotiated (see below). Finding a solution that suits all parties will be challenging given that all the remaining EU Member States will need to consent to any future trade agreement, in contrast to the majority votes required in the European Parliament and Council to conclude the WA.

As mentioned already, the backstop may continue indefinitely, overriding future agreements. The same is true of the separation provisions in Part 3, although the effects of these will diminish over time (see "Cliff edge avoided", above).



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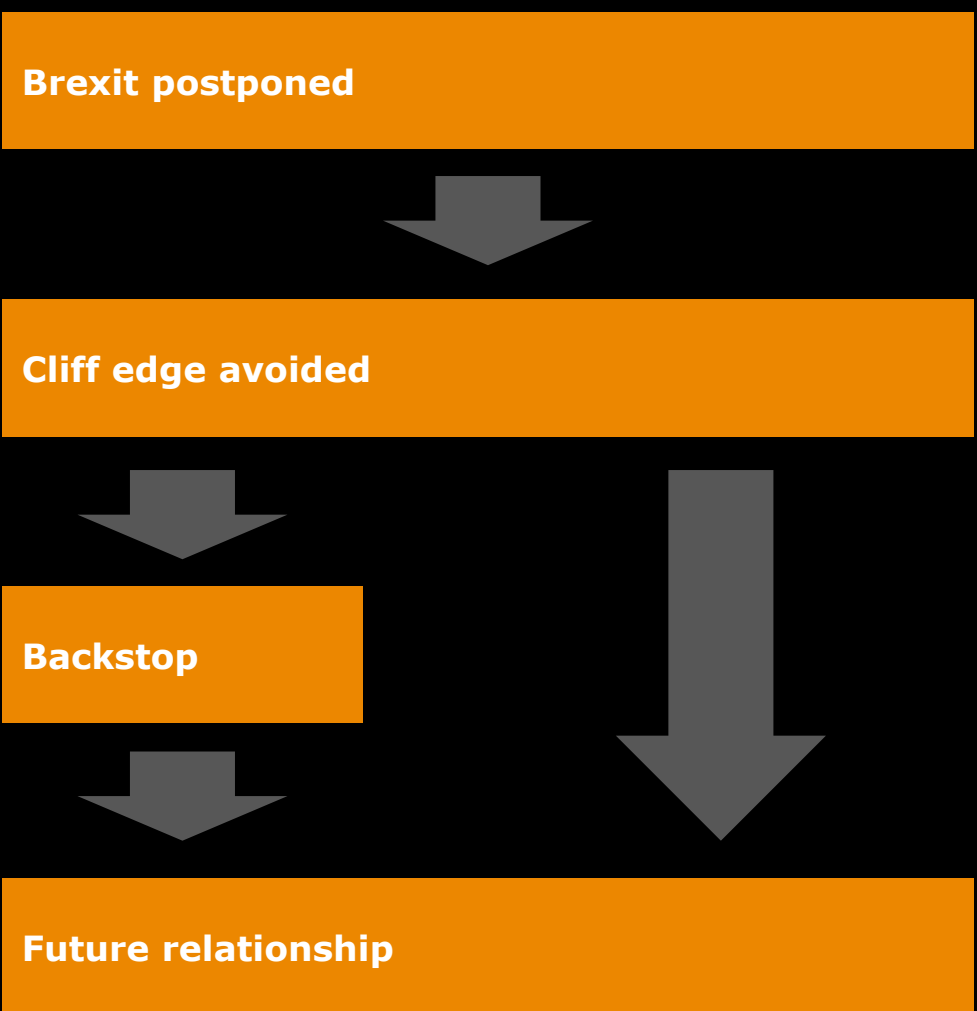
Withdrawal Agreement - No-deal

It is not a foregone conclusion that the WA and Declaration will eventually be approved by the UK and EU parliaments and the European Council. In the UK parliament, opposition to the "deal" that has been struck is strong. It has already been rejected once.

The deal may be renegotiated with the EU, and it is possible that the original or a revised version of it will be the subject of a further **referendum** in the UK. A **general election** might also be called, with unpredictable consequences.

It should be borne in mind, though, that the default outcome of the UK parliament rejecting the deal in any form is the "**no-deal**" scenario of the UK leaving the EU suddenly and completely on 29 March 2019 - or later, if more time is given by the EU. Businesses therefore need to prepare for this eventuality, however much talk there is of alternative outcomes, each of which may have insufficient support within the UK parliament.

For more information, see the section on no-deal at the end of this document.



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Declaration - Purpose and structure

In contrast to the WA that accompanies it, the Declaration is not intended to be a binding document, but is instead a statement of the parties' intentions regarding their long-term relations.

In theory the WA governs the process of exiting the EU, and the Declaration deals with UK-EU relations after that. However, the WA has a long "tail", as explained above; that is to say, some of its provisions will have medium- to long-term effects that override what is in the Declaration and the terms of any agreements made pursuant to that.

The Declaration itself breaks down into five Parts, with an introduction. The language is mostly general and aspirational, and will be fleshed out in agreements to be negotiated after Exit Day (currently set for 29 March 2019 at 11pm UK time). This is deliberate: the EU will only start detailed negotiations on long-term relations once the UK is a "third country", and both parties want the Declaration to be flexible enough to accommodate different visions of the UK-EU relationship, depending on political choices to be made in the months and years to come.



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Declaration - Introduction

The introduction to the Declaration establishes a general theme: that the agreements to be negotiated will be wide-ranging and flexible, and should build on the WA, including the bare-bones customs union in the backstop and corresponding level playing field provisions. However, the limits to what can be agreed are also set out clearly - see paras 4 and 5 (below).

Notably absent are any references to the “common rulebook” and “frictionless trade” envisaged in the Chequers proposal agreed by the cabinet in July 2018 and set out in the subsequent UK White Paper on future UK-EU relations.



“This declaration establishes the parameters of an **ambitious, broad, deep and flexible partnership** across trade and economic cooperation, law enforcement and criminal justice, foreign policy, security and defence and wider areas of cooperation ...” (para 3)

“The future relationship will be based on a balance of rights and obligations, taking into account the principles of each Party. The balance must ensure the autonomy of the Union’s decision making and be consistent with the Union’s principles, in particular with respect to the **integrity of the Single Market and Customs Union and the indivisibility of the four freedoms**. It must also ensure the **sovereignty of the United Kingdom and the protection of its internal market**, while respecting the result of the 2016 referendum” (para 4)

“While it **cannot amount to the rights or obligations of membership**, the Parties are agreed that the future relationship should be approached with high ambition with regard to its scope and depth, and recognise that it **might evolve over time ...**” (para 5)

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Declaration - Part I: Initial provisions

Part I is relatively short. It starts by emphasising the parties' common values, and stipulates that the UK must continue to respect the European Convention on Human Rights ("**ECHR**"). This is not an EU institution, and many countries are subject to the ECHR without being part of the EU, European Free Trade Association or European Economic Area, but an ongoing commitment to the ECHR nevertheless places some constraints on the UK.

In addition, Part I covers data protection rules, where close cooperation is expected between the UK and EU following the introduction of the General Data Protection Regulation earlier this year. Emphasis is also placed on participation in EU programmes in areas such as science and innovation (para 12, below), as well as culture, education, defence and space, etc.

Introduction

Part I:
Initial Provisions

Part II:
Economic
Partnership

Part III:
Security
Partnership

Part IV:
Institutional
arrangements
etc

Part V:
Forward Process

"The future relationship should incorporate the United Kingdom's continued commitment to respect the framework of the **European Convention on Human Rights** (ECHR), while the Union and its Member States will remain bound by the Charter of Fundamental Rights of the European Union, which reaffirms the rights as they result in particular from the ECHR" (para 7)

"The Union's **data protection rules** provide for a framework allowing the European Commission to recognise a third country's data protection standards as providing an adequate level of protection, thereby facilitating **transfers of personal data to that third country**. On the basis of this framework, the European Commission will start the assessments with respect to the United Kingdom as soon as possible after [Brexit], endeavouring to **adopt decisions by the end of 2020**, if the applicable conditions are met ..." (para 9)

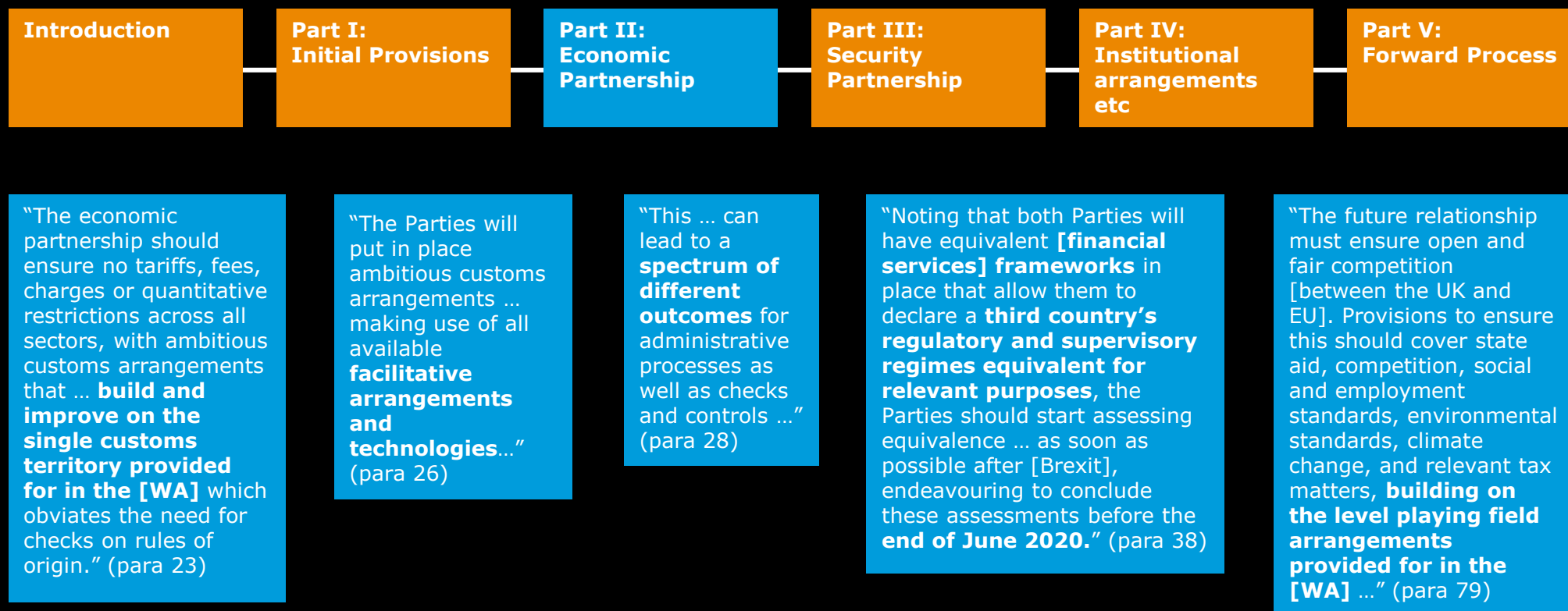
"The Parties will ... explore the participation of the United Kingdom to (sic) the **European Research Infrastructure Consortia** (ERICs), subject to the conditions of the Union legal instruments and individual ERIC statutes, and taking into account the level of participation of the United Kingdom in Union programmes on science and innovation" (para 12)

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Declaration - Part II: Economic partnership

Part II is the heart of the Declaration, but remarkably light on detail, with little of substance on transport, for example. The reference in para 28 to a “spectrum of different outcomes” underlines the parties’ desire for flexibility.

Some passages in Part II have attracted particular criticism, especially the references in paras 23 (tariffs) and 79 (level playing field) to “building on” arrangements in the WA, rather than letting them fall away when the backstop ends. Paras 37 and 38 are also controversial, although not unexpected, in envisaging that financial services will be provided into EU27 countries only on the existing (rather than an enhanced) basis of “equivalence”. The end of free movement of people, and the need for visas for long-term visits, are implied in paras 50 to 59 on mobility.



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Declaration - Part III: Security partnership

Understandably, there is much in Part III on judicial cooperation in criminal matters, as well as on money-laundering and law enforcement generally, foreign policy, security and defence. But it is remarkable that there is no reference in any part of the Declaration to judicial cooperation where civil disputes are concerned. This is an important omission, given the number of parties who choose English courts in their agreements, and the size of the English legal services industry.

On the other hand, para 104 provides reassurance that the UK will continue to collaborate “to the extent possible under the conditions of Union law” in European Defence Agency and Permanent Structured Cooperation projects etc.



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Declaration - Part IV: Institutional arrangements etc

Part IV has attracted criticism because of its references to disputes under the forthcoming agreements being decided by arbitration, and in certain respects by the Court of Justice of the EU (“**CJEU**”), as well as to compensation being payable for breaches, and to temporary measures such as the suspension of parties’ obligations for a limited time. The involvement of an arbitration panel and the CJEU were both envisaged, however, in the government’s White Paper on future UK-EU relations, published in July 2018.



“The Parties should establish a **Joint Committee responsible for managing and supervising the implementation and operation of the future relationship**, facilitating the resolution of disputes ... [it] should comprise the Parties’ representatives at an appropriate level, establish its own rules of procedures, reach decisions by mutual consent, and meet as often as required to fulfil its tasks” (paras 129 & 130)

“... the Joint Committee may agree to refer the dispute to an **independent arbitration panel** at any time, and either Party should be able to do so where the Joint Committee has not arrived at a mutually satisfactory resolution within a defined period of time. The **decision of the independent arbitration panel will be binding on the Parties.**” (para 133)

“Should a dispute raise a question of interpretation of Union law ... the arbitration panel should **refer the question to the CJEU** [Court of Justice of the EU] as the sole arbiter of Union law, for a binding ruling. The arbitration panel should **decide the dispute in accordance with the ruling given by the CJEU** ...” (para 134)

“Where a Party fails to take measures necessary to comply with the binding resolution of a dispute within a reasonable period of time, the other Party would be entitled to **request financial compensation or take proportionate and temporary measures, including suspension of its obligations** within the scope of the future relationship ... Either Party may refer the proportionality of such measures to the independent arbitration panel.” (para 135)

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Declaration - Part V: Forward process

Part V of the Declaration is the shortest. It makes important points about the parties acting in good faith (para 138) and proceeding quickly, so that the provisions of the new agreements can come into force by 31 December 2020, when the Transition Period under the WA is due to end. This is remarkably ambitious, although it was agreed late in negotiations that the Transition Period may be extended to the end of 2022 - still a challenging deadline.

Priority is to be given to negotiating arrangements that ensure there is no hard border on the island of Ireland in the longer term.



"In setting out the framework of the future relationship between the Union and the United Kingdom, this declaration confirms, as set out in the [WA], that it is the clear intent of both Parties to **develop in good faith agreements giving effect to this relationship** and to begin the formal process of negotiations as soon as possible after [Brexit], such that they can **come into force by the end of 2020.**" (para 138)

"... preparatory organisational work .. Should draw up a proposed schedule to deliver the work programme required, having identified the areas likely to require the greatest consideration, such as those elements related to the **alternative arrangements for ensuring the absence of a hard border on the island of Ireland on a permanent footing.**" (paras 141 & 142)

"The Parties will convene a **high level conference at least every six months** from [Brexit] to take stock of progress and agree, as far as is possible between them, actions to move forward." (para 147)

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Declaration - What they said about it ...

"I can say with absolute certainty that there is not a better deal available."

Theresa May, Prime Minister

"Nothing in this political declaration changes the hard reality of the Withdrawal Agreement."

Boris Johnson, former Foreign Secretary

"It's the best deal possible and the EU will not change its fundamental position when it comes to these issues."

Jean-Claude Juncker, European Commission President

"26 pages of waffle."

Jeremy Corbyn, Labour Party Leader

"We will remain allies, partners and friends."

Michel Barnier, EU Chief Negotiator

"Lots of unicorns taking the place of facts about the future relationship."

Nicola Sturgeon, Scottish National Party Leader

"The declaration ... offers a stepping stone to a range of future relationships rather than plunging into the no-deal rapids."

Financial Times

"It reads like a letter to Santa."

Philip Lee, Conservative MP

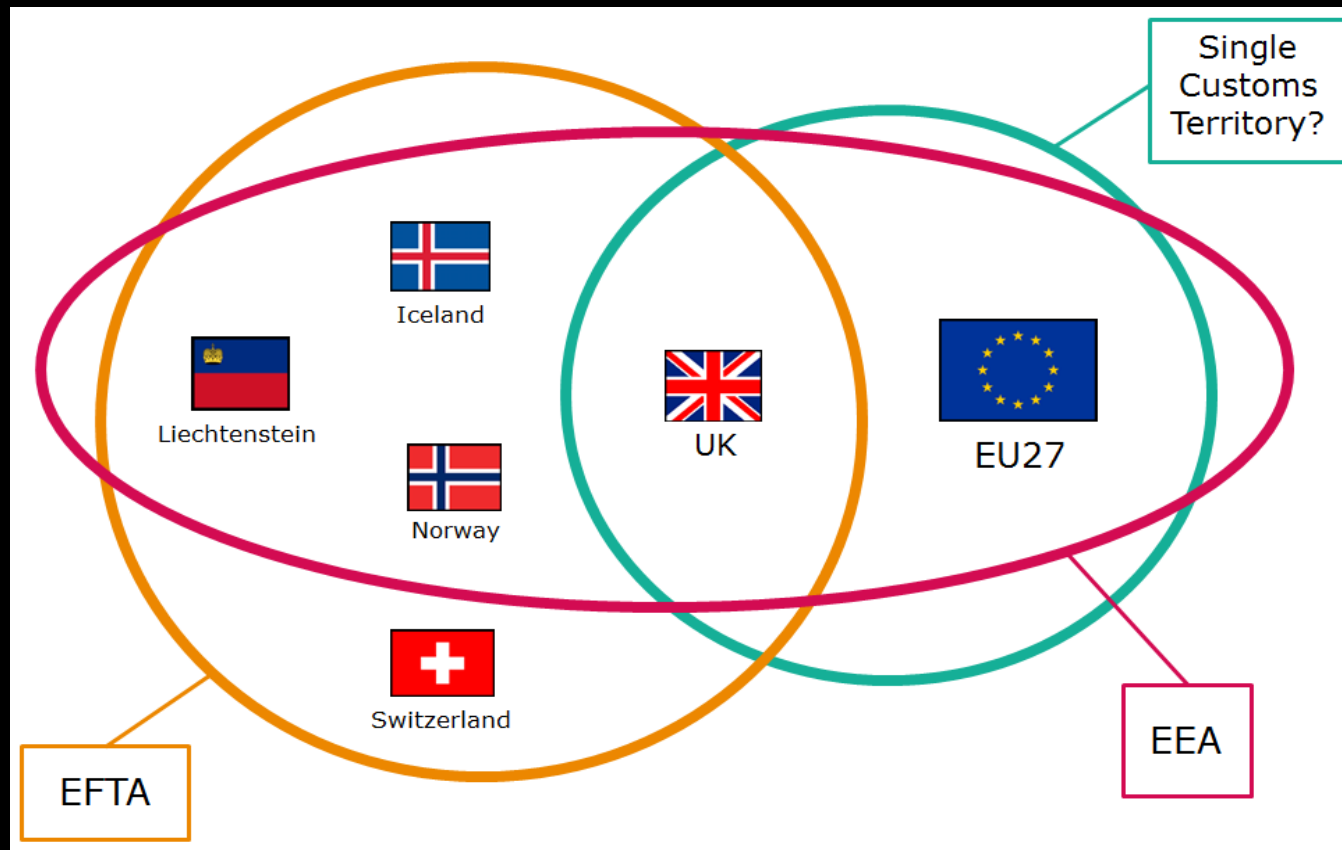
"It sounds like a great deal for the EU."

Donald Trump, US President

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Norway Plus

An alternative to the future UK-EU relationship outlined in the Declaration is the Norway Plus model, also called Common Market 2.0. This involves the UK re-joining the European Free Trade Association (“**EFTA**”) and, on that basis, staying in the European Economic Area (“**EEA**”) and therefore the Single Market. “Plus” refers mainly to a customs union with the EU, not enjoyed by EFTA states generally, but necessary if there is to be no general customs border in the Irish Sea. The customs union may take the form of the bare-bones Single Customs Territory negotiated as part of the Withdrawal Agreement backstop (Protocol on Ireland, Art 6). There may be other additional elements too (see box on right). For more information on EFTA and the EEA, see www.efta.int



Norway is within EFTA and the EEA, and so:

- is subject to **EU laws** relating to the Single Market, but has little influence over them - this would be a serious problem e.g. for the UK’s financial sector
- makes substantial **ongoing payments** to the EU
- is committed to the **free movement of people/labour** (subject to an emergency brake: EEA Agreement Art 112)
- is outside the direct jurisdiction of the **CJEU**
- may benefit from the EU rules on **jurisdiction and judgments** (Lugano Convention 2007)

The UK may also agree to:

- a **customs union** with the EU in some form
- participation in the **Common Agricultural and Fisheries Policies** - these are not part of the EEA Agreement

For further information, speak to your usual contact

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No-Deal - Introduction

It is now more than two years since the UK voted to leave the EU, and we are less than 80 days from Brexit. However, it is only recently that a no-deal Brexit has seemed likely - that is, a departure from the EU without a comprehensive agreement as to:

- how and when the UK should disengage from EU rules
- what rights citizens should have
- how much the UK should pay
- what form the longer-term UK-EU relationship should take

It is now time, therefore, for the government and businesses to activate contingency plans for this eventuality, if they have not done so already. The EU is doing the same, as are individual EU Member States.

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No-Deal - What to do?

In some areas a regime exists at the global level for the UK to fall back on if there is a no-deal Brexit. However, these regimes are not always directly enforceable by the courts (World Trade Organisation rules on trade being a prime example), and where they are, they are sometimes limited in scope. The Hague Convention on Choice Of Court Agreements 2005 is a good example of this: only exclusive jurisdiction agreements are covered, and the Convention does not apply to certain kinds of dispute anyway - see our video on English Jurisdiction and Judgments: What Happens after Brexit?

That said, the EU's own rules for dealing with a third country (one outside the EEA) are often workable, if much less useful than those that apply between EU Member States. In some cases they also require a formal decision to be made by the European Commission, for example regarding the "equivalence" of the financial services regime of a third country. Whereas this kind of decision may have been made during the transition period of the WA (see Declaration para 38), under no-deal there will be a hiatus between Brexit and orderly relations being established.

For some months the European Commission and UK government have been issuing a steady stream of advice to businesses and individuals on how to prepare for a no-deal Brexit. The EU's advice can be found in its Brexit preparedness notices and related materials:

https://ec.europa.eu/info/brexit/brexit-preparedness_en

UK advice is set out chiefly in a series of technical notices:

<https://www.gov.uk/government/collections/how-to-prepare-if-the-uk-leaves-the-eu-with-no-deal>

The technical notices should be treated with caution, however. In addition to stating (misleadingly) that a no-deal scenario is unlikely, they have been criticised for giving minimal information and being reticent about the scale of the practical problems that might arise. They should be read on conjunction with other, more detailed materials released by the UK and EU as Brexit approaches.

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No-Deal - Mitigation

In addition to providing basic guidance, official advice is helpful in giving some indication of how the UK and EU plan to mitigate the effects of a no-deal Brexit. There is some reluctance to articulate these plans, partly because they are not yet fully formed in some cases, but also because of the fear that being seen to prepare for a no-deal Brexit increases the chance of it happening. There is also reluctance on the EU's side to be seen to be making "mini-deals", when their official position is that the only deal on the table is the one set out in the WA and Declaration. However, some arrangements being planned by the UK and EU are clearly reciprocal in nature. For example, the European Commission has stated that UK citizens will not need visas for short visits to EU Member States, and Regulation EC 539/2001 will be amended accordingly, but it adds that in the event of no-deal this arrangement is "entirely conditional upon the UK also granting reciprocal and non-discriminatory visa-free travel to all EU Member States" (European Commission press release dated 13 November 2018).

Other measures will be taken on both sides on a unilateral basis, in the parties' own interests. The European Commission has stated that all measures "must be compatible with EU law" and will not "replicate the benefits of membership of the Union." It also warns that it will not "remedy delays that could have been avoided by preparedness measures and timely action by the relevant stakeholders". In particular, measures should not "compensate companies that have not taken the necessary preparedness measures when their competitors have done so, as this would distort the level playing field" (Contingency Action Plan, published by the European Commission on 13 November 2018).

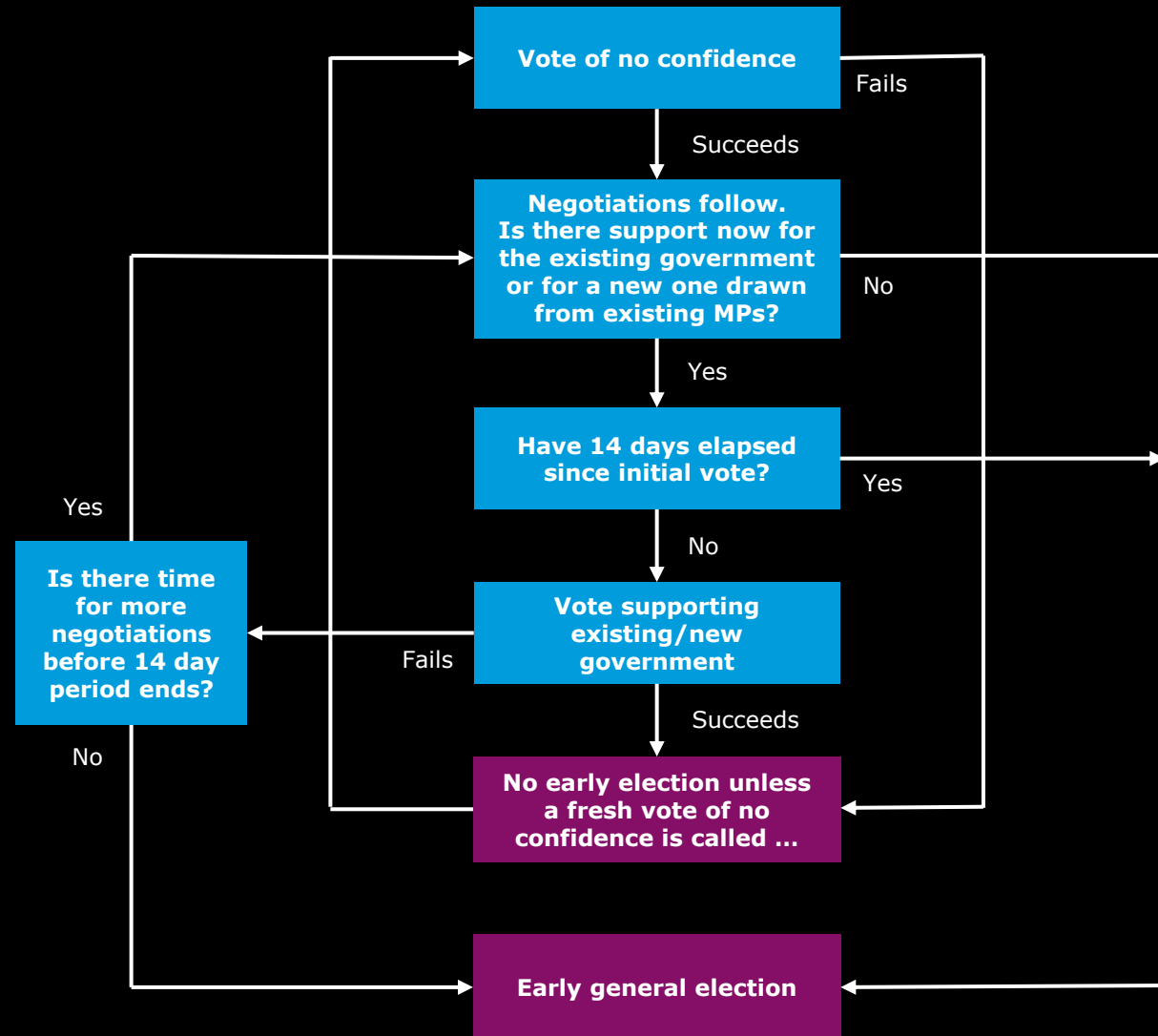
Further contingency measures, and the funds to put them into practice, are being announced on an almost daily basis. For example, the EU recently announced 14 distinct measures covering (among other things) financial services, air transport, customs and climate policy (European Commission press release dated 19 November 2018).

For the latest news, and information about how the measures affect your business, speak to your usual contact at Stephenson Harwood.

Votes of no confidence

This chart shows the two-stage procedure for calling a vote of no confidence in the UK government and securing a change of government and/or an early general election. If the initial vote succeeds, there is a cooling off period of 14 days during which MPs may change their minds or lend their support to an alternative government drawn from the existing House of Commons. Failing that, an early general election is called.

The procedure is set out in section 2 of the Fixed-term Parliaments Act 2011 ("**FTPA**"), which also allows an early election to be called by the simpler method of asking two thirds of MPs to vote for it (s 2(1)&(2) FTPA).



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Second referendum

Many Members of Parliament advocate a second referendum. This is controversial in principle, but also raises difficult issues in practice.

What question should be asked?

Some argue that the public should be asked to choose between leaving on the terms negotiated with the EU, and not leaving at all. Others argue that, since the public has already decided to leave, the choice should be between leaving on the negotiated terms and leaving without a deal. A three-way choice is also possible, but this could split the leave vote, making a result in favour of remaining in the EU more likely. It is also not clear whether voters' second preferences should be taken into account, and if so, how.

Who would vote?

Some believe that the franchise should be extended so that individuals aged 16 and 17 are allowed to vote. In the referendum of 2016 only people aged 18 or over were free to participate. However, opinion polls show that the option of remaining in the EU is more popular among the young than the old, so extending the franchise in this way could well affect the result.

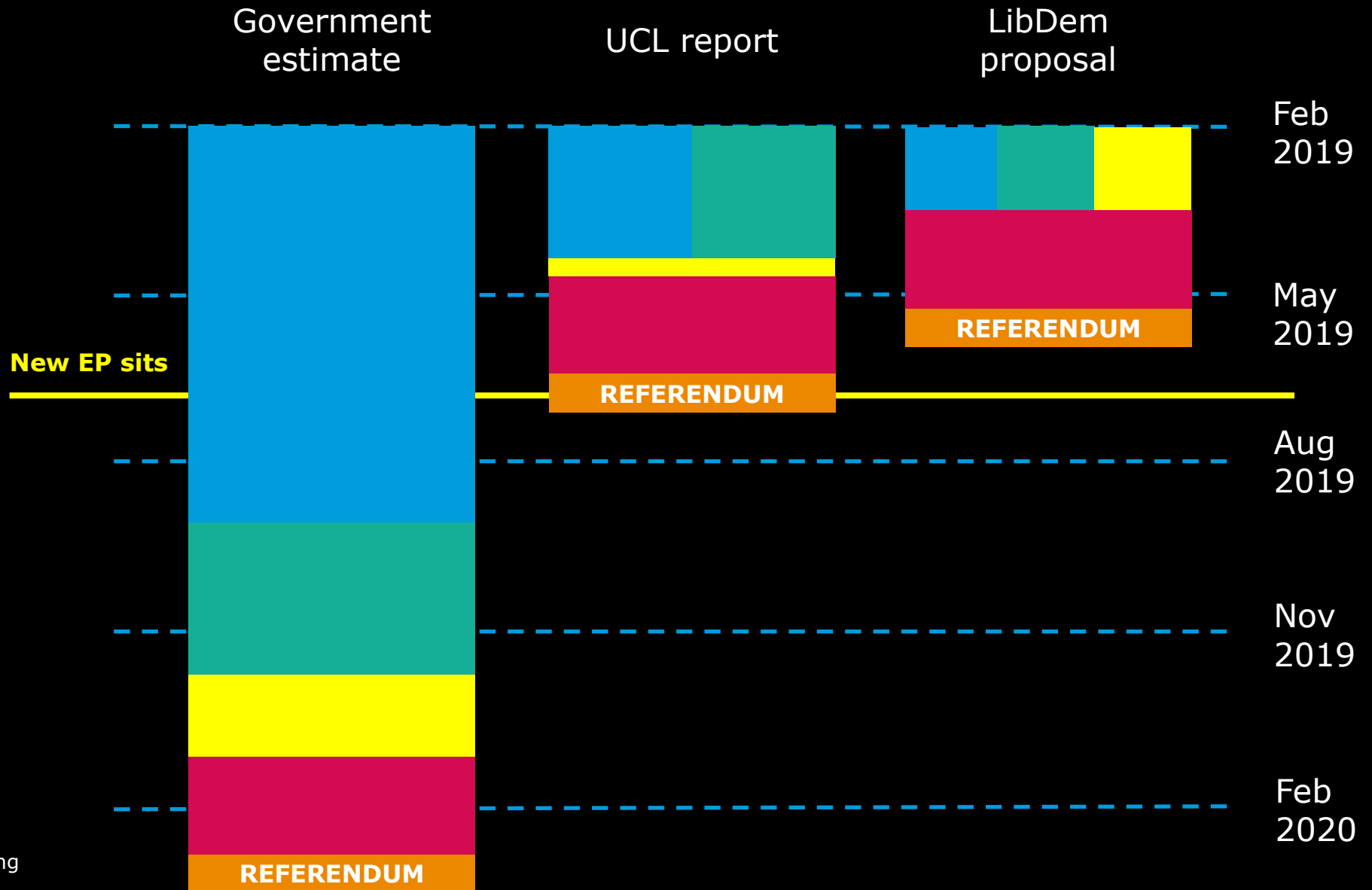
Timing

The UK Government is currently telling MPs that it would take more than a year to organise a second referendum. However, the Constitution Unit at University College London ("**UCL**") estimated in a report last year that the process could be made a lot quicker if primary legislation is passed at the same time as the Electoral Commission tests questions to be put to voters - an essential part of the process. The Liberal Democrats ("**LibDems**") and others propose abbreviating the process even further by dealing with all legislation and question testing at the outset. Whichever approach is taken, the Political Parties, Elections and Referendums Act 2000 requires the final, campaigning stage to last at least ten weeks - see next page.

The date of the referendum is significant because a new European Parliament ("**EP**") will be elected on 23 - 26 May and start sitting on 2 July 2019, and the EU is reluctant to delay Brexit beyond that.

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Second referendum - timing



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