

WITHDRAWAL  
AGREEMENT  
REPORT



**INTRODUCTION TO  
THE WITHDRAWAL  
AGREEMENT**





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# INTRODUCTION

At the point of its exit from the EU, the UK's relationship with the EU will be governed by the Withdrawal Agreement, an international treaty negotiated by the UK and the EU which is intended to –

- tie up the administrative and financial loose ends from the UK's membership of the EU,
- protect UK and EU citizens living in each other's territory, and
- provide a stand-still period in relation to the application of EU law in order to allow for the negotiation of a trade deal.

This article is intended to give an overview of the content of the Withdrawal Agreement rather than deal in detail with any particular aspect or its impact on any specific sector, as well as some comments regarding several interesting public law issues to which the Agreement gives rise.

## BRIEF BACKGROUND TO THE WITHDRAWAL AGREEMENT

The means by which a Member State leaves the EU is governed by Article 50 of the Treaty on European Union ("TEU").

Under Article 50, once a Member State has given notice of its intention to leave, there then commences a two year period – extendable by consent – during which the exiting state and the remaining Member States negotiate an agreement governing the terms of the former's departure.

The Withdrawal Agreement constitutes the terms negotiated between the UK and the EU 27 between June 2017 and October 2019 following the UK's notification of its intention to leave which was given on 29 March 2017.

The negotiation has occurred in two tranches. A first draft of the Agreement was concluded by Theresa May's government in November 2018. However, although the deal was endorsed unanimously by the EU27 Member States, it was voted down by UK MPs on 15 January, 12 March and 29 March 2019. Although initial opposition covered a range of issues, it quickly coalesced around the 'backstop' in the Protocol on Ireland/Northern Ireland. This would have seen the UK as a whole form a customs union with the EU and commit to mirroring certain 'level playing field' obligations with respect to environmental protection, labour and social rights, state aid and competition, and tax – with Northern Ireland complying with a raft of additional EU legislation. During the period that the Protocol was in effect the UK would have been unable to sign its own trade deals with third countries. That opposition meant that the government could not ratify the Agreement at the time, giving rise to a risk that the UK would leave the EU with no deal in place.

Both MPs and the government were, at that point, unwilling to risk the economic consequences of a 'no-deal Brexit' and an extension was secured to the Article 50 timeline to allow further time to secure the consent of MPs to the Agreement. The first extension lasted until 12 April 2019 with another agreed until 31 October 2019.

Despite securing assurances from the EU as to the interpretation of the Northern Ireland backstop, it became obvious that the Agreement would not be passed by MPs in its current form and so, when Boris Johnson took over as Prime Minister on 24 July 2019, the UK government sought to renegotiate certain elements of it – most particularly the backstop.

That renegotiation produced a new version of the Withdrawal Agreement which was agreed on 17 October and published on 19 October 2019. The House of Commons convened a special sitting on the same day (in its first Saturday sitting since the invasion of the Falklands in 1982) in order to consider the new Agreement. However, MPs voted to withhold their approval until the legislation implementing the Agreement in UK law had been passed.

The purpose of withholding consent was to ensure that the Prime Minister was bound by the terms of the EU Withdrawal (No.2) Act 2019 (the 'Benn Act') which required him to seek a further extension to the Article 50 timeline if no Agreement had been approved by 19 October 2019. MPs feared that if the Agreement was approved but the implementing legislation proved controversial then the Agreement would not have been ratified by 31 October 2019 and the UK would still face a no-deal Brexit.

In compliance with the Benn Act, a further extension was sought until 31 January 2020 and, on 22 October 2019 the implementing legislation in the form of the European Union (Withdrawal Agreement) Bill (the 'WAB') passed its second reading. That vote was hailed as the first time that MPs had signalled consent to a draft of the Agreement.

However, on 28 October the EU granted the requested extension and the next day the Early Parliamentary General Election Act 2019 was passed through the House of Commons, receiving royal assent on 31 October.

Parliament was dissolved on 6 November 2019 and the WAB fell having made no further progress since its second reading. The Withdrawal Agreement therefore remained unratified by either the UK or the EU.

In the election of 12 December 2019, the Johnson government secured a majority of 80 seats with a pledge to pass the WAB, ratify the Agreement and take the UK out of the EU on 31 January 2020 with no further extensions.

The WAB was reintroduced, with amendments, shortly after the Queen's Speech on 19 December 2019.



# WHEN DOES THE WITHDRAWAL AGREEMENT COME INTO FORCE?

THE WITHDRAWAL AGREEMENT WILL NOT COME INTO FORCE UNLESS IT HAS BEEN RATIFIED BY THE UK AND THE EU.

Under Article 185, the Withdrawal Agreement will come into force on the earlier of the following –

- Where both the UK and EU have ratified the Agreement and notified the Secretary General of the European Council that they have done so, the day following the end of the Article 50 period.
- The first day of the month following the ratification of the Agreement by both the UK and EU and notification of ratification to the Secretary General.



# WHAT DOES THE WITHDRAWAL AGREEMENT COVER?

The Withdrawal Agreement is structured as follows:

Part I	Common provisions	Cross-cutting clauses in relation to the interpretation and operation of the Withdrawal Agreement. These include territorial scope, definitions and how its provisions will be given effect in the UK.
Part II	Citizens' rights	Protections for the rights of EU citizens in the UK and UK citizens in the EU, preserving their right to live, work and study in their host countries.
Part III	Separation provisions	Provisions relating to the decoupling of the UK from the EU's legal framework in respect of various matters.  These include provisions relating to market access for goods, ongoing customs, VAT and excise matters, intellectual property, ongoing police and judicial co-operation in both criminal and civil/commercial matters, the protection of data obtained before the end of transition, ongoing public procurement procedures, Euratom issues, ongoing EU judicial/administrative processes, and privileges and immunities.
Part IV	Transition period	Provision for a standstill transition period until 31 December 2020 to allow for the negotiation of a future trade deal between the two sides, during which the UK will still be treated as an EU Member State in most respects and will continue to apply EU law.

Part V	Arrangements for calculating a financial settlement	A mechanism to allow for the calculation of amounts to be paid by the UK to the EU in view of financial commitments which the UK signed up to during its membership.
Part VI	Governance arrangements	Arrangements to allow for the establishment of a Joint Committee to perform certain governance functions including resolution of disputes between the parties in relation to the interpretation of the Agreement and obligations under it.
	Protocol on Ireland/Northern Ireland	Provisions to allow for the application in Northern Ireland of a number of EU customs rules in circumstances where a future trade deal has not been concluded by the end of the transition period.
	Protocol on UK Sovereign Base Areas in Cyprus	Arrangements for the continued application of certain elements of EU law on UK bases in Cyprus to ensure no loss of rights for Cypriot civilians living and working in those areas. Such areas will continue to be part of the EU's customs territory.
	Protocol on Gibraltar	Provisions on bi-lateral co-operation on citizens' rights, certain products, environment, and police and customs, as well as a bilateral agreement in relation to taxation and the protection of financial interests.



# WHAT IS THE POLITICAL DECLARATION?

**UNDER ARTICLE 50 TEU, THE WITHDRAWAL AGREEMENT MUST TAKE ACCOUNT OF THE FUTURE RELATIONSHIP BETWEEN THE LEAVING MEMBER STATE AND THE EU.**



This means that during the withdrawal negotiations, both sides must come to some agreed view as to what their future trading relationship will look like once the Member State has departed. This makes sense as one of the functions of the Withdrawal Agreement is to provide a bridge between EU membership and that future trading relationship, so the latter will in many ways shape the content of the former.

The Political Declaration is therefore an agreed set of commitments and parameters that served as a backdrop to the negotiation of the Withdrawal Agreement and which will guide the negotiations for a future trade deal after the UK leaves the EU.

Given the connection between the two, changes were made to the November 2018 version of the Political Declaration as part of the renegotiation of the Withdrawal Agreement. These included stripping out references to the Northern Ireland backstop which was removed from the Withdrawal Agreement.

The Political Declaration is structured in five parts as follows:

Part I	Basis for Co-operation	The parties commit to establishing a future trading relationship on the basis of shared principles including in relation to human rights, democracy, the rule of law, mutual co-operation globally, non-proliferation of nuclear weapons and high levels of data protection.
Part II	Economic Partnership	<p>Sets out an aspiration to conclude an ambitious and wide-ranging future economic partnership encompassing a Free Trade Agreement and co-operation in particular sectors.</p> <p>The aim for trade in goods is to preserve the current situation in which there are no tariffs or quotas on trade in goods between the UK and the EU.</p> <p>Trade in services is left more open, although the Political Declaration sets out principles of market-access, non-discrimination and regulatory autonomy and co-operation.</p>
Part III	Security Partnership	<p>In terms of law enforcement, the aim is for the future relationship to cover data exchange, operational co-operation between law enforcement agencies, judicial co-operation in criminal matters and anti-money laundering and criminal financing.</p> <p>On foreign policy and defence, the need for future co-operation is recognised while respecting the autonomy of both parties.</p>
Part IV	Institutional and other Horizontal Arrangements	<p>An overarching institutional framework will be underpinned by mechanisms for dialogue and arrangements for setting the direction and implementing the future relationship.</p> <p>Dispute resolution provisions will allow for expedient problem-solving using a flexible mediation mechanism in some areas. However, in some instances the Joint Committee established under the Withdrawal Agreement can be used and may refer the dispute to an independent arbitration panel.</p>
Part V	Forward Process	A commitment is made for the parties to begin formal negotiations on the future relationship as soon as the UK leaves the EU, and endeavour to have a new relationship framework in place by the end of the transition period in December 2020.

# WHAT IS THE LEGAL STATUS OF THESE DOCUMENTS?

ONCE RATIFIED BY EACH SIDE, THE WITHDRAWAL AGREEMENT WILL BE A LEGALLY BINDING INTERNATIONAL TREATY.

As such, it will bind the UK in international law rather than create domestic rights that can be relied on in UK courts. However, elements of it will be incorporated into UK law through the European Union (Withdrawal Agreement) Act which will create domestic rights – in relation to the citizenship provisions, for example.

By contrast, the Political Declaration is not legally binding at any level and is simply a political statement of current intent in terms of a basis for negotiations on a future trade deal once the UK has left the EU. It is essentially aspirational in nature. It does not require any particular form or content of a deal, or indeed require that there be any future deal at all.

However, Article 184 of the Withdrawal Agreement requires the parties to negotiate the future relationship in good faith and the Political Declaration is likely to provide the background against which that obligation will be read.



# TRANSITIONAL ARRANGEMENTS

THE NOVEMBER 2018 VERSION OF THE WITHDRAWAL AGREEMENT MADE PROVISION FOR A TRANSITION PERIOD FROM 31 MARCH 2019, THE ORIGINAL DATE ON WHICH THE UK WAS DUE TO LEAVE THE EU, UNTIL 31 DECEMBER 2020 (ARTICLE 126).

That transition period is capable of a single extension of either one or two years by mutual agreement between the UK and EU. A decision on whether to extend must be made before 1 July 2020 (Article 132). Any extension will require the UK to make an appropriate financial contribution to the EU budget, to be decided by the Joint Committee (Article 132(3)).

The intention is to provide a standstill period after the UK has officially left the EU during which businesses can adapt to the change and the UK and EU can negotiate a future trade deal. As such, apart from participation in EU institutions and governance structures and some other exceptions (Articles 127(1) and (7) and 128), the UK will be treated as if it continued to be an EU Member State in EU law for the duration of the transition period (Articles 7, 127(1), (3) and (6)).

The revisions made to the Withdrawal Agreement in October 2019 did not include any update to the length of the transition period, mainly because its end was defined to coincide with the end of the EU's current Multiannual Financial Framework. This means that almost half of the original 21 month period has been lost, leaving very little time for a trade deal to be agreed.

## THE EFFECT OF THE TRANSITION PERIOD

For the most part, in practice, not much change will be seen in the legal landscape during the transition period.

During the transition period EU law continues to apply in the UK as if it was still an EU Member State (Article 127(1)). Any changes or additions to EU law made during the transition period will also apply.

However, the UK will be excluded from decision-making in respect of new laws and the administration and governance of the EU (Article 7(1)).

As such, the UK remains part of the EU single market and customs union and must continue to respect the four freedoms of movement of goods, people, services and capital, as well as continuing to apply the EU customs code to imports into the UK from third countries.

This means that during the transition period the UK will be unable to conclude any trade agreements of its own with non-EU countries (although it may negotiate and ratify them so long as they do not enter into force during the transition period – Article 129(4)).

However, it does not mean that the UK will automatically continue to benefit from the EU's own trade deals with third countries. A footnote to Article 129(1) states that the EU will notify the counterparties to its trading agreements that the UK is to be treated as if it was still a member of the EU during the transition period. However, this is essentially a request for third countries to treat the UK as such, and they are under no obligation to do so.

More widely, the UK will continue to be bound by the EU's obligations stemming from international agreements (Article 129(1)). It will also continue to apply the EU's Common Foreign and Security Policy, including implementation of the EU's sanctions regime, unless an alternative agreement is reached during the transition period on the areas covered by that policy (Article 127(2)).

Internally, the EU's Justice and Home Affairs policy will continue to apply, including the European Arrest Warrant (Article 62(1)). However, EU Member States may refuse to surrender their own nationals to the UK in view of fundamental principles of national law (Article 185). Where a Member State does so, the UK can make a similar decision in relation to that Member State.

Germany has stated that it will no longer surrender its nationals to the UK in reliance on Article 185. This is unsurprising as Germany has a constitutional bar to the extradition of its nationals to non-EU countries.

## GOODS PLACED ON THE MARKET AND CUSTOMS ARRANGEMENTS

In general, goods that are already in the distribution chain at the end of the transitional period will be able to continue to their end-user in either the UK or EU, and be put to use, with only limited additional requirements (Article 41(1)).

This applies to goods including agricultural products, consumer products (such as toys, textiles, cosmetics), health products (pharmaceuticals, medical devices), and industrial products such as motor vehicles, marine equipment, machinery, lifts, electrical equipment, construction products, and chemicals. However, live animals and animal products must meet the EU and UK's rules on imports from third countries (Article 41(3)).

In its guidance, the European Commission gives the following examples of how this will work –

A CE-marked X-ray machine sold by an EU-27 manufacturer to a hospital in the UK but not yet shipped or physically delivered before the end of the transition period, can be shipped and delivered to the hospital after that date on the basis of its compliance with applicable requirements at the time it was placed on the market. Hence, no need for re-certification or affixing of new, UK-specific conformity markings or adapting the product to any new product requirement, including the indications to be affixed on the product or the information to be provided with it (product manual, instructions for use and the like).

Likewise, a car produced by a UK manufacturer based on a type-approval granted by the UK authorities and sold to an EU-27 distributor before the end of the transition period, can be shipped to the distributor, further sold to an end-customer, registered and entered into service in any Member State on the basis of its compliance with applicable requirements at the time it was placed on the market.

Goods placed on the market before the end of the transition period will be subject to the same rules in relation to customs as when they began their journey (Article 47 – 50).

It will be for the person claiming that goods began their journey before the end of the transition period to prove that this was the case – so all relevant documents should be retained (Article 42).

## INTELLECTUAL PROPERTY

Existing EU unitary intellectual property rights – such as trademarks and design rights – will be converted into identical UK national rights free of cost (Articles 54 and 55).

Existing EU-approved geographical indications will be protected in the UK, and UK indications will be protected in the EU unless and until a future trade deal is concluded, even if this is after the transition period (Article 54(2)).

## CROSS-BORDER DISPUTES

During the transition period, the current EU civil co-operation rules will continue to apply.

The Rome I and Rome II Regulations will continue to apply in the UK to determine the applicable law for contracts and non-contractual damages respectively for contracts concluded and damage suffered during the transition period (Article 66).

Likewise, for legal proceedings commenced before the end of the transition period, the Brussels I Regulation on jurisdiction and enforcement will continue to apply, as will the Brussels IIa Regulation on divorce and separation and the EU Maintenance regulation on maintenance payments (Article 67).

As explained in the European Commission's guidance on the Withdrawal Agreement, this means that where at the end of the transition period –

- litigation is pending between a UK party and an EU party before a UK court, the UK court remains competent to apply EU law in the case, and
- proceedings have been commenced against a UK party in the court of an EU Member State, EU law on the recognition and enforcement of judgements will apply in the UK to that court's judgement.

Current EU law on service, co-operation between UK courts and courts in EU Member States, judicial co-operation, legal aid and mediation will also apply to actions taken and requests made before the end of the transition period (Articles 68 and 69).

## DATA TRANSFERS

The Withdrawal Agreement covers data processed or obtained before the end of the transition period, or on the basis of the Agreement. EU data protection law would apply in the UK in respect of the processing of personal data of subjects outside the UK where the data was processed –

- under EU law before the end of transition period, or
- after the end of the transition period under the Withdrawal Agreement.

(Article 71(1))

Under the General Data Protection Regulation, personal data can only be transferred to countries outside the EU which guarantee an 'adequate' level of protection for that data. A decision on whether the protection offered by a third country is adequate is made by the European Commission.

The provisions in Article 71(1) of the Withdrawal Agreement would not apply if the processing was covered by an adequacy decision in relation to the UK (Article 71(2)). If an adequacy decision ceased to apply, the UK would have to ensure its data processing was 'essentially equivalent' to EU law (Article 71(3)).

On the EU side, data obtained from the UK before the end of the transition period, or after the end of transition period under the Agreement, would not be treated any differently to data obtained from an EU Member State simply on the basis that it had originated from the UK (Article 73).

## PUBLIC PROCUREMENT PROCEDURES

Public procurement procedures which have been commenced, but not concluded, before the end of the transition period will continue to be subject to EU public procurement rules until the award of the relevant public contract(s) (Articles 75 – 78).

Likewise, EU public procurement rules will continue to apply to the award of call-off contracts made under a public framework agreement, where that framework agreement was launched before the transition period ends. In such cases EU rules will continue to apply until the relevant framework agreement ends.

## MUTUAL RECOGNITION OF QUALIFICATIONS AND PASSPORTING

Where the UK and EU Member States have recognised certain professional qualifications before the end of the transition period, this recognition shall continue after the end of the transition (Article 27).

In line with the general principle that EU law will continue to apply in respect of the UK during the transition period, financial passporting will continue in effect until the end of this period. This means that firms authorised in the UK will continue to be able to provide cross-border services into, or establish branches in, EEA Member States and vice versa until the end of the transition period.

## THE POSITION OF THE COURT OF JUSTICE OF THE EUROPEAN UNION

### DURING THE TRANSITION PERIOD

During the transition period EU institutions and other bodies, offices and agencies will continue to exercise their powers under EU law in relation to the UK (Articles 95 and 131). In particular, the Court of Justice of the European Union ("CJEU") will have jurisdiction in relation to the UK, as provided for in the EU Treaties.



Where proceedings have been commenced by or against the UK before CJEU prior to the end of the transition period, these will proceed to final determination, including any appeals (Article 86). CJEU may also continue to hear preliminary references from UK courts during the transition period.

The UK, and UK lawyers, will be able to participate in CJEU cases brought during the transition period (Article 90).

#### AFTER THE TRANSITION PERIOD

UK courts may refer questions about EU law referred to in the citizens' rights provisions of the Withdrawal Agreement to CJEU for eight years following the end of the transition period. Where such a reference is made, CJEU's interpretation will be binding on the UK court (Article 158).

New infringement cases against the UK, and cases in relation to breaches by the UK of the transitional arrangements in the Withdrawal Agreement, may be brought before CJEU for four years after the end of the transition period (Article 87).

In addition, enforcement actions and preliminary references to CJEU can be made during and after the transition period (without a four year time limit) in respect of the interpretation and application of certain provisions of EU law relating to the financial settlement (Article 160).

CJEU will also be able to use its annulment powers under Article 263 of the Treaty on the Functioning of the European Union to annul decisions taken by EU bodies during the transition period in relation to the UK, or decisions relating to issues arising before the end of the transition period, but decided afterward (Article 95(3)).

More broadly, courts in EU Member States may make preliminary references to CJEU for rulings on the interpretation of the Withdrawal Agreement. The UK has a right to be informed of the domestic proceedings that led to any such reference (Article 161).

The UK will have the right to participate in any proceedings brought before CJEU in relation to citizens' rights, the financial settlement or as the result of a domestic EU preliminary reference and UK-qualified

lawyers will be able to provide representation and assistance in such proceedings (Article 161(3)).

As discussed below, CJEU will also have a role in interpreting EU law points arising out of the dispute resolution procedure.

#### INTERPRETATION OF EU LAW IN THE WITHDRAWAL AGREEMENT BY UK COURTS

UK courts must interpret references to EU law in the Withdrawal Agreement in line with any CJEU judgments handed down after the UK leaves the EU but before the end of the transition period (Article 4(4)). Article 4(5) requires that CJEU judgments following the end of the transition period must be given 'due regard' by UK courts when interpreting and applying the Withdrawal Agreement. These provisions will be given domestic effect in UK law.

#### PROVISIONS THAT DO NOT APPLY UNTIL THE END OF TRANSITION PERIOD

Under Article 185 the following provisions, with some exceptions, do not come into force until the end of the transition period –

- Provisions on citizens' rights in Part II.
- Separation provisions in Part III.
- Title I of Part VI, which sets out the position on CJEU's jurisdiction and UK participation in CJEU cases on matters arising in relation to citizens' rights and the separation provisions following transition.
- Articles 169 – 181 setting out dispute settlement procedures in the interpretation and application of the Withdrawal Agreement.
- The Protocol on Ireland/Northern Ireland.
- The Protocol on Sovereign Base Areas in Cyprus.

The Protocol on Gibraltar will apply during the transition period but, apart from Article 1 (on citizens' rights), will cease to apply at the end of it.



# WHAT ARE THE GOVERNANCE ARRANGEMENTS?

THE GOVERNANCE ARRANGEMENTS REMAIN THE SAME ACROSS THE NOVEMBER 2018 AND OCTOBER 2019 VERSIONS OF THE WITHDRAWAL AGREEMENT. THOSE ARRANGEMENTS HAVE A NUMBER OF TIERS OUTLINED BELOW.

## THE JOINT COMMITTEE

At the top is the Joint Committee made up of representatives of the UK and EU (Article 164). The Joint Committee is responsible for the implementation and application of the Withdrawal Agreement and either party can refer to it any issue relating to implementation, application or interpretation.

The Joint Committee will make decisions by mutual consent and those decisions will be binding on the parties (Article 166). It can also amend its own rules of procedure and, most importantly, the Withdrawal Agreement itself for four years after the end of the transition period –

'to correct errors, to address omissions or other deficiencies, or to address situations unforeseen when [the] Agreement was signed, and provided that such decisions may not amend the essential elements of this Agreement.' (Article 164(5)(d))

In addition, the Joint Committee will undertake several other important functions in terms of how the arrangements in the Withdrawal Agreement will operate. For example, under Article 5(2) of the Protocol on Ireland/Northern Ireland, before the end of the transition period, it will establish the criteria for considering that

goods brought into Northern Ireland are not at risk of being moved into the EU.

## THE SPECIALISED COMMITTEES

The next tier of governance is formed of Specialised Committees to which the Joint Committee can delegate certain responsibilities (Article 164(5)(a)). The following Specialised Committees are established by the Withdrawal Agreement (Article 165), with the Joint Committee able to add more if it wishes (Article 164(5)(b)) -

- (a) Citizens' rights.
- (b) Other separation provisions.
- (c) Protocol on Ireland/Northern Ireland.
- (d) Protocol on Sovereign Base Areas in Cyprus.
- (e) Protocol on Gibraltar.
- (f) Financial provisions.

The Specialised Committees established by the Agreement are composed of experts representing both the UK and EU (Article 165(1) and (3)).

The specialised committees may draw up draft decisions and recommendations and refer them for adoption by the Joint Committee and the existence of a Specialised Committee does not prevent either the UK or EU referring any matter directly to the Joint Committee (Article 165(2) and (4)).

The rules of procedure for the Joint Committee and Specialised Committees are set out in Annex VIII to the Withdrawal Agreement with each sitting at least annually.

## THE JOINT CONSULTATIVE WORKING GROUP

Lastly, there is a Joint Consultative Working Group established under Article 15 of the Protocol on Ireland/Northern Ireland. The Working Group's main function will be as a forum for sharing information and mutual consultation in relation to the arrangements in the Protocol. The Working Group comes into being when the Withdrawal Agreement comes into force, but the provision that it meets 'at least once a month' does not come into force until the Protocol is enacted (Article 185).

It is through the Working Group that the EU will provide information on EU laws that would be required to be adopted in relation to Northern Ireland under the Protocol, and through which relevant information from the UK would flow to EU bodies and institutions (Article 15(3) of the Protocol).

The Working Group can make no binding decisions on matters before it and will work under the supervision of the Specialised Committee on Ireland/Northern Ireland (Article 15(2) of the Protocol).

## HOW WILL DISPUTES IN RELATION TO THE WITHDRAWAL AGREEMENT BE MANAGED?

In the event of a dispute on the interpretation of the Agreement, initial attempts at a political resolution will take place in the Joint Committee (Article 169). If no solution is found, either party can refer the dispute to arbitration (Article 170(1)). The decision of the arbitration panel will be binding on both parties (Article 175).

Under Article 171, there will be a list of 25 possible members for the arbitration panel, with the EU and UK proposing 10 each and agreeing the remaining five jointly. Panellists cannot work for the EU, any member state government or the UK government. Each panel will be made up of five panellists – two proposed by each of the parties with the chair chosen by consensus, or by the Secretary-General of the Permanent Court of Arbitration where no consensus can be reached.

An arbitration panel will usually give a decision within 12 months of a matter being referred to it (Article 173(1)).

Where any dispute involves a question regarding the interpretation of EU law the arbitration panel must refer it to CJEU, the decision of which will be binding (Article 174).

Once the arbitration panel has made a decision, the parties will negotiate a 'reasonable' timeline for its implementation (Article 176). Where no consensus can be reached, the question of what is a reasonable period of time will be referred back to the panel. Any period for implementation can be extended by mutual agreement.

The party that brought the original dispute can ask the arbitration panel to review the measures taken by the other party to comply with its ruling (Article 177). Where the panel finds that its decision has not been complied with, it may impose a financial penalty to be paid to the aggrieved party (Article 178(1)). Again, if the dispute raises a question of interpretation of EU law, the panel is obliged to refer it to CJEU.

If the financial penalty has not been paid within one month, or the panel's decision is still not complied with after six months, the Agreement allows the complainant to take proportionate steps to suspend elements of the application of the Withdrawal Agreement itself, except for the provisions in relation to citizens' rights, or parts of other agreements between the EU and the UK (Article 178(2)). Such suspension only lasts until compliance is restored and is subject to review by the arbitration panel (Article 178(3) and (5); Article 179).

- An important point to note is that CJEU is not the dispute settlement body for the Withdrawal Agreement – its role is limited to determinations on the interpretation of any EU law that applies by virtue of the Agreement.

# PROCESS FOR IMPLEMENTATION OF THE WITHDRAWAL TREATY

IT IS IMPORTANT TO SEPARATE OUT AND UNDERSTAND THE TWO DISTINCT CONCEPTS OF RATIFICATION AND IMPLEMENTATION.

Ratification is an act of international law whereby a signatory state indicates its intention to be bound by the treaty.

With some exceptions, most international treaties are ratified by the UK only after the requirements of section 20 of the Constitutional Reform and Governance Act 2010 have been met. This requires that the text of the treaty be laid before each House of Parliament for 21 sitting days with an explanatory memorandum. During that time either House can resolve that it should not be ratified. If the resolution comes from the House of Lords, the treaty can be ratified regardless. However, a resolution from the House of Commons will force the government to lay the treaty again for another 21 sitting days with a further explanatory memorandum. By this means, MPs can hold up ratification indefinitely.

Section 13 of the European Union (Withdrawal) Act 2018, sought to overlay a further set of requirements for the ratification of the Withdrawal Agreement. It states that the Agreement cannot be ratified by the UK unless it has been laid before both Houses, approved by House of Commons and considered by the House of Lords, and an Act of Parliament implementing it has been passed.

The WAB is the legislation introduced by the government to implement the Withdrawal Agreement in domestic law. Its passing would therefore fulfil one of the preconditions for ratification set out in section 13 of the EU(W)A.

However, in an attempt to short circuit the process, the WAB contains provision to repeal section 13 of the EU(W)A and to disapply the 2010 Act with respect to the initial ratification of the Withdrawal Agreement (although not subsequent changes to it). This means that when the WAB is passed the government may ratify the Withdrawal Agreement without the need to take any further steps.

On the EU side, the European Council endorsed the Withdrawal Agreement on 17 October 2019 and authorised its signature on 21 October 2019. It then passed the Agreement to be approved by a majority of the European Parliament following which it will be concluded by the European Council on approval by at least 20 of remaining 27 Member States with 65% of the EU population.

The EU will not require any implementing legislation on its side as the Withdrawal Agreement itself ensures that the EU law that it makes applicable will apply in respect of the UK during the transition period and thereafter as necessary (Articles 4(1) and 7, 127(3) and (6)).



# NOTABLE PROVISIONS/POINTERS FROM A PUBLIC LAW PERSPECTIVE

THE WITHDRAWAL AGREEMENT HAS FUNDAMENTAL CONSTITUTIONAL IMPLICATIONS FOR THE UK – PRIMARILY DURING THE TRANSITION PERIOD, BUT POTENTIALLY THEREAFTER.

Article 4 states that –

- the Withdrawal Agreement itself will have primacy over UK domestic law in the same way as EU law does before exit and during the transition period,
- the Withdrawal Agreement shall have direct effect meaning that where its provisions are clear, precise and unconditional they can be relied on before a UK court,
- the UK must provide a power in domestic legislation for UK courts and 'administrative authorities' to dis-apply UK laws which are inconsistent or incompatible with the Withdrawal Agreement, an interesting question here is what the UK will interpret administrative authorities to mean when providing a power to dis-apply legislation,
- UK courts must follow CJEU judgments made before the end of the transition period when interpreting the Withdrawal Agreement and EU law, and must have 'due regard' to decisions made after the end of the transition period in relation to such matters, and
- references to EU law in the Withdrawal Agreement include new legislation or amendments to existing EU laws that come into

force during the transition period, which in circumstances where the transition period is extended would include laws into which the UK has had no input.

All of this adds up to a quite extraordinary transfer of sovereignty from the UK to the EU – much more than when the UK was a Member State given that it will no longer be able to influence the laws to which it is subject and will have no representative member on CJEU.

However, the intention is that this will last only for a limited period of time – limiting the UK's need to comply with laws into which it has had no input while a Member State – and is necessary to ensure a period of legal stability before the commencement of the future trading relationship.

## THE JOINT COMMITTEE

The Joint Committee, with its power to rewrite parts of the Withdrawal Agreement to correct for deficiencies for four years after the end of the transition period, has been described by the House of Lords EU Committee as a 'uniquely powerful and influential' body. Any such amendments will, like the rest of the Agreement, have supremacy over UK domestic law.

The Joint Committee's meetings will be held in private and its decisions and recommendations will not be published by default – although either side can decide to publish them (Annex VIII, Rule 10). The WAB states that the UK's representative on the Joint Committee must be a government minister, so there is at least some scope for MPs to seek information about its workings, although it is notable that the WAB includes reporting requirements in relation to disputes brought before the Joint Committee, but not other details.

The power of the Joint Committee together with this lack of transparency is likely to attract criticism should it make any controversial changes to the Agreement.

## NORTHERN IRELAND

The Protocol on Ireland/Northern Ireland has important constitutional implications for Northern Ireland. Firstly, it includes a consent mechanism whereby members of the Northern Ireland Assembly must vote every four years for Northern Ireland to continue to be bound by certain Articles in the Protocol (Article 18 of the Protocol on Ireland/Northern Ireland). These include provisions relating to –

- customs and the movement of goods,
- the protection of the UK's internal market,
- technical regulations and approvals,
- VAT and excise,
- the single electricity market, and
- State aid.

(Articles 5 – 10 of the Protocol)

Where consent is withheld, the relevant provisions will cease to have effect after two years.

In the event that consent to the continued application of the provisions is secured from a majority of Assembly members designated as unionist and a majority of Assembly members designated as nationalist (as opposed to a bare majority of all MLAs

taken together) consent does not need to be sought again for eight years instead of four.

Secondly, should no trade deal be concluded between the UK and EU prior to the end of the transition period Northern Ireland will continue to apply many EU customs rules beyond the transition period whereas the rest of the UK will not. This will serve to create a customs and regulatory border between Northern Ireland and Great Britain unless and until such a trade deal is concluded which replaces the Provisions of the Protocol on Ireland/Northern Ireland (Article 13(8) of the Protocol).

## DOMESTIC IMPLEMENTATION

Of course – aside from those rights under it which may have direct effect – the Withdrawal Agreement will take effect in domestic law only through the WAB. For example, it will be through the WAB that the UK Parliament agrees to limit its sovereignty by providing for the Withdrawal Agreement to take precedence over UK legislation, in the same way that the European Communities Act 1972 gave precedence to EU law.

This will give rise to a complex legislative framework comprising the WAB, the EU (Withdrawal) Act 2018, the European Communities Act 1972 (the effect of which will be preserved, with amendments, during the transition period) and the Withdrawal Agreement itself.

This multi-layered framework is bound to give rise to issues of interpretation and effect – particularly in those instances where the WAB simply seeks to act as a conduit for concepts in the Withdrawal Agreement – which may end up in court.

## NEXT STEPS/TIMELINE

**THE WAB WILL COMPLETE ITS PARLIAMENTARY STAGES AND BECOME LAW IN JANUARY 2020.**

The UK and the EU will then ratify the Withdrawal Agreement, as set out above and the UK will leave the EU at 11pm, UK time, on 31 January 2020. The Withdrawal Agreement will then come into force either when it is ratified, or on 31 January 2020, depending on when the ratifications take place, and the transition period will commence.

The European Council will then take steps to grant the European Commission a mandate to commence negotiations on the future trade deal between the UK and the EU. This may not be signed off until the European Council summit on 26 and 27 March 2020. The version of the WAB introduced following the 2019 election no longer contains a requirement for Parliament to sign off on the UK's negotiating position so there should be no hold-up from the UK side in that respect.

By the end of June 2020, the UK will need to decide whether it wishes to request an extension to the transition period beyond 31 December 2020 as this would need to be agreed with the EU by 1 July 2020. It should be noted that the revised WAB contains a provision stating that no extension can be agreed in the Joint Committee. This is in

line with the government's political commitments not to extend the transition period so, at least at this point, an extension looks unlikely.

Where no extension is agreed, the transition period will come to an end on 31 December 2020. It is the UK government's hope that a comprehensive trade deal will be in place by then but, if it is not, the default position is that the Great Britain's trade with the EU will be governed by World Trade Organization rules, with some specific controls imposed on goods flowing between Northern Ireland and Great Britain in accordance with the Protocol on Ireland/Northern Ireland.

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