



## Brexit: Phase II

A briefing on the transition phase and what happens next with Brexit





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## Overview

A year on from Theresa May suffering the largest ever parliamentary defeat of a British Prime Minister over her Withdrawal Agreement, and 10 months on from the date the UK was meant to leave the EU, the Withdrawal Agreement Bill has reached Royal Assent. After almost 50 years of membership, the UK is leaving the European Union.

The electorate delivered Boris Johnson and the Conservative mandate an unequivocal mandate on 12th December 2019 to “Get Brexit Done” and many will be hopeful that the end of the parliamentary paralysis will put an end to the uncertainty that has constrained the UK for the last few years.

However, the reality will not be as straight forward. The UK now enters into a transition period with the European Union - a period in which the future relationship of the two sides will be decided. This agreement will need to encompass everything from security and trade to fisheries and financial services.

Under the terms of the Withdrawal Agreement, the transition period is due to end on 31st December 2020, but there is the option to extend for up to two years if both sides agree more time is needed by 1st July 2020. This clause was deemed necessary due to the complexity of the negotiations ahead, and the widely-held expectation that they cannot be completed in under a year.

Boris Johnson, however, emboldened by his new majority has removed this extension clause from his Withdrawal Agreement Bill and replaced it with one explicitly forbidding any member of the Government from extending the period beyond 31st December 2020.

This self-imposed deadline means that the UK Government now has 11 months in which to negotiate, conclude and ratify an agreement with the EU, one which is widely expected to be one of the most complex and broad in both sides’ recent history.

## How will negotiations run?

For the majority of Theresa May's reign, the negotiations for the withdrawal agreement were run from the Department for Exiting the European Union, led by the Prime Minister's chief Brexit negotiator Olly Robbins – a senior British civil servant. However, when Boris Johnson replaced her in No.10 the responsibility transferred primarily to the Cabinet Office under the stewardship of Sir David Frost.

Downing Street have now confirmed that this arrangement will, in part, continue for the next stage of the Brexit process. Sir David Frost will lead negotiations on behalf of the UK Government from the Cabinet Office, drawing on help team from within a "Taskforce Europe" group. Due to the encompassing nature of the next stage of negotiations, the majority of Whitehall departments will be hoping for a seat at the table, but the main pool of staff expects to be sourced from the Foreign Office, Treasury and the Department for International Trade.

The EU negotiations have been run from the start by Michel Barnier, a French politician renowned for his diplomacy and skill. He will now head up a Task Force for Relations with the United Kingdom on behalf of the European Commission – the executive arm of the EU. Barnier will negotiate on behalf of all the EU 27, taking his lead from a negotiating mandate all countries will agree to.

## When will negotiations start?

Although the UK is leaving the European Union at 11pm on 31<sup>st</sup> January 2020, and the UK Government stating it is "ready to begin" negotiations, the official negotiations will not begin until late February or early March.

Due to the rapidness in which the Withdrawal Agreement was reached, and the fluidity and chaos of the general election, the UK Government has had little opportunity to strategise and plan for the detail of what they are hoping to secure from the transition period. They are yet to publish their official negotiating mandate and have removed the clause in the Withdrawal Agreement Bill which would have given MPs the chance to formally lend it their approval.

The European Commission on the other hand have had months in which to plan for these negotiations and are expected to publish their negotiating mandate in the first week of February. However, there will then be an additional delay as it seeks to gain formal approval for it from the EU 27 – which will not be straightforward given the differing priorities of each member state.

Eric Mamer, chief spokesman for the European Commission, told a press conference in Brussels recently confirmed this process: "This we know will take some time, which is why we have said we will start negotiations as quickly as we can, but it will certainly not be before the end of February, beginning of March."

## The EU will have the upper hand in these negotiations

The European Commission is adept at negotiations, having honed their skills negotiating securing over 40 trade deals that span over 70 countries on behalf of the EU. The UK is no stranger to negotiations and will be able to draw on considerable expertise from the civil service but, having been a member of the EU for almost 50 years, they are not experienced in securing trade deals as a third country.

Added to this, the aforementioned delay in planning and establishing a negotiating mandate will put the UK on the backfoot – as it did during the first phase of negotiations. The UK have still not laid out their red lines, and Ministers have offered confusing and contradictory statements on the key areas of alignment, rules of origin and checks.

The European Union, in contrast, have remained singularly unified and consistent throughout the Brexit process. Their red lines – namely the integrity of the Single Market and preservation of their union – have not changed.

Throughout the first stage of the Brexit negotiations, both May and Johnson insisted that keeping “no deal on the table” was critical if the UK was to secure a good deal with the EU, arguing it presented a threat that would incentivise the EU to offer concessions.

Leaving without an agreement in place at the end of the transition period is not in the interest of either side, but the sting of no-deal has been cauterised now with the agreement of the Ireland/Northern Ireland Protocol. This protocol, which prevents a hard border on the island of Ireland by placing one in the Irish sea instead, will be active regardless of whether an agreement is reached by 31<sup>st</sup> December 2020. The key risk of no deal therefore, namely the political and economic impact on the island of Ireland, has been removed.

It is a common misconception that the UK Government’s new majority gives the UK a stronger hand in negotiations during the transition phase. The EU’s red lines and objectives will remain the same regardless of whether they are negotiating with a minority or a majority government. The reality may in fact be that, due to Johnson’s domestic strength, the EU are cautiously optimistic that he is more likely to agree to further concessions around level playing field arrangements and closer alignment, as the prime minister is no longer beholden to the European Research Group.

## Option of divergence means losing market access

Businesses favour alignment, with the deputy director general of the CBI, Josh Hardie, recently stressing that British businesses would like to see maximum alignment, in order to prevent any disruption of trade through the imposition of checks and tariffs.

The Government, however, have removed the commitment to build on level playing field arrangements from the political declaration and indicated that the option for divergence is an objective for them in any agreement.

The UK cannot simultaneously request unfettered zero tariff/zero quota market access and greater scope for divergence – the two are trade-offs. If the EU allowed the UK to have both then it would, amongst other things, jeopardise the integrity of the Single Market and Customs Union – which are red lines for the EU. The UK Government will need to decide what to prioritise: sovereignty or market access, the more you have of one, the less you have of another.

## The Northern Ireland protocol will result in checks

The replacement of the “Irish backstop” with the Ireland/Northern Ireland protocol was hailed as a triumph by Boris Johnson and his supporters but condemned by opposition parties and every single party in Northern Ireland, largely due to the regulatory divergence it will almost inevitably create between Northern Ireland and the rest of the United Kingdom.

Boris Johnson himself has spoken a number of times about Brexit having no disruption to business, stressing specifically about the lack of checks on goods going to GB to Northern Ireland.

Memorably, Boris Johnson told exporters in Northern Ireland in November that businesses would not have to even fill in additional paperwork, telling businesses that they should direct anyone suggesting otherwise to telephone him: “and I will direct them to throw that form in the bin”.

However, in October 2019 Stephen Barclay told a Lords EU Committee that “exit summary declarations will be required in terms of Northern Ireland to Great Britain.”

The reality is that it remains very unlikely that the Government would not require a degree of checks and paperwork from exports from NI into GB. Even more unlikely is that none will be required from goods going from GB into NI. The EU’s chief negotiator, Michel Barnier confirmed, stressing that “the implementation of this (the protocol) foresees checks and controls entering the island of Ireland.”

Businesses will almost certainly not have enough time to prepare for these changes, as they will not be aware of what is required until the relationship between the UK and EU is decided (specifically until the degree of regulatory alignment between the two sides is established).

The UK government have stated that the processes would be “largely electronic” and would relate to regulatory alignment, rather than customs compliance. However, the work on establishing or creating such a system has not begun – and is unlikely to be functional by 31st December 2020.

## Areas of contention or compromise

### Level Playing Field Arrangements

Level Playing Field Arrangements is a trade term used to refer to a set of common rules and standards which two sides agree to accepting in order to prevent any undercutting of each other.

For example: If the UK were to diverge on issues like environmental, labour or state aid rules then this could give them an advantage over the EU. In those instances, this would be because producers could then lower things like employment rights in order to get an advantage on labour or could heavily subsidise an industry to give it an advantage over EU producers.

For this reason, the EU want to ensure that there are level playing field arrangements in place in these areas to ensure the UK is keeping to a minimum level of regulation in order to stop one side from exploiting the market access by undercutting prices. This is particularly an issue in the UK/EU trade agreement due to the geographical closeness of the two sides – the EU do not want a competitor on their door step.

The political declaration stresses this, referring to the “geographic proximity and economic interdependence” between the two sides as a reason for ensuring that there are “robust commitments to ensure a level playing field.”

The EU will not allow the UK to have a zero tariff/zero quota deal unless it agrees to Level Playing Field Arrangements on issues like taxation, environment, labour and state aid rules.

"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," European Commission President Ursula von der Leyen said in a speech at the London School of Economics.

This is going to be a crucial area of contention between the two sides. Theresa May's Withdrawal Agreement contained a number of legally binding commitments with regards to level playing field arrangements, but the new version agreed by Boris Johnson includes nothing binding.

The political declaration does make mention of the desire for an “ambitious” trading arrangement, with cooperation on level playing field arrangements to ensure fair competition. This, however, is not binding and contains very few details about what the UK might be willing to accept level playing field arrangements on.

Since winning a majority, the UK Government have become bolder in their rejection of alignment.

In a recent interview with the Financial Times, Chancellor Sajid Javid was robust on the issue, stating: “there will be no alignment (with EU rules). We will not be a rule taker.”

If there is no easing of this position from either side, then it is extremely unlikely any future trade deal will be a zero tariff/zero quota one.

One EU diplomat is quoted as saying: “In the end it is all rather simple: If Britain wants to diverge from EU rules, it will diverge. Such an approach would obviously lead to new trade hurdles between Britain and the EU and in consequence less trade, less investment, less jobs.”

## Fisheries

Since the EU Referendum campaign, becoming an “independent coastal state” which could “take back control of UK waters” has been a powerful symbol. Many were calling for fewer European boats present in UK waters and, in turn, the reallocation of fishing opportunities to the greater benefit of UK fishermen, reversing the decline of the British fishing industry. This would have important implications for the UK’s fishing fleet and those of the EU27 and remains one of the most contentious issues in the Brexit debate today.

The UK fishing industry accounts for 0.12 per cent of the UK’s GDP and is of vital importance to some coastal communities. In 2018 it was reported that there were around 12,000 active UK fishermen. Core to the debate is the impact of the EU’s Common Fisheries Policy (CFP) on UK fishermen, as all rules relating to catches, quotas and discards designed by the European Commission, built upon an ideology of shared waters. Many UK fishermen believe this provides them with unequal access to their own waters: indeed, more than 700,000 tonnes of fish and shellfish are caught each year by EU boats in UK waters, resulting in UK boats catching 40 percent of the tonnage of fish caught in British waters. By comparison it is reported that, in 2015, only 16 per cent of fish and shellfish landed by UK vessels was caught in other EU member states’ waters which could indicate why some fishermen feel like this isn’t a fair deal.

Answering calls from fishermen, thus far Britain has refused to offer any promises to Brussels on access to UK coastal waters for EU fishermen, and UK officials remain hard-nosed on their line that they will seek a relatively larger quota compared with currently under the CFP. In their manifesto, in addition to a commitment to “take back control”, the government stated that there would also be a legal commitment to fish sustainably and a legal requirement for a plan to achieve maximum sustainable yield for each stock. The UK’s Fisheries Bill, introduced just this week, will give powers “to implement new deals negotiated with the EU and other coastal states, set quotas, fishing opportunities and days at sea, along with new measures for Devolved Governments and a single set of UK-wide fisheries objectives to ensure that fish stocks and the marine environment are better protected”, the Government claims.

Despite the UK Government’s repeated assurances that they will not sell-out the UK fishing industry, the EU is still seeking guaranteed access to UK coastal waters. As the FT reports, the majority of the EU catch is made in the North East Atlantic, with much of it part of British waters, ensuring continued access will be firmly on the EU’s agenda in negotiations. EU leaders have reportedly agreed to make the bloc’s future economic relationship with the UK dependent on continued rights for EU fishermen, explicitly linking the City of London’s future market access to Britain granting EU fishermen access to UK coastal waters. Most recently, Ireland’s Prime Minister, Leo Varadkar, warned the UK that they may have to make concessions in areas such as fishing in order to get concessions from the EU in areas such as financial services, which accounted for around 6.9 per cent of UK GDP in 2018. Further to this, Barnier cautioned that the tightness of the 11-month timetable for agreeing a UK-EU trade deal.



Security cooperation is central to the UK/EU relationship. As a member, the UK is a significant financial contributor to the EU's Common Foreign and Security Policy, as well as having access to shared intelligence and data programmes such as the Schengen Information System II. As a member, the UK also has access to security programmes such as European arrest warrants.

It is in neither sides interest to lose this ability to share intelligence on matters of security, but it is unclear how the UK will retain access as a third country. The issue around law enforcement will be problematic, however. Experts have been keen to stress the importance of the UK having a continued involvement in systems such as Europol but to do so may require the UK to fall into the jurisdiction of the European Courts of Justice – an institution reviled by Brexiteers and one which Boris Johnson has pledged to exit in totality.

## Business needs certainty and time to implement new processes

Despite the Prime Minister's assertion that Brexit will be "done" by 31<sup>st</sup> January 2020, uncertainty will prevail throughout the next few years as the UK seeks to unstitch itself from the European Union and recast its role on the global stage. Businesses will again struggle to plan ahead – recently the Institute of Directors (IoD) found that 55% polled agreed they "will only be able to make planning and investment decisions with certainty when we understand our future relationship with the EU".

Without clarification on what the UK and EU are both willing to concede on, businesses will again be forced to prepare for a multitude of opposing scenarios simultaneously. Without clarification on immigration and visas, the skills crisis will likely worsen in key sectors. Without clarification on tariffs and checks then businesses will be unable to prepare effectively for any interruption or change to their operating model and supply chain.

The threat of no deal will also remain high on the agenda for business. The 11-month timetable the UK has locked itself into is extremely ambitious and increases the possibility of the UK leaving without a deal, resulting in severe disruption and adjustment across every sector.

If a shallow and basic deal is agreed by the end of 2020, then uncertainty will remain for a number of sectors not covered in such an agreement. It is unclear whether they would revert to WTO rules in the interim and the staggered approach would undoubtedly impact their ability to engage in anything other than short term or crisis planning.

It is unclear at what point the UK Government will begin issuing advice to businesses on what steps they should be taking, but it is very likely that most businesses will only be able to afford to make such significant preparations or mitigating overhauls to their working practice and operating models once. Businesses will need months – not weeks – in order to implement new systems if there is not to be significant disruption in the sector/supply changes.



After four years of uncertainty, the Government need to give businesses the confidence to begin strategically planning for the long term again. This can only be accomplished by the Government being upfront, transparent and open to compromise throughout the transition period, in order to secure a comprehensive agreement which offers stability and certainty to UK business.

## What needs to happen domestically?

The negotiations are likely to consume Whitehall and the Government, but there are also key issues that need to be solved domestically if the UK is to leave the EU smoothly on 31st December 2020. The Government have now introduced key bits of legislation such as the Fisheries Bill, but these still need to complete their passage through both Houses. Given the size of their majority, this does not present a significant hurdle for the Government.

However, with freedom of movement set to end on 31st December 2020, the UK now has to have a new immigration system in place and operational by the end of the year. This, amongst other things, require new systems and checks at borders which need to be working efficiently immediately if the UK is not to face an immediate skills crisis.

### About the author



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