

Brexit's Back, Alright...

(with sincere apologies to the Backstreet Boys)



October 2020

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Introduction

After three years of dominating the news (in the UK at least), Brexit has been extremely quiet for much of the year. This is hardly a surprise given that we have been in the thick of a global pandemic that has changed so much about the way we live, but also given that the UK has been in a transition period since leaving the EU on 31st January.

But this autumn, Brexit has shot back up the agenda with a vengeance.

The clock is ticking and the transition period is set to end at 11pm UK time on 31st December, deal or no deal (a phrase which may be familiar to anyone with even the slightest passing interest in Brexit). In June, the UK government emphatically decided not to apply to extend the transition period by the 1st July deadline.

Pandemic notwithstanding, negotiations have been ongoing throughout the year, but neither side has presented an optimistic outlook on the prospects of breaking through the deadlock ahead of December. Political leaders on both sides have urged their negotiators to work intensively but acknowledged that significant gaps remain between them.

In this guide, we take a look at the key milestones, the status of the negotiations and what businesses can do to prepare for the end of the transition period. Surprisingly to many, it's not simply a question of waiting to see if there's a deal and what it looks like. We know already that many significant things will change even if there is a deal. We therefore consider across some of the most affected areas what January 2021 might look like and what you can do now to prepare your business.



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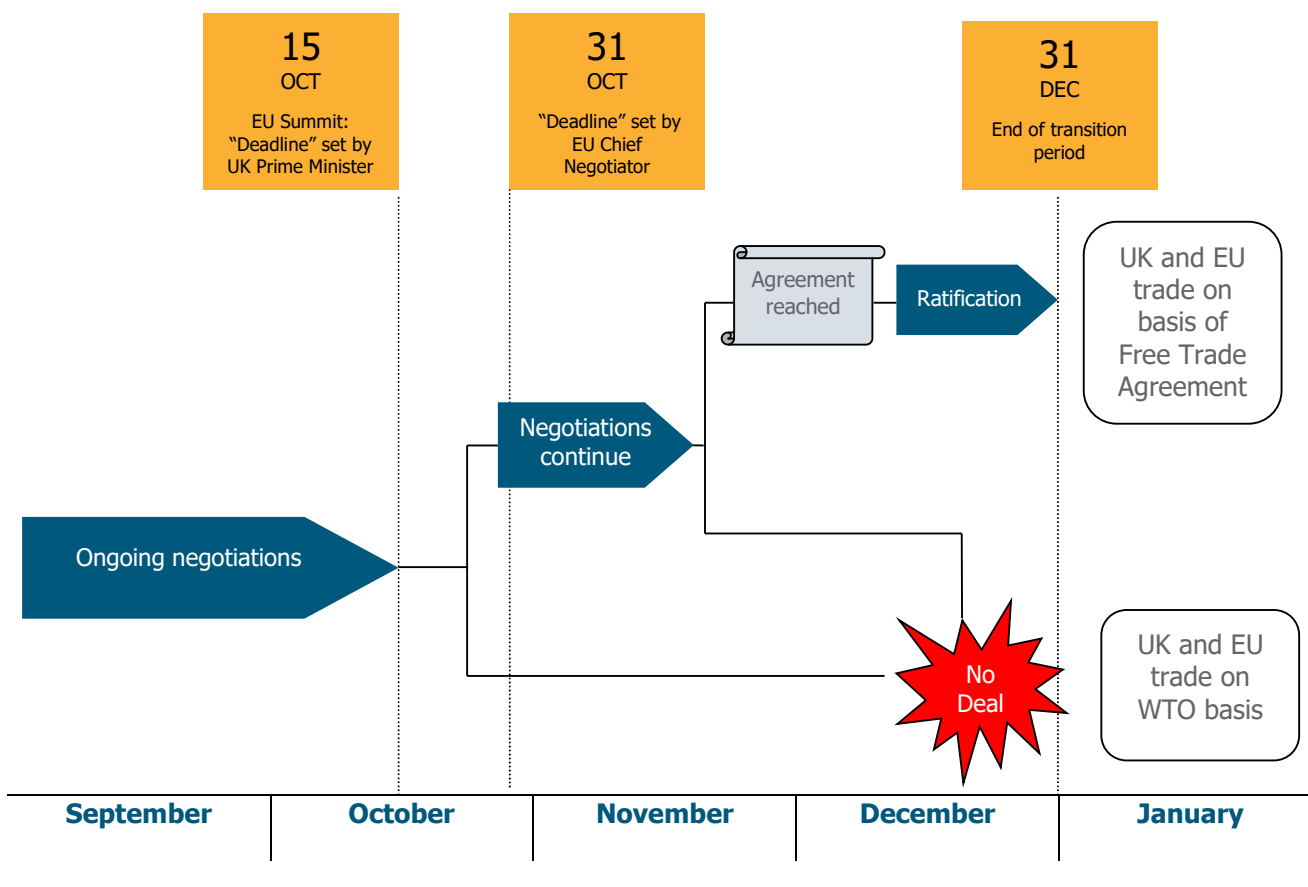
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Timeline



Can the transition period be extended if necessary?

Legally, as things currently stand, the answer is "no".

Under the Withdrawal Agreement, the deadline for the UK to request an extension to the transition period was 30th June 2020. The UK government opted not to do so.

Theoretically, the Withdrawal Agreement could be amended to change the deadline, but this would require changes to follow the Article 50 procedure, including approval by the European Parliament. In practice, this is unlikely.

On that basis, even if politicians wanted to extend the transition period (which seems unlikely) it would not now be legally straightforward to do so.

How can there be "No Deal"? I thought they had a deal last year...

Indeed they did!

But the agreement reached between the UK and EU last year was the Withdrawal Agreement setting out the terms for the UK's departure from the EU. It does not address the future relationship between the two, which is the subject of current negotiations for a Free Trade Agreement.

Last year, the references to a "No Deal" Brexit were about the UK leaving the EU with no Withdrawal Agreement. Now, those references are to the transition period ending with no Free Trade Agreement being in place.

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Key areas of dispute

Part of Brexit's complexity is the sheer number of issues thrown up by the UK's departure from the EU. In many respects, the negotiations over the last few years have barely scratched the surface on these issues. However, the main roadblocks in the negotiations at the time of writing can be summarised as follows:



Northern Ireland Protocol

Arguably, the thorniest issue in the negotiations for the Withdrawal Agreement throughout 2017-19 was how to deal with the Irish border, balancing the need to avoid a hard (physical) border between Northern Ireland and the Republic of Ireland with the need to protect the integrity of the EU Internal Market. The solution finally agreed was the Northern Ireland Protocol which, in a nutshell,:

- keeps Northern Ireland within the EU single market for goods, including regulations and state aid rules, so goods can flow freely between Northern Ireland and the Republic with no need for checks; and
- Goods travelling from Great Britain (i.e. England, Scotland and Wales) to Northern Ireland deemed "at risk" of being imported into the Republic of Ireland would be subject to EU tariffs, with refunds being made if the goods then stay in Northern Ireland.

The Protocol, which is part of the legally binding Withdrawal Agreement, therefore erects a de facto customs and regulatory border when goods travel from Great Britain to Northern Ireland. Although the UK government signed up to this, and the Withdrawal Agreement was resoundingly approved in the UK Parliament, such a position is not popular within the ruling Conservative Party. Most recently, this has led to a showdown around the government's publication of its "**UK Internal Market Bill**" which, by the government's own admission, breaches international law in seeking to override parts of the Northern Ireland Protocol through domestic legislation. In particular, the UK Internal Market Bill would give UK ministers the right to override the Northern Ireland Protocol in relation to the requirements for goods travelling between Northern Ireland and Great Britain, and to disapply EU state aid rules affecting Northern Ireland. At the time of writing, this particular issue has led to emergency discussions between the UK and EU and explosive debates. What effect it ultimately has on negotiations remains to be seen.



Level Playing Field / State Aid

When the Withdrawal Agreement was entered into, it was accompanied by a Political Declaration outlining the heads of terms for the future UK/EU relationship. The Political Declaration stated that the future relationship would contain "robust commitments to ensure a level playing field". From the EU's perspective, there is an open concern about giving a near-neighbour extensive access to its market without reassurance that the UK will not undercut it through weak regulation or extensive state aid to industry. From the UK government's perspective, fettering its discretion goes against the stated commitments to achieving "sovereignty". Suffice it to say, at the time of writing there remains a significant gulf between where the parties see the commitments landing. This is further complicated by the UK agreeing to stronger commitments with other countries (e.g. Japan in respect of state aid) than it is offering the EU.



Fishing rights

Not a significant legal issue, but worth a mention nonetheless as it is a potentially significant political issue. The extent to which the EU and UK will have access to each other's fishing waters and related rights to sell products in each other's markets remains a point of contention that could yet escalate.

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It's not all bad news...



Anyone reading the news about Brexit could be forgiven for believing that there is no consensus between the UK and the EU on any points in relation to the potential Free Trade Agreement. However, the outlook is not as bleak as that. Negotiators have reached broad agreement on a number of important points which, if (and it's a big if) the hurdles currently standing in the way of a deal are overcome, will form part of the agreement. Both the UK and EU have published draft FTA texts. Whilst they contain many points of difference (some of which are highly significant), key areas in which they are broadly aligned are as follows:

- **Tariffs:** Both the UK and EU intend to eliminate tariffs on goods of UK or EU origin traded between them.
- **Temporary movement of individuals for business purposes:** The UK and EU draft texts are not far apart in their treatment of the temporary movement of people for business purposes, with the texts following fairly common FTA norms. There is some divergence between the two on details, such as the length of stay allowed for intra-corporate transferees or short-term business visits, but the broad principles are essentially agreed.
- **Services (generally):** Reflecting the political declaration agreed last year, both parties have included provisions aiming for general liberalisation of services, which would effectively prohibit discrimination on the grounds of nationality of service providers and allow market access for service providers. However, this will be subject to as-yet unseen detailed exceptions. Notably, this also excludes financial services (in respect of which see below).

And what we definitely won't see...

There are also a number of areas that we know already will not be covered by a UK-EU Free Trade Agreement, as they either do not form part of the discussions or have already been ruled out. Examples include:

- **Customs Union:** The UK and EU will definitely not remain in a customs union even if there is a deal (as a consequence of which mechanisms were needed to avoid a hard Irish border).
- **UK participation in EU agencies:** Contrary to some of the wishes set out by the UK government in the early days of Theresa May's premiership (remember that?), the UK will not be participating in certain EU agencies and will not be treated as part of the EU for those purposes. For example, the UK will not be part of the EU's REACH chemicals regime and will not be governed by the European Chemicals Agency (in a way that, for example, other non-EU countries such as Norway are). The same position applies in relation to other agencies relating to medicines, aviation, banking and food safety.

EU-only or "mixed" trade agreement?

The form of the trade agreement negotiated by the UK and the EU will have a significant impact on how it is ratified. Where the terms of a trade agreement fall within the EU's exclusive competency, the EU institutions can negotiate and ratify the trade deal themselves. However, where a trade agreement also covers areas of shared competency with Member States (a 'mixed agreement'), such as non-direct foreign investment or investor / state dispute settlement, ratification is also required by each of the individual Member States. The requirement for all Member States to ratify a mixed agreement can lead to delays, for example when a Belgian region delayed the ratification of the EU-Canada trade agreement. Although it is too early to say for sure, it appears likely that any UK/EU agreement will be "mixed".

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Topic by topic analysis

In this section, we set out the key points to look out for on a topic-by-topic basis. We consider the following issues:



Goods

- Tariffs
- Customs rules
- Regulatory position



Services

- General position
- Financial Services
- Transport
- Audiovisual Services



Data

- GDPR
- Transfer of data



Intellectual Property

- Existing rights
- 'Exhaustion'
- Future rights



Company law

- Establishment
- Jurisdiction

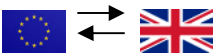
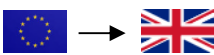
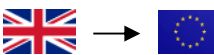
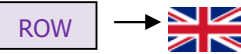

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Goods



Tariffs

If there's a deal	If there's no deal
<div style="text-align: center;">  </div> <p>EU/UK Trade</p> <ul style="list-style-type: none"> • Tariff and quota free • Only applies to goods of EU or UK origin. Note that the Rules of Origin have not yet been finalised. The UK proposal for the definition of "UK goods" to include inputs from countries with which both the UK and EU have a FTA (e.g. car parts from Japan) appears to have been rejected. The EU position is that only inputs of UK or EU origin should count. Watch this space.... 	<div style="text-align: center;">  </div> <p>EU to UK Trade</p> <ul style="list-style-type: none"> • EU goods would be subject to the UK Global Tariff (UKGT). • Tariffs would be imposed on goods in sensitive sectors including agriculture, vehicles and chemicals. <hr/> <div style="text-align: center;">  </div> <p>UK to EU Trade</p> <ul style="list-style-type: none"> • UK goods will be subject to EU Common External Tariff (i.e. those tariffs applicable to countries not having a FTA with the EU).
<p>Applicable whether or not there's a deal</p>	
<div style="text-align: center;">  </div> <p>Rest of World to UK Trade</p> <ul style="list-style-type: none"> • Most goods subject to the UK Global Tariff (UKGT). • UKGT reduces or removes tariffs from the (currently applicable) EU Common External Tariff rates for imports from most countries, except in sensitive sectors such as agriculture, vehicles and chemicals. • Exemptions from the UKGT if the goods originate from: <ul style="list-style-type: none"> • a country with a UK FTA (e.g. those "rolled over" from EU agreements); or • a developing country covered by the Generalised System of Preferences (or related scheme). 	
<div style="text-align: center;">  </div> <p>A few words about Northern Ireland</p> <ul style="list-style-type: none"> • Under the Northern Ireland Protocol, in respect of goods travelling from Great Britain to Northern Ireland, if those goods are "at risk" of being transferred to the Republic of Ireland, traders must pay the EU tariff if it is higher than the UK tariff. They will then be refunded if the goods remain in Northern Ireland. • Even if there's a deal, goods of non-EU/non-UK origin will be affected by this if the EU Common External Tariff is higher than the UKGT (which will be the case across thousands of product lines). 	

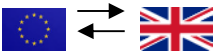

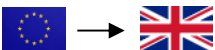

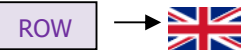

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Goods



Customs

If there's a deal	If there's no deal
 EU/UK Trade <ul style="list-style-type: none">UK and EU will cooperate to facilitate and simplify customs procedures.That is the likely extent of any deal regarding customs.	
Applicable whether or not there's a deal	
 EU to UK Trade <ul style="list-style-type: none">Customs declarations will be required for imports from the EU into the UK from 1 January 2021.Six-month "grace period" until 1 July 2021 to defer declarations on most goods, with physical checks taking place at the point of destination until then.Additional checks and pre-notification for some goods (e.g. food, excisable goods).	
 UK to EU Trade <ul style="list-style-type: none">Customs declarations required from 1 January 2021 for imports from the UK into the EU.Checks are likely to take place at the border with effect from 1 January 2021.	
 Rest of World to UK Trade <ul style="list-style-type: none">No change from current customs procedures.	
 A few words about Northern Ireland <ul style="list-style-type: none">Under the Northern Ireland Protocol, checks are required on goods travelling from Great Britain to Northern Ireland to ensure that the appropriate tariffs are paid and they meet EU standards (especially in the case of agri-food products). How this will be enacted in practice is still the subject of debate, although the UK government has acknowledged that some checks will be necessary.Goods travelling from Northern Ireland to Great Britain require an exit summary declaration, although this is one of the issues in contention in the Internal Market Bill.	

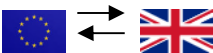


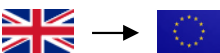

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Goods



Regulatory Position

If there's a deal	If there's no deal
 <p>EU/UK Trade</p> <ul style="list-style-type: none">• This area of the deal is still under negotiation, with discussions around the extent to which the UK will agree to maintain standards concerning labour, environmental rules and climate change.• Unlikely to allow for mutual recognition of conformity assessment bodies (meaning that UK bodies cannot certify goods as EU-compliant).	
Applicable whether or not there's a deal	
 <p>EU / ROW to UK Trade</p> <ul style="list-style-type: none">• From 1 January 2021, imports of regulated products should contain the UK mark instead of CE marking. However, for most products, CE marking is still permissible until 2022 or 2023 and there are transitional provisions governing where marking must be affixed until 2023 (e.g. labels etc.).• The substantive rules governing products are likely to remain unchanged in the medium-term.• Businesses importing regulated products from the EU will in some circumstances become the "importer" or "manufacturer" for UK regulatory purposes (e.g. chemicals, cosmetics, toys).	
 <p>UK to EU Trade</p> <ul style="list-style-type: none">• Products must continue to meet all EU standards and requirements.• CE marking will still be required for products imported into the EU, although it is likely that marking affixed following assessment by a UK notified body will no longer be acceptable.• Businesses importing regulated goods from the UK will in some circumstances become the "importer" or "manufacturer" for EU regulatory purposes (e.g. chemicals, cosmetics, toys).	
 <p>A few words about Northern Ireland</p> <ul style="list-style-type: none">• Northern Ireland will remain subject to EU standards and requirements, even if the rest of the UK diverges.• Goods sold in Northern Ireland must continue to bear CE marking, coupled with a UK(NI) mark if they have been assessed by a UK-based notified body.	

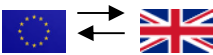

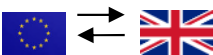
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Services



General Position

If there's a deal	If there's no deal
 <p>EU/UK Trade</p> <ul style="list-style-type: none"> UK and EU will commit to treat each other's service suppliers in the same way as their own (although in many sectors they both already commit to do this under GATS). It is unlikely that there will be much more substantively. 	
<p>Applicable whether or not there's a deal</p>	
 <p>EU/UK Trade</p> <ul style="list-style-type: none"> The position very much varies depending on the specific service sector. We set out below details concerning a few key sectors. 	

Financial Services



EU to UK Trade	UK to EU Trade
 <ul style="list-style-type: none"> EU providers will be able to continue to "passport" services into the UK for a limited period if they have registered under the FCA's temporary permissions regime. 	 <ul style="list-style-type: none"> UK providers may be able to continue to provide services in the EU on a temporary basis, although this will need to be assessed and reviewed on a case-by-case basis. In the absence of an equivalent temporary permissions regime, UK providers must establish in the EU to continue to provide services The EU is considering granting "equivalence" to the UK in applicable sectors, but the process is ongoing and may not be completed by the end of the transition period. Even if granted, equivalence only applies to a very limited number of areas of regulation, so will be of limited help.

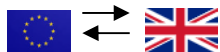
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Transport



EU/UK Trade

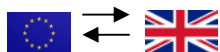


- **Railway** undertakings providing cross-border services will no longer be able to rely upon "equivalence". Undertakings will have to ensure that they and their train drivers comply with both UK and EU rail licence, safety and authorisation requirements.
- **Air carriers** wishing to provide commercial services (in respect of passengers, mail and/or cargo) in the EU will no longer be able to operate on the basis of licences granted by the UK licensing authority (the CAA).
- **Road transport** operators established in the UK will no longer hold a community licence, so will no longer be entitled to automatically transport goods into and across the EU.

Audiovisual services



EU/UK Trade



- UK services broadcast into the EU will no longer benefit from the Audiovisual Media Services Directive and the country of origin principle, meaning providers will be required to comply with the requirements of each relevant Member State. EU service providers will need to comply with UK rules.
- The European Convention on Transfrontier Television (ECTT) continues to apply. The UK must continue to permit freedom of reception of services from each of the 20 signatory Member States and vice versa.

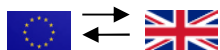
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Data



Applicable whether or not there's a deal



EU/UK Trade

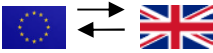

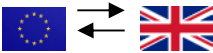
- The UK will bring the General Data Protection Regulation ("GDPR") into domestic law as the "UK GDPR" and a slightly modified version of the current Data Protection Act 2018 will continue to apply. However, the UK will have the possibility to review the legal framework.
- The Government is seeking an adequacy decision from the European Commission in respect of transfers of data from the EEA to the UK. If an adequacy decision is not received by the end of the transition period, Standard Contractual Clauses (SCCs) or other alternative appropriate safeguards will have to be put in place for EU counterparts to lawfully transfer personal data to organisations in the UK.
- No changes will be required in respect of personal data transfers from the UK to the EU/EEA, or countries deemed by the EU to have in place 'adequate' protections.
- Following the *Schrems II* case, the EU-US Privacy Shield has been invalidated. Companies that were relying on the Privacy Shield to transfer personal data to the US need to put in place an alternative transfer mechanism including SCCs, but will also need to assess whether they need to implement supplementary measures to ensure an adequate level of protection.

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Intellectual Property



If there's a deal	If there's no deal
 <p>EU/UK Trade</p> <ul style="list-style-type: none">• Although it will almost certainly contain a chapter concerning Intellectual Property, any agreement is likely to have limited practical effect.• The UK and EU will continue to recognise each other's protected designations of origin (e.g. Champagne, Feta etc.).	
Applicable whether or not there's a deal	
 <p>EU/UK Trade</p> <ul style="list-style-type: none">• Rights existing (in the UK) at the end of the transition period in respect of EU trademarks, international trademarks with an EU designation, registered community designs and unregistered designs will be converted to comparable UK rights and designations, and will therefore still continue to apply in the UK.• Businesses in the process of applying for (but not yet in possession of) a European trademark, international trademark with an EU designation, or registered community design at the end of the transition period will have 9 months to apply to convert these applications into equivalent UK protections.• Goods placed on the UK market by the right holder (or with the right holder's consent) may no longer be considered exhausted in the EEA.• The UK will continue its participation under the European Patent Convention following Brexit, although it should be noted that the UK has officially withdrawn its ratification of the Unified Patent Court Agreement, despite having ratified that agreement in April 2018, after the UK voted to leave the EU.• Copyright protection will remain largely unaffected, although cross-border copyright content portability arrangements which are applicable during the transition are likely to be affected.• Sui generis database rights will no longer be enforceable in the EU in respect of new databases created in the UK. However existing database rights at the end of the transition period will continue to be recognised in both the EU and UK until the end of their current term.• UK nationals and companies and organisations domiciled in the UK will no longer be eligible to hold .eu domain names.	

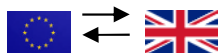
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Company law



Applicable whether or not there's a deal



EU/UK Trade

Establishment

- UK incorporated companies will become third-country companies and will not automatically be recognised in the EEA. Restrictions are likely to apply on the ability of UK businesses to own or operate a company registered in the EEA (for instance restrictions on the nationality or residency of senior managers and directors, or limits in shareholdings of non-nationals).
- Subsidiaries of UK companies in the EU will continue to be covered by EU and Member State legislation.

Jurisdiction

- EU rules on recognition and enforcement of UK judgments in the EU (and vice versa) will no longer apply. Should the UK not obtain the EU's agreement to accede in its own right to the 2007 Lugano Convention, and where the narrower protections of the 2005 Hague Convention on Choice of Court Agreements do not apply, enforcement of UK decisions will largely be determined by the national rules of the relevant Member State.