If the Withdrawal Agreement between the EU and the UK is ratified before the expiry of the Article 50 deadline, the immediate “cliff edge” risks of no deal will be avoided. There will be a transition period, during which UK will be treated as if it were a member of the EU, lasting at least until the end of 2020. What happens after that date will be governed by the Political Declaration and future negotiations.

Whether or not a new trade agreement is achieved by the end of the transition period, businesses will need to consider the potential new “cliff edge” risks of regulatory changes and border checks at the end of that period.

This note answers some key questions about the workings of the Withdrawal Agreement as agreed by EU and UK negotiators on 17 October 2019 and the European Union (Withdrawal Agreement) Bill (WAB) as published on 21 October 2019. The WAB must be passed by both Houses of Parliament and receive Royal Assent before the UK can enter into and ratify the Withdrawal Agreement.

Transition period

What is the transition period?
The transition period (or implementation period) under the Withdrawal Agreement applies from when the agreement comes into force until 31 December 2020. It operates as a “standstill” period. The UK will technically have left the EU but for most purposes will continue to be treated as if it were a member of the EU. The main exception is that the UK will not have representation or voting rights in EU decision-making and institutional processes. For example, it will no longer have MEPs sitting in the European Parliament.

The transition period means that, on the day after the UK leaves the EU, the UK will still be treated as a member of the EU single market and customs union. EU law (including as it is applied by member states) will continue to apply in the UK and businesses and individuals can continue to operate, work and travel between the EU and the UK just as before exit. The UK will be subject to new EU laws that come into force and apply during the transition period.

The UK will continue to be bound by the EU’s international agreements and the EU will notify other parties to such agreements that the UK is to be treated as a member state for the purposes of those agreements during the transition period.

During the transition period negotiations will take place on the relationship between the EU and the UK that will follow the end of the transition period (see below). If agreed, new arrangements on foreign policy and security may come into effect before the end of the transition period.
How does the WAB provide for the transition period?

An international agreement such as the Withdrawal Agreement does not apply, as a matter of UK law, unless it is incorporated by legislation into UK law. While the European Union (Withdrawal) Act 2018 (the 2018 Act) was passed to legislate for the UK’s exit from the EU to prepare for a no deal outcome, the WAB is needed to implement the Withdrawal Agreement.

The WAB is somewhat convoluted in its approach. While the 2018 Act repeals the European Communities Act 1972 (the 1972 Act), which has given effect to EU law in the UK since the UK joined, the WAB amends the 2018 Act and in effect revives the 1972 Act for the duration of the transition period.

In the terminology of the WAB, the UK will leave the EU on “exit day” (currently 31 October 2019) and the transition period (also known as the implementation period) will end on “IP completion day”. “IP completion day” is defined as 31 December 2020, and this definition will need to be changed if the transition period is extended (see below).

The WAB will:

> Provide that all references to the EU or to member states in legislation should be read during the transition period as if they included the UK, and references to EU law should be treated as applying to the UK to the extent required by the Withdrawal Agreement.

> Preserve the powers under the 1972 Act that enable incoming EU legislation to be implemented in the UK by secondary legislation. This is intended to enable the government to make rules implementing new EU directives during the transition period, as required by the Withdrawal Agreement.

> Retain the role of European Court decisions in the interpretation of EU-derived law and the ability of the UK to refer matters to the European Court until IP completion day.

Do businesses need to do anything to prepare for the transition period?

The transition period means that there will generally be no immediate changes, but the UK’s exit from the EU may have some consequences that need action by businesses. For example:

> Although the WAB provides that UK legislation is to be read as though the UK was still a member of the EU during the transition period, this does not apply to private contractual arrangements. Businesses may need to check contracts and agreements in case references to, for example, the EU or EEA need to be changed to clarify that the UK is still in scope, where relevant.

> Businesses may wish to communicate with employees and other stakeholders to ensure they are clear about the impact of the transition period.

> Businesses will need to consider their plans for the next stages of the Brexit process. They should be mindful of “cliff edge” risks at the end of the transition period and ensure they retain any elements of no deal planning that may be needed in the future.

> They may also want to start engaging with governments concerning the impact of potential future trade negotiations and/or regulatory change on them and their sectors.
Can the transition period be extended?
The Withdrawal Agreement allows the transition period to be extended by the Joint Committee (representing both the EU and the UK) established under the Withdrawal Agreement. Any decision of the Joint Committee to extend must be made before 1 July 2020. An extension can only be made once and can be for a period of one or two years, to the end of 2021 or 2022.

If the transition period is extended, there will be differences in how the UK is treated by the EU during the extension. For the purposes of the EU’s budget as it applies from 2021, the UK will be treated as a third country, not an EU member state, and will have to negotiate the contributions it makes to the EU in return for benefits.

The WAB requires the UK Parliament to consent to an extension, but does not enable Parliament to require the government to seek an extension. However, the government has said it will bring forward an amendment to the WAB to give Parliament a greater say on whether there should be an extension.

When will changes to UK law due on “exit day” come into force?
The transition period means that there is no need for immediate changes to UK law, and the WAB defers changes made under the 2018 Act until the end of the transition period.

To preserve continuity as far as practicable, the 2018 Act, before amendment by the WAB, incorporated EU law as at the “exit day” into UK law. It gave the government power to make regulations to amend retained EU law to deal with any “deficiencies” arising from the UK’s withdrawal from the EU. These powers have been exercised extensively and over the last year hundreds of regulations have been made by statutory instrument to prepare for a no deal exit. Most of the changes made by these regulations are stated to come into force on “exit day”.

As explained above, the effect of the transition period is that the UK will be treated as though it is still a member of the EU for most purposes. Accordingly, the WAB provides that EU law will be incorporated into UK law at the “IP completion date” – that is, the end of the transition period – rather than at the exit date. Likewise, it changes the effective date of amendments made by statutory instruments under the 2018 Act to the IP completion date.

After the transition period

What kind of future relationship will follow the transition period?
The Political Declaration as agreed between the UK and EU negotiators on 17 October 2019 sets out the framework for the future relationship. It contemplates a free trade agreement and cooperation in a number of other areas including security.

The Political Declaration is not legally binding – it merely sets out aspirations and matters on which the parties will endeavour to reach agreement. While the UK government is expressing confidence that agreements can be made in accordance with the Declaration by the end of the transition period, many experienced trade negotiators doubt whether it is feasible to have a fully operative agreement in place by the end of 2020. Such an agreement would not be negotiated under the streamlined Article 50 procedure but under the EU’s normal procedures for negotiating international agreements, and potentially could require separate ratification by member states’ parliaments.
Pressure of time may limit the scope and extent of any future agreement, or risk the transition period coming to an end without an agreement having been concluded. The UK would then face the risks of leaving the single market and customs union without a deal. Even with an FTA, the nature of the relationship mapped out by the Political Declaration suggests that the UK likely to diverge from EU rules and trade policy. This would mean that the end of the transition period will bring new trade barriers between the EU and the UK including regulatory checks on goods, authorisation and licensing requirements and restrictions on provision of services.

The Political Declaration contains some specific interim timelines for decisions relevant to the future relationship:

> Financial regulation: The UK and EU will endeavour to conclude equivalence assessments under existing rules by the end of June 2020.

> Fisheries: The EU and UK will use “best endeavours” to conclude and ratify an agreement on fisheries by 1 July 2020 in time to determine fishing opportunities for the first year after the transition period.

> Data: The EU and UK will each endeavour to reach adequacy decisions in relation to data protection rules by the end of 2020.

For further information see our note on the Political Declaration.

What say will Parliament have over the future relationship?

The WAB has various provisions regarding UK Parliamentary oversight of the next phase of EU negotiations. The government is required to make a statement to the House of Commons within 30 sitting days of exit on its “objectives for the future relationship with the EU” and it may subsequently make revised statements of objectives. Any such statement, which essentially will describe the government’s negotiating goals, must be consistent with the Political Declaration. Parliament must approve the statement of objectives before the government begins negotiations.

The government is obliged to seek to achieve the objectives agreed to by Parliament and must report regularly to Parliament on progress of negotiations.

Any future treaty agreed with the EU will be subject to Parliamentary approval before being ratified. The provisions of the Constitutional Reform and Governance Act 2010 on laying treaties before Parliament for a period before ratification are disapplied in relation to treaties on the future relationship.

Will further legislation need to be passed at the end of the transition period?

The UK government will need to pass legislation to deal with a number of areas, including immigration, agriculture and the environment, where policies have previously been defined by the UK’s membership of the EU. It may also need to legislate to implement aspects of any future trade agreement or other agreements with the EU.

There may also need to be further amendments made to correct deficiencies in EU law provisions retained under the 2018 Act to reflect either the outcome of future relationship negotiations or other developments, including new legislation implemented, between now and the end of the transition period.
Other issues

What arrangements will apply to Northern Ireland after the transition period?
The Protocol on Ireland/Northern Ireland in the Withdrawal Agreement makes special arrangements about the relationship that Northern Ireland will have with both the EU and the UK at the end of the transition period. The arrangements in the Protocol were revised in October 2019 to replace the former “backstop”. The new provisions will mean that instead of checks between Northern Ireland and the Republic there will need to be checks on goods transferring between Great Britain and Northern Ireland.

The new provisions will see Northern Ireland following EU single market rules for goods, and aligned to EU rules on customs, VAT, state aid and the single electricity market, while still remaining part of the UK’s customs territory and VAT area, and still able to benefit from UK trade agreements. There will be a “consent mechanism”, with the Northern Ireland assembly given an opportunity to vote periodically on whether it wants this set of arrangements to continue.

The WAB contains broad powers for the Protocol to be implemented by secondary legislation but does not legislate for the consent mechanism. Further details on the operation of regulatory checks, customs and VAT are to be worked out by the Joint Committee under the Withdrawal Agreement.

Will workers’ rights be preserved in the UK after Brexit?
The WAB contains a schedule on “protection of workers’ rights” but does not offer any guarantees against the removal of rights.

The provisions arise from opposition parties’ concerns that leaving the EU will enable the UK to depart from EU law on the protection of workers’ rights. The former Irish backstop protocol would, if it had come into force, have required the UK to maintain a “level playing field” (i.e. stayed aligned with the EU) in a number of areas, including employment and workers’ rights. However, these provisions are no longer in the Withdrawal Agreement and have been replaced with weaker and non-legally binding commitments in the Political Declaration.

The provisions in the WAB will require ministers to make a statement to Parliament in respect of any proposed Acts relating to workers’ rights as to whether rights in place at the end of the transition period are affected. A table of all the EU directives considered to confer workers’ rights is set out in the WAB. After the end of the transition period, ministers will also have to report periodically to Parliament on new EU legislation conferring rights on workers. However, there is nothing in the WAB to prevent Parliament from passing legislation that is inconsistent with workers’ rights under EU law.
Further resources

- Withdrawal Agreement
- Revised Protocol on Ireland/Northern Ireland and guide
- Unilateral Declaration on Consent
- Revised Political Declaration

For other information relating to Brexit impacts and preparations see our Brexit Microsite on the Knowledge Portal and Linklaters Brexit homepage.

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