

Brexit: The proposed transitional arrangements – do they provide certainty?

27 March 2018

Introduction

On 28 February 2018, the European Commission published its initial draft of the withdrawal agreement which is expected to form the basis of a treaty that will govern both the withdrawal of the UK from the European Union (EU) and the transition period following that withdrawal (the **Withdrawal Agreement**). The initial draft provided that a transition period would run from the date that the Withdrawal Agreement entered into force until 31 December 2020 and that during that transition period, EU law would continue to apply, and the UK would be subject to the jurisdiction of the European Court of Justice (CJEU).

Ratifying those terms would address the immediate cliff-edge that firms are currently facing and ensure that the UK would not become a ‘third country’ until 1 January 2021.

What has now been agreed in relation to the Withdrawal Agreement?

On 19 March 2018, the UK government and European Commission negotiators published a revised **draft** of the agreement which highlights certain elements of the text in green in order to demonstrate which areas have been agreed between the parties (subject to technical legal revisions). Certain sections are colour coded yellow to mean that the policy has been agreed but changes and/or clarifications are still required and the remainder is white in order to highlight where discussions are still on-going.

A number of provisions within the draft Withdrawal Agreement have now been agreed in principle, for example in relation to citizen’s rights but given the concern around the impact a disorderly withdrawal would have on businesses and financial markets, it is understandable that the focus has been on the terms of the ‘agreed’ transitional period.

What are the terms of the transitional arrangements?

The transitional arrangements will govern the UK – EU27 relationship for a time-limited period after the UK has left the European Union and after the Withdrawal Agreement has come into force with the aim of enabling the UK’s continued participation in the customs union and the single market during that period. The key terms cover:

Timing

The transitional period will start on the date the Withdrawal Agreement enters into force – both sides agree that this should be 30 March 2019 - and end on 31 December 2020. The agreed text does not include the possibility of extending the end date. Any extension after the Withdrawal Agreement comes into force could not be agreed under Article 50, and would require negotiation and conclusion on a different legal basis.

Scope

Most Union law (as defined in the agreement) will apply to the UK during the transitional period (and will have the same legal effect as it does within Member States) bar certain limited exceptions. These include the retention of the UK's pre-withdrawal opt-outs under Protocol 15 to the Treaty on the Functioning of the EU on the single currency, Protocol 19 of the Schengen acquis and Protocol 21 on the position of the UK and Ireland in the area of freedom, security and justice. Europe may invite the UK to co-operate on new measures in the area of freedom, security and justice under the conditions set out for co-operation with non-EU27 countries. The EU27 will consult the UK on draft EU acts that identify or refer directly to specific member state authorities, procedures, or documents to ensure their proper implementation and application by and in the UK. Where the parties come to an agreement on security and defence, that agreement will apply instead of the Withdrawal Agreement.

The scope of the transitional arrangement means that UK firms would not be entitled to passport into Norway, Lichtenstein, Iceland or Switzerland (i.e. the EEA/EFTA states) under the EEA Agreement or to benefit from other agreements that the European Union has in place with third countries, unless those countries agree.

It is also worth noting that Gibraltar is included in the draft Withdrawal Agreement for a transitional period but the applicable text is footnoted and states that the agreement should “respect paragraphs 4 and 24 of the European Council guidelines of 29 April 2017, notably as regards Gibraltar”. This means that Spain retains an effective veto over the application of the transition agreement to Gibraltar.

Institutional arrangements

Although most Union law will apply to the UK during the transition period exceptions will apply and UK representatives will not be able to attend the meetings normally attended by member state representatives unless otherwise provided. These meetings include EU expert groups and the comitology committees of member state representatives, which the European Commission consults before adopting implementing acts. However, in a softening of the original position the agreed text provides that during the transition period, UK representatives or experts may on invitation exceptionally attend such meetings (or parts of meetings), without voting rights and in relation to relevant agenda items, if one the following conditions is fulfilled:

- The discussion concerns individual acts to be addressed during the transition period to the UK or to natural or legal persons residing or established in the UK.
- The UK's presence is necessary and in the interest of the EU27, in particular for the effective implementation of EU law during the transition period.

The text also provides that during the transition period, where draft EU acts identify or refer directly to specific member state authorities, procedures, or documents, the EU27 will consult the UK on such drafts with a view to ensuring the proper implementation and application of that act by and in the UK.

Specific arrangements relating to the Union's external action

During the transition period, the UK is bound by all obligations arising from agreements concluded by the EU27. The UK cannot participate in the work of any bodies set up under those agreements unless it does so in its own right or it has been invited by the EU27. The UK cannot take any action that would prejudice the EU27 in relation to any international organisation, agency or body but the UK can negotiate, sign and ratify international agreements provided they do not enter into force during the transition period. Where there is need for co-ordination, the UK may be consulted on a case by case basis.

Supervision and enforcement of transition provisions

The agreed transition text provides that during that period, the European institutions, bodies, offices and agencies will have the powers conferred upon them by EU law in relation to the UK and natural and legal persons residing or established in the UK, and the CJEU will have jurisdiction as provided for in the Treaties.

Are the agreed transitional arrangements legally binding?

On 23 March, the European Council endorsed the political declaration on the transitional arrangements; however, the terms will not become legally binding until the entire draft Withdrawal Agreement has been finalised and ratified by the European Parliament, the European Council and the UK. Both the UK government and the European Commission negotiators are working towards finalising the terms of the draft Withdrawal Agreement by October 2018 and the process must be completed by 29 March 2019. Accordingly, even if the text is agreed at a political level by October 2018, the process of ratification could take several months; meaning legal certainty is unlikely before the end of 2018.

Furthermore, given the areas that are still yet to be agreed – for example, in relation to Northern Ireland, there is still a risk of ‘hard’ Brexit and that the UK would become a ‘third country’ with no transitional period.

Should firms continue with their Brexit contingency planning?

Immediately following the political announcement regarding the terms of the transitional arrangement, the Eurozone’s top financial services supervisors told banks to keep planning for Brexit without any transition arrangements on the basis that the agreed arrangements are not legally binding and may yet be vulnerable to political risk.

Whilst it is encouraging that political negotiations are progressing in key areas, the continued risk that political disagreement may derail the ratification of any agreement at a late juncture in proceedings means that firms must continue developing their contingency plans on the basis that there may be a cliff-edge come March 2019. Both UK and EU27 firms should continue to evaluate what Brexit may mean for their business and finalise their post-Brexit modelling given that legal clarity is unlikely to be forthcoming until very late in 2018.

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