

# WHEN IS THE LATEST THE EU AND UK COULD AGREE THE TERMS OF THEIR FUTURE RELATIONSHIP IN TIME TO APPLY AT THE 31 DECEMBER 2020 END OF TRANSITION?

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Legal Briefings - By **Eric White and Paul Butcher**

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When (and indeed if) agreement is reached, it will need to be ratified by both sides in order to come fully into force. However, given the extended negotiations and the very short time left, the UK and EU may need to use alternative routes to the usual ratification processes for the agreement to be effective on 1 January 2021 - and thereby avoid any gap between the current status quo transition and any agreed new arrangements.

## **EU PROCESS AND OPTIONS**

On the EU side, ratification normally requires approval by the European Parliament (by simple majority of votes cast) and the Council of the European Union (through a qualified majority\*). The EU Parliament has stated that it could vote on a deal as late as 28 December 2020, provided that it had time to scrutinise the text. However, a vote in the EU Parliament could be avoided - according to article 218 (5) of the EU Treaty, the EU Council has the option to apply the agreement in part or in full provisionally from signature, which only requires approval by the Council and information of the Parliament.

A possible complication that could arise would be if the agreement is considered to cover topics of Member State or shared EU and Member State competence. If topics of Member State competence are covered, the agreement will require Member State ratification, which would give rise to a very considerable delay (and one that will pass beyond 1 January 2021). Where the topics are of shared competence, national ratification is an option and the decision to pursue it is political. We note that the 2019 Japan–EU trade agreement was ratified as an “EU-only” agreement on this basis even though it included provisions of shared competence.

## **UK PROCESS AND OPTIONS**

In the UK, under the normal process for ratifying an international agreement, the agreement will become binding 21 days after the terms have been laid before Parliament, provided that MPs do not vote against it, which means that this route to ratification is no longer on the table if the year-end deadline is to be met. The UK Government may prefer, as with the Withdrawal Agreement, to use primary legislation to bring the new trade agreement into force. This can be quicker than the usual process and would also enable any necessary changes to existing legislation or the introduction of any new law required by the agreement. In the current circumstances, and with the UK Government’s large majority and likely opposition support, the agreement is unlikely to be blocked in the UK Parliament.

Section 22 of the Constitutional Reform and Governance Act 2010 provides for an even quicker alternative – in exceptional circumstances, the UK Government can ratify a deal provisionally without Parliament’s consent and so may rely on this approach if there is not enough time for Parliament to vote.

## **CONCLUSION**

Technically, this means that both the UK and the EU have the mechanisms to ensure that a deal is enforceable on 1 January 2021 even if it is agreed at close to the end of the year. However, two notes of caution:

- Once agreement is reached between the negotiators, even with the most expedited processes outlined above there are still steps to be taken which could take days. Amongst other things, this includes finalising the text (so called “legal scrub”) and translation into 23 languages (notwithstanding that we understand most of the agreement is already prepared in this way);
- What is technically possible, is not the same as what is politically acceptable.

So: it is possible to imagine circumstances in which the EU and UK reach agreement on a deal prior to the 31 December while still not being able to ensure that there is no limbo period between the end of the status quo transition and the new arrangements coming into effect, however, there is greater flexibility to avoid this than had been widely discussed until very recently.

Note that this is a more detailed version of our original blog post [here](#), given that negotiations have carried on much later than previously anticipated.

If you would like to discuss any issues in relation to the countdown to the 31 December 2020 and beyond, please contact your regular Herbert Smith Freehills relationship contacts, or otherwise any of our experts listed [here](#)

\*This requires 55% of Member States, representing at least 65% of the total EU population, to vote in favour

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## KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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