



BREXIT: NEXT STEPS

As the UK heads towards a general election on 12 December 2019, the UK's EU withdrawal date has been pushed back to 31 January 2020 at the latest. The progression into law of the Brexit deal negotiated by Prime Minister Boris Johnson has been put on hold by the election, but businesses will need to consider what the election means for Brexit, and what would happen on exit day and beyond.

NEXT STEPS FOR THE UK

What has the UK done since the extension was agreed?

The UK Parliament passed a statutory instrument on 30 October 2019 amending the date of "exit day" under the European Union (Withdrawal) Act 2018 (the 2018 Withdrawal Act) from 31 October 2019 until 31 January 2020. Alongside this, the UK has also suspended until 1 February 2020 its accession to the Hague Convention on choice of court agreements.

More significantly, however, the UK Parliament agreed to hold an early general election, on 12 December 2019. The main UK political parties are now in full campaigning mode, have released their manifestos, and can expect their Brexit policies to be closely scrutinised in the build up to the vote.

How will the UK give effect to the withdrawal agreement?

The Prime Minister agreed with the EU a withdrawal agreement to replace that agreed by his predecessor. For this agreement to come into UK law, Parliament must pass the European Union (Withdrawal Agreement) Bill (the WAB).

However, the Parliamentary session in which the WAB was presented ended upon the dissolution of Parliament on 6 November for the purposes of the election. If the withdrawal agreement is to come into force, the WAB will need to be re-introduced and passed by the House of Commons and the House of Lords in the next Parliamentary session, after the general election.

What impact will the general election have on Brexit?

A Conservative Party majority in the House of Commons will mean that Prime Minister Boris Johnson can push on with his Brexit deal. The Conservative Party manifesto says that a Conservative Government would reintroduce the WAB before Christmas, with a view to the UK leaving the EU on the terms set out in the withdrawal agreement in January.

If the Conservative Party remains the largest party in Parliament but fails to gain a majority, it could seek to remain in government by forming an alliance with

another party, as it did following the inconclusive 2017 general election. Depending on the number of seats held by the Conservative Party, Prime Minister Boris Johnson could also seek to push through the WAB, relying on votes from dissident members of other parties.

If the Labour Party were to form the government after the election, it says that it would scrap the deal negotiated by Prime Minister Boris Johnson and, within three months, negotiate a new deal with the EU. Within six months of being elected, a Labour government would hold a public vote with two voting options: Labour's new deal with the EU, or the UK remaining in the EU. The Labour Party's approach would require the UK and the EU to agree another extension to the date of the UK's withdrawal from the EU in order to avoid the UK having left the EU before the new referendum.

The Liberal Democrats propose to revoke the UK's article 50 notice to the EU and for the UK to remain as a member of the EU. The UK is able unilaterally to withdraw its notice of withdrawal from the EU.

What is the transition period and does EU law apply in the UK during that time?

Under the current Prime Minister's withdrawal agreement, the UK would leave the EU on 31 January 2020 and, as a result, would no longer have any role in the EU's institutions or law-making processes. Departure would be followed by a transition period, during which the UK would remain subject to EU law (including new laws coming into force during the transition period) and participate in the EU's single market and customs union. The transition period is intended to provide time for the UK and EU to negotiate a deal on the UK's long-term trade relationship with the EU while minimising disruption for citizens and businesses in the UK and the EU while this happens.

The transition period will begin immediately following exit day and end on 31 December 2020. Under the terms of the withdrawal agreement, the transition period can be extended once for "up to 1 or 2 years", provided that the UK and EU agree on an extension prior to 1 July 2020. The Conservative Party says in its manifesto that it would not extend the transition period beyond the end of 2020.

The WAB provides the UK law mechanism by which EU law will continue to have effect in the UK during the transition period despite the UK having left the EU and the repeal of the European Communities Act 1972 (the "ECA", which is the current legal means by which EU law is implemented in the UK).

What happens if Parliament does not pass the WAB before exit day?

If the UK does not pass the WAB before exit day, and no extension to the departure date has been agreed between the UK and the EU, the withdrawal agreement (including provisions for transition) will not come into effect. Under UK law, this would mean that the principal provisions in the 2018 Withdrawal Act would apply. These repeal the ECA, but then bring into UK law all EU law applicable in the UK on exit day, subject to amendments made to that EU law by statutory instrument in order to remedy deficiencies arising from the UK's withdrawal from the EU. So, for example, institutional aspects of EU law would cease to apply, as would aspects of EU law that depend upon reciprocity between the member states. This would result in a no deal scenario.

What if Parliament passes the WAB but the European Parliament does not approve the Brexit deal?

The European Parliament must consent to any withdrawal agreement, but it has said that it will not hold a vote until after the UK Parliament has approved the withdrawal agreement. Though highly unlikely, it is possible that the European Parliament could decline to approve the Withdrawal Agreement despite the UK Parliament having done so. If this were to happen, the UK would leave the EU on 31 January 2020 (subject to any further extensions of the article 50 period) with no transition period or other deal with the EU. This scenario is highly unlikely because the European Commission has already endorsed the Withdrawal Agreement.

What about the European Commission?

The UK Government has declined to nominate a European Commissioner before the UK general election on 12 December 2019, despite its obligation under EU law to do so. The UK said that it cannot propose a UK European Commissioner in a pre-election period, but the European Commission pointed to EU case law establishing that a member state cannot invoke domestic law to justify its failure to comply with its EU law obligations. As a result, the EU commenced infringement proceedings against the UK for breach of EU law. The UK was asked to respond to EU infringement proceedings by Friday 22 November, but so far has not responded. In practice, the infringement procedure is unlikely to make the UK appoint a Commissioner. The European Parliament has approved the Commission without a UK Commissioner and it will take office on 1 December 2019.

NEXT STEPS FOR THE EU

What does the European Union need to do?

On Wednesday 27 November 2019, the European Parliament voted to approve the next European Commission. The next Commission, led by President-elect Ursula von der Leyen, was originally due to take office on 1 November 2019, but a tough round of European Commissioner hearings in the European Parliament, and the UK's refusal to nominate a Commissioner, has delayed the confirmation procedure. The von der Leyen Commission will now take office on 1 December 2019.

In the financial services sector, the European Commission has proposed extending temporary equivalence for UK CCPs beyond March 2020. This reduces the risk of disruption for UK CCPs and their clearing members in the event of a no-deal Brexit. Longer term, the UK and EU have agreed in the Political Declaration to endeavour to complete equivalence assessments by June 2020 in respect of the future UK-EU relationship.

How has the European Commission been affected by recent developments?

The current European Commission has already stayed on beyond the end of its term of office on 31 October 2019. The next European Commission is now due to take office on 1 December 2019. Previous European Commissions have also stayed on beyond the end of their term in a "caretaker" capacity, so the current Commission's circumstances are not entirely out of the ordinary. There is no express EU Treaty basis covering the powers of the Commission under these circumstances, but EU case law indicates that a "caretaker" Commission may deal with "current business", which is limited to actions such as adopting

regulations proposed before the end of the Commission's term. Further delays to the new Commission taking office may have hampered the Commission's ability to make new Brexit-related decisions or pursue new competition enforcements.

Although the next Commission has been confirmed, the von der Leyen Commission will not include a Commissioner from the UK. This presents some legal uncertainty, as a European Council decision from 2013 (2013/272/EU) states that "the Commission shall consist of a number of members... equal to the number of Member States". Aggrieved parties could attempt to use this decision as a basis for procedural challenges to any decisions made by the Commission – there is a possibility, for instance, that Commission competition decisions could be overturned in court. However, in its decision of 23 November 2019 to adopt the list of Commissioners-designate, the European Council said that the absence of UK Commissioner "cannot constitute an obstacle for the appointment of the next Commission in order for it to start exercising the full range of its power under the Treaties as soon as possible". Some commentators nevertheless expect important Commission decisions to be delayed until the Commission's legal position becomes more clear.

What happens after the transition period?

The purpose of the transition period is for the UK and the EU to negotiate a long-term trade agreement. The withdrawal agreement allows the UK and the EU to agree before July 2020 an extension of the transition period, but clause 30 of the WAB would require the UK Government to gain Parliamentary approval before it agreed to an extension, adding a considerable political complication to the process. Unless an extension to the transition period is put in place or the UK and the EU reach agreement on long-term trade arrangements, the end of the transition period will result in there ceasing to be any specific trade deal between the UK and the EU – a no deal scenario.

Even an agreed trade deal does not guarantee that disruption will be entirely avoided after the transition period. For example, the UK and EU have set out their aspirations for a comprehensive free trade agreement in the Political Declaration, agreed alongside Prime Minister Johnson's withdrawal agreement. This aims to ensure "no tariffs, fees, charges or quantitative restrictions across all sectors". Nevertheless, cross-border trade following the end of transition is still likely to involve some additional costs, for instance those associated with proving the origin of products to ensure compliance with the "rules of origin" envisaged in the Political Declaration.

CONCLUSION

Risks to businesses relating to a no-deal Brexit on 31 January 2020 are constantly shifting, as are the risks associated with a "hard" exit at the end of a transition period. The current political dynamic in the build-up to the UK general election plays a large part in this uncertain picture as the outcome of the vote will determine the future UK Government and affect the UK's approach to Brexit. Businesses should be prepared for the two main flashpoints in the UK's current Brexit timeline: exit day and (if the Prime Minister's revised deal comes into effect) the end of the transition period. For both flashpoints, businesses should not only consider the implications of a no-deal scenario but also understand the potential effect on trade between the UK and EU that may occur with a deal.

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