

Brexit: the politically endorsed deal

27 November 2018

Following months of negotiations, 25 November 2018 finally saw the UK and the EU27 formally endorse the article 50 withdrawal [agreement](#) and the political [declaration](#) on the future relationship. There are a number of steps that now need to take place in order for the documents to be ratified by both sides ahead of 29 March 2019. This will be no mean feat, particularly as regards political uncertainty in the UK. Our [publication](#) from 19 November 2018 looks at what the route to ratification by the UK might look like, and the likely timescales involved.

In this publication, we take the opportunity to consider the substance of the two documents and outline the process for developing the future relationship if the deal is in fact ratified ahead of 29 March 2019.

Article 50 Withdrawal Agreement

On 13 November 2018, the UK and EU27 announced political agreement on the text of the article 50 withdrawal agreement with the document being published by both the European Commission and the UK Government shortly after the UK cabinet confirmed that it supported the text. The draft dated 24 November and linked above is now subject to final legal revision which may cause certain parts of the text to change. Assuming it is ratified, the agreement will be an international treaty between the UK and the EU27 setting out the terms of the UK's withdrawal.

Running to 585 pages, much of the text of the agreement had been concluded far earlier in the year but the arrangements regarding Northern Ireland proved to be the key stumbling blocks. For businesses, the political announcements back in March that transitional arrangements had been agreed were welcomed. Our analysis of the withdrawal agreement below focuses on the scope and substance of those transitionals as well as discussing two other key aspects of the agreement: (i) the agreed position on Northern Ireland; and (ii) how international agreements would apply to the UK during the transitional period.

The implementation period

Part four of the article 50 withdrawal agreement confirms that the implementation period starts on 29 March 2019 and ends on 31 December 2020. The final text introduced a new article enabling the Joint Committee (which will be established pursuant to the terms of the agreement) to extend the implementation period by up to one or two years following the adoption of a single decision provided it is made by 1 July 2020. This provision is intended to offer the opportunity for the parties to agree additional time to make sure that a future agreement, including provisions for avoiding a hard border in Ireland, may be reached before the end of the transition period.

The aim of the implementation period is to ensure continuity, so that individuals and businesses only have to prepare for one set of changes as the UK moves to its future relationship with the EU27. Article 127 provides that during this period the UK will no longer be a member of the EU, but the UK will be treated as such under Union law unless otherwise specified. This means that during this time EU law and EU supervision and enforcement arrangements will continue to apply to the UK. As a result, the UK will continue to participate in the EU Customs Union and Single Market (with all four freedoms) and all EU policies. Any changes to the EU acquis will automatically apply to and in the UK. At the end of the implementation period, the current application of common rules will come to an end, as will the transitional arrangements under which EU law applies in the UK.

Specific arrangements have been included in relation to foreign policy and security to enable the future relationship in these areas to come into effect during the implementation period. If an agreement on the future relationship does come into effect in this way, the relevant areas of existing EU law will cease to apply to the UK.

In a concession that was agreed earlier in the year, the UK will be able to participate in some meetings of EU bodies and agencies, including internationally, where necessary or relevant to the UK.

The article 50 withdrawal agreement provides that the European Commission may bring infraction cases against the UK for up to four years after the end of the implementation period for failures to comply with EU law prior to the end of the implementation period. In addition, where an administrative decision has been made after the end of the implementation period which requires UK action and this is not taken, then the European Commission may bring that matter before the Court of Justice of the European Union (CJEU) for up to four years following the relevant decision.

International agreements

According to article 129, during the implementation period, the UK will be treated as a Member State for the purposes of international agreements concluded by the EU. As a result, the UK will be bound by the obligations stemming from those agreements. This means, for example, that third countries will have access to the UK market under the conditions set out in the EU's trade agreements. A footnote to the article confirms that the third parties to the agreements will be notified of this approach by the EU and where the implementation period is extended pursuant to article 132, third countries will also be notified of that fact. These agreements cover a wide range of important policy areas, such as trade, aviation, data-sharing, and security, climate change, international development, energy and judicial cooperation.

The aim of these provisions is to provide a basis for continuity and to give businesses and citizens the necessary certainty that there will be no disruption to existing relationships underpinned by international agreements as the UK leaves the EU and moves into the implementation period. However, whilst the UK Government stated in its July 2018 [white paper](#) on legislating for withdrawal that it is in everyone's interests - the UK, the EU and third countries - that international agreements continue to apply to the UK during the implementation period, the issue is that those third countries are not party to the article 50 withdrawal agreement.

In February 2018, the UK Government published a [technical note](#) which outlines the UK's approach to international agreements during the implementation period. The note states that "the UK view is that the best approach would be for the parties to confirm that, for the duration of the implementation period, these agreements continue to apply to the UK and that the UK is to be treated in the same way as EU Member States for the purposes of these agreements. This would be achieved by agreement of the parties to interpret relevant terms in these international agreements, such as "European Union" or "EU Member State", to include the UK. This approach is underpinned by international law and practice, including Article 31 of the Vienna Convention on the Law of Treaties, which provide that a treaty is to be interpreted in its context, which can include a subsequent agreement between the parties regarding its interpretation or application. The form of such an agreement under Article 31 would be a matter for discussion. It would not be necessary, for example, to deal individually with each EU treaty. The key requirement would be the clear agreement of the parties that the underlying treaty continued to apply to the UK during the implementation period."

Whilst the International Trade Committee (one of the Select Committees of the House of Commons which oversees the operations of the Department for International Trade) launched an inquiry covering this point earlier in the year, the UK

Government's response to the inquiry was far from satisfactory – citing the new wording and footnote now found in article 129 – and in the white paper referred to above, the UK Government stated that “a number of [third] countries have already welcomed this approach publicly, which is encouraging.” The UK Government has confirmed that article 129 will be reflected in the UK legislation implementing the article 50 withdrawal agreement, however there is no legal certainty that third countries will continue to honour their obligations under international agreements during the implementation period.

In relation to new international trade agreements, the UK is permitted to negotiate, sign and ratify new agreements during the implementation period provided that they do not come into effect until after that period has ended. Moreover, the implementation of the Northern Ireland ‘backstop’ (see below) would further constrain the UK's ability to put into effect international trade agreements since the UK has agreed to operate in a single customs territory with the EU, align its tariffs and other applicable customs rules and harmonise its external commercial policy applicable to the customs territory with the one of the EU.

Northern Ireland – the ‘backstop’

If an agreement on the future EU-UK relationship is not applicable by 31 December 2020, the EU27 and the UK have agreed that a backstop solution will apply in order to avoid a hard border between Ireland and Northern Ireland and such backstop would work until such a time as a subsequent agreement is in place. Alternatively, as mentioned above, the article 50 withdrawal agreement confirms that there is scope for the Joint Committee to agree (prior to 1 July 2020) to an extension of the transition period.

In the scenario where the “backstop solution” would apply, the position would be as follows:

- there would be a single EU27-UK customs territory which would avoid the need for tariffs, quotas or checks on rules of origin between the EU27 and the UK;
- a set of agreed measures would ensure that there is a level playing field between the EU27 and the UK;
- the EU's customs code (which sets out the provisions for releasing products into free circulation) would continue to apply to Northern Ireland, meaning that Northern Irish businesses would not face restrictions when placing products on the EU's Single Market; and
- the UK, as regards Northern Ireland, would ensure continued alignment on a limited set out rules – for example, in relation to legislation on goods, VAT and excise in respect of goods, and state aid rules – in order to avoid a hard border.

Governance of the article 50 withdrawal agreement

The withdrawal agreement contains detailed provisions on governance and dispute resolution. In the event of a dispute on the interpretation or application of the article 50 withdrawal agreement, an initial political consultation would take place in a Joint Committee – this will be made up of representatives of the UK and the EU and will meet once a year. If no solution is found, either party can refer the dispute to binding arbitration. In those cases where the dispute involves a question of EU law, the arbitration panel has an obligation to refer the question to the CJEU for a binding ruling. In addition, each party may request that the panel refers a question to the CJEU. In such cases, the arbitration panel must refer the question to the CJEU, unless it considers that the dispute in reality does not touch on EU law. The decision of the arbitration panel will be binding on the EU27 and the UK. In case of non-compliance, the arbitration panel may impose a lump sum or penalty payment to be paid to the aggrieved party. There are also provisions allowing either party to take further steps following persistent non-compliance with arbitration rulings, including suspending obligations arising under the withdrawal agreement (at least temporarily).

Next steps

As outlined in our publication from 19 November 2018, securing the approval of the UK Parliament is likely to be the most challenging part of the ratification process. However, both the European Parliament and the Council of the EU must

also approve the deal. The Council must approve the deal by a qualified majority of the EU27 member states – likely to be obtained in a matter of days - whereas the European Parliament’s consent requires the support of the majority of the members. This approval process is more likely to take a few weeks.

The proposed UK/EU future relationship

The political declaration, which was concluded at the same time as the article 50 withdrawal agreement, sets out the terms and the scope of the future relationship. It will be turned into an international treaty or treaties once the UK has left the EU.

When reviewing the content of the declaration, it worth bearing in mind how different the starting positions were for each side – the UK has been keen for the declaration to be as detailed and as binding as possible whereas the EU has maintained that the document is simply a statement of intent which is subject to negotiation and change. The declaration as published appears to be closer to the latter than the former.

Part two of the political declaration addresses the future UK-EU27 economic partnership, describing a comprehensive partnership encompassing a free trade area and wider sectoral co-operation, underpinned by level-playing-field provisions, which respects the integrity of the EU’s single market and customs union and the UK’s internal market, and recognises the development of an independent UK trade policy beyond the economic partnership.

Services and investment

For services, the UK and EU 27 aim to conclude ambitious, comprehensive and balanced arrangements on trade in services (whilst respecting each other’s autonomy to regulate) which go beyond World Trade Organisation commitments and which are in line with Article V of the General Agreement on Trade in Services (**GATS**), with substantial sectoral coverage, covering all modes of supply and providing for the absence of substantially all discrimination in the covered sectors but including limitations and exceptions as appropriate. The arrangements would cover a range of sectors including professional and business services as well as financial services.

Both sides have committed to including provisions on market access and national treatment under host state rules, ensuring that UK and EU27 services providers and investors are treated in a non-discriminatory manner. The arrangements would also allow for temporary entry and stay of natural persons for business purposes.

In relation to regulatory aspects, the declaration states that the UK and EU27 should:

- agree disciplines on domestic regulation - these should include horizontal provisions such as on licensing procedures and specific regulatory provisions in sectors of mutual interest, including financial services;
- establish a framework for voluntary regulatory co-operation in areas of mutual interest, including information exchange; and
- develop appropriate arrangements on those professional qualifications that are required to follow regulated professions, where in the parties’ mutual interest.

Financial services

In the area of financial services, there has been little development since the UK Government confirmed that the approach for this sector would be on the basis of regulatory independence and equivalence. The declaration only includes three paragraphs and whilst the UK Government’s white paper on the future relationship suggested an increased scope for the equivalence regime, this document merely states that the UK and EU27 agree to keep their respective equivalence frameworks under review.

Both sides are “committed to preserving financial stability, market integrity, investor and consumer protection and fair competition, while respecting each other’s regulatory and decision-making autonomy, and their ability to take equivalence decisions in their own interest” (this last qualification will be of particular concern to financial institutions given the state of discussions between the EU and Switzerland relating to the equivalence decision relating to the Swiss Stock Exchange).

This commitment is stated to be without prejudice to either party's ability to adopt or maintain any measure where necessary for prudential reasons. However, the UK and EU27 agree to engage in close cooperation on regulatory and supervisory matters in international bodies.

The declaration states that both the UK and EU27 should start assessing the equivalence of each other's regulatory and supervisory regimes as soon as possible after the UK leaves the EU, endeavouring to conclude these equivalence assessments before the end of June 2020.

There is also confirmation that there will be close and structured co-operation on regulatory and supervisory matters that are in the mutual interests of both the UK and EU27. This co-operation should:

- be grounded in the economic partnership;
- be based on the principles of regulatory autonomy, transparency and stability; and
- include transparency and appropriate consultation in the process of adoption, suspension and withdrawal of equivalence decisions, information exchange and consultation on regulatory initiatives and other issues of mutual interest, at both political and technical levels.

Goods

The political declaration describes UK-EU27 trade arrangements on goods that will create a free trade area, combining deep regulatory and customs co-operation, underpinned by provisions ensuring a level playing field for open and fair competition. These arrangements include the following features:

- no tariffs, fees, charges or quantitative restrictions across all sectors;
- customs arrangements that build and improve on the single customs territory provided for in the Northern Ireland backstop under the article 50 withdrawal agreement which removes the need for checks on rules of origin;
- consideration of mutual recognition of trusted traders' programmes, administrative co-operation in customs matters, and mutual assistance, including for the recovery of claims related to taxes and duties, and through the exchange of information to combat customs fraud and other illegal activity; and
- the extent of the UK's commitments on customs and regulatory co-operation (including in relation to rule alignment) will be taken into account in the application of related border checks and controls.

Judicial co-operation in relation to civil matters

Although the political declaration contains wide-ranging proposals for on-going cooperation between the UK and the EU27 and refers specifically to on-going judicial cooperation in criminal and matrimonial matters, it is noteworthy that there are no express provisions on on-going cooperation in the civil justice sphere more generally. This is a puzzling omission given the benefits that cooperation in this area would bring to businesses, consumers and employees both in the UK and the EU27. It is also odd given the UK Government's consistent public pronouncements (including in its 2017 future partnership paper on civil judicial-cooperation and in its July 2018 white paper) about the desirability of an arrangement that allows for "close and comprehensive cross-border civil judicial co-operation on a reciprocal basis" and "a coherent package of rules" in this area.

This absence of any express provision on civil justice (beyond the matrimonial context) is unhelpful, but it does not mean that there is no scope to reach agreement in this area during the negotiations for the future relationship as the political declaration makes it clear that, where the two sides consider it to be in their mutual interests during the negotiations, the future relationship may encompass areas of cooperation beyond those described in the declaration. There is also the possibility that the UK will seek to re-join existing arrangements for cross border judicial co-operation between Member States and non EU states e.g. the Lugano Convention. Such a process would presumably remain separate from the negotiations regarding the UK/EU future relationship.

Data protection

Recognising the importance of data flows, the UK and the EU27 are committed to ensuring a high level of personal data protection to facilitate those flows. As a result, the European Commission will start the assessments of the adequacy of the UK's data protection standards under the General Data Protection Regulation as soon as possible after withdrawal, aiming to adopt decisions by the end of 2020 if the applicable conditions are met. The UK has also committed to take steps to ensure comparable facilitation of personal data transfers to the EU in the same timeframe if the applicable conditions are met. Given this approach, both sides are also committed to ensuring appropriate co-operation between regulators.

The process for negotiating and concluding the future relationship

Part five of the political declaration sets out the process for the development of the legal agreements that will give effect to the future relationship and confirms the commitment for the UK and EU27 to develop those agreements in good faith and to begin the formal process of negotiations as soon as possible after the UK's withdrawal from the EU, so that they can come into force by the end of 2020.

The declaration also states that between the approval of the declaration and the UK's withdrawal, the UK and the EU27 will each carry out preparatory work, identifying the areas likely to require the greatest consideration and drafting a proposed schedule. Immediately following the UK's withdrawal, the UK and the EU will agree a programme including:

- the structure and format of the negotiation rounds, including with respect to parallel tracks; and
- a formal schedule of negotiating rounds.

The UK and the EU will convene a high-level conference at least every six months from the date of withdrawal to take stock of progress and agree actions to move forward.

Practical comment

Given the EU27 were successful in their desire for the political declaration on the future relationship to simply be an agreed statement of intent rather than a detailed and binding agreement, the possibility of protracted negotiations on the future treaty is high. The introduction of article 132 and the ability to extend the implementation period out until 31 December 2022 (at the latest), means that businesses and consumers may continue to face a great deal of uncertainty for another four years. The lack of legal clarity as regards international agreements would also be unwelcome for such an extended period of time given that the future bilateral agreements could not enter into force until the implementation period was concluded.

Despite the political agreement outlined above, ratification is far from certain. As a result, the UK, the European Commission and now individual member states have ramped up preparations for a hard Brexit. Over the last few weeks, we have seen member states such as Germany and France publish draft legislation similar to that produced by the UK government pursuant to the EU (Withdrawal) Act 2018, which aims to limit the impact of possible cliff edge risks. With four months until the UK leave the EU, those risks are still very real.

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