1. What is the Withdrawal Agreement?

The Withdrawal Agreement is the agreement negotiated between the EU and the UK under Article 50 of the Treaty of the European Union ("TEU") which is the provision dealing with the withdrawal by a Member State of the EU. The aim of the Agreement is to set out the arrangements for the UK’s withdrawal from the EU on 31 January 2020.

The UK’s future relationship with the EU will be negotiated in a separate agreement (see Q5 and Q10 below) but the Political Declaration on the framework for the future relationship, which was agreed by the European Council alongside the Withdrawal Agreement in October 2019, sets out the scope and terms for the future relationship. Both documents are closely linked and have now been formally adopted by the UK and the EU. Before the UK could ratify the Withdrawal Agreement, UK legislation had to be in place in order to implement any provisions in the Agreement that need to have effect in the UK. The European Union (Withdrawal Agreement) Act 2020 ("Withdrawal Agreement Act") was adopted and implements the Withdrawal Agreement into UK law.

An earlier version of the Withdrawal Agreement and the Political Declaration was agreed between the UK and the EU in November 2018 under Theresa May’s Government but was rejected three times by the UK Parliament and ultimately resulted in her resignation. The main stumbling block to its approval were the provisions on the Irish backstop (see Q2 below) which were subsequently re-negotiated, resulting in substantial changes to the Irish Protocol (see Q3 below).

2. The Irish backstop – what was it and why did it prove so controversial for the UK?

The Protocol on Ireland/Northern Ireland deals with the position of the island of Ireland once the UK leaves the EU. Both the EU and the UK are committed to avoiding a hard border between Ireland and Northern Ireland and respecting the Good Friday Agreement. The UK was also keen to avoid a commercial border in the Irish Sea between Northern Ireland and the rest of the UK as this would undermine the constitutional integrity of the UK, raising the question as to where any customs and other checks on trade would take place after Brexit. Whereas the UK proposed to settle this issue as part of the overall future relationship between the EU and the UK, the EU insisted on a “backstop” provision in the Withdrawal Agreement, which was a position of last resort in the event the UK left the EU and did not immediately move to a new free trade agreement with the EU.

Deal/transition period

- Now it has been approved by the UK and EU Parliaments, the Withdrawal Agreement applies to arrangements for the UK’s withdrawal from the EU with effect from 11pm GMT on 31 January 2020, when the UK ceased to be a Member State.
- The UK is now in a transition period following its exit from the EU until the end of 2020. UK legislation calls this the “implementation period”.
- During transition, EU law continues to apply in and to the UK and the UK continues to trade with the EU as part of the Single Market.
Under the original Irish backstop provisions, the EU and the UK would have been part of a single customs territory, with Northern Ireland more closely aligned with the EU, from the end of the transition period and until the future relationship would take effect. The UK would have been required to align its tariffs and other customs legislation on that of the EU and would not have been allowed to apply lower duties than those applied by the EU, which would have made it difficult for the UK to negotiate trade agreements with third countries as regards goods.

Although the backstop was intended to apply on a temporary basis, the main concern for the UK was that it could, if it took effect, have ended up being indefinitely committed to the customs backstop with the EU. There was no unilateral right for the UK to leave the customs union with the EU if no alternative solution to the Irish border was agreed. This would have in practice thwarted one of the main aims of those advocating leaving the EU, namely the ability to agree trade arrangements with third countries on different terms from the EU and the right to change the UK’s WTO schedules, setting out duties applying to imports from WTO members.

3. What is the main difference between the original and the revised Protocol on Ireland/ Northern Ireland?

The revised Withdrawal Agreement replaces the previous Protocol on Ireland/Northern Ireland with a new Protocol taking a very different approach to securing the objective of avoiding a hard border between Northern Ireland and the Republic of Ireland. The attempt to avoid creating a regulatory and customs border between Northern Ireland and the rest of the UK has largely been abandoned. Under the new approach, the whole of the UK, including Northern Ireland, will leave the EU Customs Union. Northern Ireland remains part of the UK customs territory and will be included in any future UK free trade agreements. But in practice, Northern Ireland will apply many EU customs rules and most of its regulatory regime for goods, both agricultural and manufactured, will remain aligned with the EU internal market rules for goods. This will create a customs and regulatory border in the Irish Sea between Ireland and the rest of Great Britain. The revised Protocol allows the Northern Ireland Assembly to provide consent for certain EU regulations continuing in Northern Ireland.

The effect of these arrangements is mitigated by measures enabling Northern Ireland businesses to benefit from the UK customs rates, where they are more favourable but only by later adjustment of the fiscal effects arising from application of the EU regime.

Contrary to the previous “backstop” arrangements, which were an insurance policy and would only have taken effect if the UK and the EU had not managed to address the issue under a new trade relationship, the new arrangements set out in the revised Protocol are intended to be permanent.

4. What else does the Withdrawal Agreement cover?

The Withdrawal Agreement (Part 4) contains provisions setting out a transition period following the date of the UK’s EU exit through to 31 December 2020 during which EU law will continue to apply in and to the UK (see Q9 below). Article 132 allows a one-off decision to be taken before 1 July 2020 extending the transition period for up to one or two years but the UK Government has ruled out extending that period and section 33 of the Withdrawal Agreement Act prohibits a Minister of the Crown from agreeing in the Joint Committee (see below) to any such extension.

The Withdrawal Agreement covers the key withdrawal issues of citizens’ rights, financial contribution and the Irish border. It also covers a range of other withdrawal issues such as issues relating to intellectual property, ongoing public procurement procedures, ongoing judicial cooperation on civil and commercial matters and ongoing judicial and administrative procedures, particularly the allocation of jurisdiction on cases current at the end of the transition period.

The Withdrawal Agreement also contains institutional arrangements specific to the Agreement, including the establishment of a Joint Committee responsible for the implementation and application of the Agreement, including any extension of transition, and provisions on disputes relating to the Agreement itself. Disputes arising under the Withdrawal Agreement can be referred to the Joint Committee with the aim of reaching a mutually agreed solution. If no agreed solution is reached within three months, there is a mechanism to establish an independent arbitration panel (composed of two members proposed by the EU and the UK each and a chairperson agreed by both parties) to rule on the dispute.

See Annex attached for a summary of the Withdrawal Agreement.

- The non-binding Political Declaration on the future relationship between the UK and the EU accompanies the Withdrawal Agreement. There will now be an intense period of negotiations seeking to finalise the future relationship between the UK and the EU so that it can come into force in legally binding form at the beginning of 2021.

At the end of the transition – will there be elements of no deal?

- At the end of the transition period, if the new trading relationship is not in place, there could be a no-deal situation in which the UK and EU revert to trading with each other on basic WTO terms. It is more likely that this will be modified by the introduction of agreed elements of the future relationship or some other temporary set of rules, even though the UK Government has ruled out extending the transition period.

- There will be no clarity on what will happen until towards the end of 2020 and the adage “plan for the worst, hope for the best” continues to apply and no-deal guidance therefore remains appropriate.
5. Why does the Withdrawal Agreement not incorporate details on the future UK/EU relationship?

The EU Commission took the view early on that the Withdrawal Agreement can only deal with separation issues and cannot include an agreement on a future relationship because such an agreement would require a different legal basis and can only be negotiated with a country that is not a Member State. So this means it can only be negotiated once the UK has left the EU.

However, the EU has accepted that discussions on an “overall understanding” of that future relationship can take place before the UK leaves. The Political Declaration, the revised text of which was finalised when the revised text for the Withdrawal Agreement was agreed, sets out the key objectives for the future relationship but is not legally binding, so the future relationship may not reflect all matters contemplated by the Political Declaration.

The Northern Ireland Protocol is, of course, an exception to the EU’s rule in that it deals permanently with an aspect of the future relationship, unless the UK and the EU agree to replace it with provisions in any new free trade agreement.

6. What further steps were necessary for the Withdrawal Agreement to come into force?

The Withdrawal Agreement required a number of approvals before it came into force on 31 January 2020. On the EU side, the Withdrawal Agreement required approval of the European Parliament (by simple majority) and approval of the Council by qualified majority vote (20 of the 27 Member States representing at least 65% of their combined population). There was no requirement for the Withdrawal Agreement to be ratified by the 27 Member States individually. As regards the UK, it was necessary to adopt specific legislation to implement those provisions of the Withdrawal Agreement that need to have effect in UK law. The Government has the power to ratify the Withdrawal Agreement under the royal prerogative but it cannot change UK law under these powers, so ratification in itself did not incorporate the Withdrawal Agreement into UK law. This was achieved through the Withdrawal Agreement Act (see Q7 below).

7. What is the relationship between the Withdrawal Agreement and the Withdrawal Agreement Act?

The Withdrawal Agreement Act implements into UK law the Withdrawal Agreement as well as two related agreements (the EEA EFTA Separation Agreement between the UK and Norway, Iceland and Liechtenstein and the Swiss Citizens’ Rights Agreement between the UK and Switzerland). It contains provisions relating to or giving effect to the provisions of the Withdrawal Agreement and provides for the disapplication of UK legislation that is incompatible and conflicts with the Withdrawal Agreement. It is a complex piece of legislation and is designed to work in conjunction with the EU Withdrawal Act 2018 (to which it makes a number of changes in order to deal with the consequences of a transition period), so both Acts need to be considered alongside each other.

Part 1 and 2, on the implementation (transition) period, amend the EU Withdrawal Act 2018 (which provides for the repeal of the European Communities Act 1972), so that the effect of the ECA is saved for the duration of the implementation (transition) period and EU law continues to apply during that period. The provisions for converting EU law into retained EU law and those relating to the primacy of retained EU law in domestic law will only take effect at the end of the transition.

Regarding interpretation of retained EU law, the EU Withdrawal Act 2018 (which previously only provided for the Supreme Court to depart from pre-exit CJEU case law, under the same approach as they would in departing from their own case law) has now been amended by the Withdrawal Agreement Act (section 26, Part 4) and allows for ministers to make orders which specify that other courts can depart from pre-Brexit CJEU judgments and which also specify the circumstances in which those courts may do so.

Part 3, on citizens’ rights, provides for the implementation into UK law of the citizens’ rights provisions of theWithdrawal Agreement. UK Courts will be able to make references to the CJEU to address questions of interpretation, for a period of eight years after the end of the transition period. A new corporate body, the Independent Monitoring Authority (IMA) is created in order to monitor the implementation and application in the UK of the citizens’ rights provisions.

Part 4 deals with other separation issues (goods placed on the market, ongoing customs procedures, intellectual property, ongoing police and judicial cooperation, and data), the financial provisions and the arrangements in the Ireland/Northern Ireland Protocol. The main financial provision includes a legislative mechanism to authorise the Government to make payments due under the UK’s financial obligations in the Withdrawal Agreement which are to be charged to the Consolidated Fund or, if the Treasury so decides, the National Loans Fund. Ministers are given wide
powers to implement the Protocol on Ireland/Northern Ireland, including facilitating access for Northern Ireland goods to the UK market and provisions to ensure there are no changes to the arrangements for North South cooperation as a result of this legislation.

8. Did the UK become a third country on 31 January 2020 or will it remain a Member State for the duration of the transition period provided for in the Withdrawal Agreement?

The UK left the EU at 11pm GMT on 31 January 2020 and ceased to be an EU Member State at that time. It became a third country for the purpose of the EU Treaties and EU law. Under the provisions on the transition period set out in the Withdrawal Agreement (and unless otherwise provided), however, any references in EU law to Member States, including EU law as implemented by Member States, is to be understood as including the UK during the transition period (See Q9 below).

9. What is the impact of the transition period set out in the Withdrawal Agreement?

The provisions dealing with the transition period will now govern the UK’s relationship with the EU until 31 December 2020. Although the Withdrawal Agreement provides for a possible extension of this transition period by up to two years, the UK Government has ruled out extending that period. The provisions in the Withdrawal Agreement on the transition period state that the full existing body of EU law will apply in the UK during the transition period. So EU law will continue to have direct effect in the UK during that period. During the transition period, the UK will no longer be represented and participate in the EU institutions but in exceptional circumstances representatives or experts from the UK may, upon invitation, attend meetings of certain committees, without having any voting rights.

The transition provisions in the Withdrawal Agreement (Articles 126 onwards) state that during the transition period, except as expressly provided otherwise in the Agreement, EU law is to be “applicable to and in the UK” so as to produce the same legal effect as it did prior to exit. The provisions also state that any references to Member States in EU law, including EU law as implemented by Member States, is to be understood as including the UK during the transition period. The EU and its Member States will during transition be bound to treat the UK and its citizens in the same way as if the UK were still a Member State of the EU.

The provisions relating to the transition period also provide that the UK will be bound by obligations resulting from international agreements concluded by the EU on behalf of the Member States. In a footnote to Article 129(1) it is agreed that “the Union will notify the other parties to these agreements that during the transition period the UK is to be treated as a Member State for the purposes of these agreements”. Such a notification will not in itself create an obligation for third countries to continue to grant the UK the treatment provided for in that particular FTA. However, since third countries have an evident interest in preserving stability in commercial relations, it is expected that this will lead to a de facto continued application of EU FTAs to the UK and several of these countries have already agreed with the UK to “roll-over” the terms of trade they have agreed with the EU so that they will apply to their trade with the UK.

10. What stage have the negotiations for the future relationship reached?

A revised version of the Political Declaration on the framework for the future relationship was agreed between the EU and the UK and published on 17 October 2019 and has now been adopted as part of the Withdrawal Agreement ratification process. The revised text still envisages “an ambitious, wide-ranging and balanced economic partnership” with an absence of tariffs, fees, charges and quantitative restrictions across all sectors, ambitious and far-reaching provisions to avoid technical barriers to trade, liberalisation “well beyond WTO” in services, cooperation of UK authorities with EU agencies and the end of freedom of movement. It also aims to provide visa-free travel and temporary entry for business. Additional areas to be covered include data protection and co-operation on security matters and criminal justice.

On 3 February 2020, the European Commission issued a press release setting out a recommendation to the European Council to begin negotiations on the future relationship with the UK. The recommendation includes the draft text of the negotiating directives; these set out the parameters of the future relationship that the EU wishes to have with the UK (eg in areas such as trade and economic cooperation amongst others) and build on the Political Declaration. As soon as the General Affairs Council adopts the draft negotiating directives, the European Commission will be formally authorised to open negotiations on the future EU-UK relationship as the Union negotiator.

The UK Prime Minister, Boris Johnson, has also published a written statement setting out the UK Government’s proposed approach to the
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The future relationship will be negotiated on the basis of Articles 207, 217 and 218 TFEU, in the same way as a free trade agreement with any other country outside the EU. It will require approval of the Council by qualified majority and the consent of the European Parliament. As the UK Government is determined not to extend the transition period beyond the end of 2020, it remains to be seen whether a trade deal can be done in the remaining 11 months. The risk of the UK ending transition without a new trade deal with the EU and reverting to trade on WTO terms remains a real risk.

11. What happens if a future relationship agreement is not in place by the end of the transition period in December 2020?

It is possible that a future relationship agreement between the UK and the EU will not be agreed and adopted by the end of 2020 when the transition period contained in the Withdrawal Agreement is set to end. Both sides will need to reach agreement on a number of difficult issues and, in addition, it is likely that the future relationship agreement will have to be ratified by the 27 Member States individually, a process that itself can take years. Unless other contingency measures are put in place, there remains a real risk of a no-deal exit with the UK reverting to trade with the EU on WTO terms. It is possible that this will be modified by the introduction of agreed elements of the future relationship or some temporary set of rules (even though the UK Government has ruled out extending the transition period) but there will be no clarity as to what will happen until towards the end of 2020.
Summary of the Withdrawal Agreement

The Withdrawal Agreement ("Agreement") consists of six parts, three protocols and a number of annexes (which provide additional information necessary to support the technical interpretation and application of the agreement).

Part One – Common provisions: this section sets out relevant definitions and territorial scope of the Agreement. It provides for the provisions of the Agreement to be interpreted under the general principles of EU law, including those of the EU Charter of Fundamental Rights. UK courts will be bound by relevant CJEU case law handed down before the end of the transition period and must pay due regard to relevant case law handed down after the transition period. The provisions of the Withdrawal Agreement produce the same legal effects in the UK as they do in the EU and the Member States, including the ability of the courts to disapply incompatible legislation, direct effect and the availability of remedies.

The UK and the EU are bound by a duty of good faith, under which they should not act in any way to undermine the Agreement and should support each other in carrying out tasks which flow from the Agreement.

Part Two – Citizens’ rights: this section deals with the rights of EU citizens in the UK and UK citizens in the EU who are exercising their free movement rights before the end of the transition period ("the specified date").

Qualifying EU citizens will be able to continue to exercise their right of free movement under EU law and live, work and study in the UK as they are currently able to do. UK citizens exercising their rights in the EU will be able to continue to do this in their host Member State. The right of UK nationals living in the EU27 to live and work in a different Member State after Brexit is not provided for in the Agreement but as part of the future relationship with the EU, the UK will also seek to secure onward movement opportunities for UK nationals in the EU. The same rights will apply to their family members who are legally resident in the host Member State before the end of the specified date.

Spouses, registered partners, dependent parents and children related to the EU/UK right holder who are not residing in the host Member State on the specified date will keep their entitlement to join an EU/UK family member at a later date, for the lifetime of the EU/UK national right holder, irrespective of their nationality.

The UK and the EU27 are entitled to require citizens concerned to apply to obtain a status which gives them the necessary rights of residence but such administrative procedures must be transparent, smooth and streamlined.

Part Three – Separation provisions: this covers a range of events in a variety of areas that may be ongoing by the end of the transition period and sets out how these will be resolved. It deals with the following:

- Goods placed on the market before the end of the transition
- Ongoing customs procedures, ongoing value added tax and excise duty matters
- Continued protection in the UK of intellectual property rights
- Ongoing police and judicial cooperation in criminal matters
- Ongoing judicial cooperation in civil and commercial matters
- Data and information processed or obtained before the end of the transition period or on the basis of the Withdrawal Agreement
- Ongoing public procurement and similar procedures
- Euratom related issues
- EU judicial and administrative procedures
- Administrative cooperation procedures between Member States and the UK
- Privileges and immunities – status of UK nationals working in EU institution and EU staff working in EU bodies in the UK
- Other issues relating to the functioning of the institutions, bodies, offices and agencies of the EU

Part Four – Transition period: a transition or implementation period, starting on the date of entry into force of the Withdrawal Agreement and ending on 31 December 2020 has been agreed. During this transition period, the UK will no longer be an EU Member State, as it will have left the EU on 31 January 2020 but unless otherwise provided in the Withdrawal Agreement, EU law will be applicable to and in
the UK, so as to produce the same legal effect as it does prior to exit.

The provisions also state that any references to Member States in EU law, including EU law as implemented by Member States, is to be understood as including the UK during the transition period.

EU law will therefore continue to have direct effect in the UK and the principle of supremacy of EU law will apply during the transition period. The UK will no longer be represented and participate as a matter of course in the EU institutions, thereby losing its right to influence and vote on new legislation. In exceptional circumstances, representatives or experts from the UK may, upon invitation, attend meetings of certain committees but without having any voting rights.

During the transition period, the UK will be free to negotiate, sign and ratify international agreements entered into in its own capacity, provided these agreements do not come into force or apply until after the transition period.

The Withdrawal Agreement (Article 132) provides for the possibility of a one-off extension of the transition period for up to one or two years, decided by the UK-EU Joint Committee.

Part Five – Financial provisions: both sides have agreed a methodology for calculating the financial settlement without agreeing a specific amount. The UK agrees to contribute and participate in the EU budget until the end of the current budget cycle (end 2020) as if it had remained in the EU. The UK will also contribute its share of the financing of the budgetary commitments entered into before the end of the current budget cycle but not yet disbursed at the end of 2020 (the so called “reste à liquider”).

Payments arising from the financial settlement will become due as if the UK had remained a Member State, so the UK will not be required to make payments earlier than would be the case, had it remained in the EU. The UK will continue to benefit from EU spending under programmes financed by the current budget until their closure. UK beneficiaries will be required to respect all relevant EU provisions governing these programmes, including co-financing.

If the transition period were extended, the terms of the UK’s contributions to the new EU budget during the extension would have to be agreed.

Any participation of the UK in EU programmes after the end of transition, as a non-Member State, will have to be discussed and agreed as part of the UK’s future relationship with the EU.

Part Six – Institutional and final provisions: in order to ensure consistent interpretation of the citizens’ rights provisions of the Agreement, UK courts will be able to make preliminary references to the CJEU for up to eight years from the end of the transition period. A Joint Committee consisting of representatives of the EU and the UK will be responsible for the implementation and application of the Withdrawal Agreement. Disputes arising under the Withdrawal Agreement can be referred to the Joint Committee with the aim of reaching a mutually agreed solution. If no agreed solution is reached within three months, there is a mechanism to establish an independent arbitration panel (composed of two members proposed by the EU and the UK each and a chairperson agreed by both parties) to rule on the dispute. Where the dispute involves a question on the interpretation of EU law, the panel will request the CJEU to rule on it but it will still be for the panel to rule on the dispute as a whole. The arbitration panel’s ruling on a dispute will be binding and the parties will need to comply within a reasonable period.

Protocol on Ireland/Northern Ireland: this Protocol aims at avoiding a hard border on the island of Ireland. Under the new approach set out in the new Protocol, the whole of the UK, including Northern Ireland, will leave the EU Customs Union. Northern Ireland remains part of the UK customs territory and will be included in any future UK free trade agreements. But in practice, Northern Ireland will apply many EU customs rules and most of its regulatory regime for goods, both agricultural and manufactured, will remain aligned with the EU internal market rules for goods. This will create a customs and regulatory border in the Irish Sea between Ireland and the rest of Great Britain. The revised Protocol allows the Northern Ireland Assembly to provide consent for certain EU regulations continuing in Northern Ireland.

Protocol relating to the Sovereign Base Areas in Cyprus: the Protocol is intended to preserve the existing unique arrangements which reflect UK’s international commitments and ensure the continued effective operation of the Sovereign Base Areas for military purposes.

Protocol on Gibraltar: the Protocol provides for close cooperation between the UK and Spain in Gibraltar in relation to the implementation of part two of the Agreement on citizens’ rights. The Protocol or any other arrangements between the UK and Spain do not in any way affect the UK’s sovereignty over Gibraltar.

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